

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

PETITION NO 331 OF 2011

**W.J1ST PETITIONER
L.N2ND PETITIONER
(Minors suing through their guardians, J.K.M and S.C.M)**

-VERSUS-

**ASTARIKOH HENRY AMKOA.....1ST RESPONDENT
JAMHURI PRIMARY SCHOOL.....2ND RESPONDENT
THE TEACHERS SERVICE COMMISSION.....3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT
THE CRADLE.....1ST INTERESTED PARTY
COALITION ON VIOLENCE AGAINST
WOMEN (COVAW)2ND INTERESTED PARTY
LIVERPOOL VCT CARE &
TREATMENT CENTRE.....3RD INTERESTED PARTY
GIRL CHILD NETWORK.....4TH INTERESTED PARTY
CENTRE FOR REPRODUCTIVE RIGHTS.....AMICUS CURIAE**

JUDGMENT

Introduction

1. This petition raises the issue of the liability of state and state organs in the education sector when persons under their employ, and over whom they exercise powers of discipline and control, violate the rights of children placed under their care.

2. It questions the policies or lack thereof pertaining to steps and process when persons in the position of the 1st respondent abuse

their positions and violate the rights of those under their charge. The petitioners allege violation of their rights by the 1st respondent through his unlawful act of defiling the minors, and assert that the 2nd – 4th respondents are vicariously liable for the 1st respondent's unlawful act committed in the course of his employment.

The Parties

3. The 1st and 2nd petitioners are minors who, at the time this petition was filed, were aged 12 and 13 years respectively. They have brought this claim through their parent and guardian, S.C.M and J.K.M respectively.
4. The 1st respondent, then the Deputy Head teacher of the 2nd respondent school, was the petitioners' Kiswahili teacher at the school situated in Nakuru County. It was at all material times under the umbrella of the Teachers Service Commission (TSC). The 2nd respondent is a learning institution where the petitioners were at all material times pupils in class six.
5. The 3rd respondent is the TSC, a constitutional commission established under Article 237 of the Constitution and tasked with the responsibility of, inter alia, registering, recruiting, employing and exercising disciplinary control over teachers.
6. Several civil society organisations working in the area of children's rights applied and were joined to the proceedings as interested

parties. COVAW, the 1st interested party, describes itself as an umbrella organization which brings together more than 300 international and national non-governmental organizations development partners, community based organizations, faith based organizations, youth and women groups and individual members interested in the welfare of the girl child in Kenya. It is charged with co-ordination and dissemination of information in the area of child programming, and mainstreaming girl child activities in the development sector through advocacy information sharing.

7. CRADLE, which was joined to the proceedings as the 2nd interested party, describes itself as a non-partisan, non-profit making and non-governmental organization committed to the promotion, protection and enhancement of the rights of the child through court representation, advocacy and law reform.
8. Liverpool VCT was permitted to participate in the proceedings as the 3rd interested party, while the Girl Child Network participated in the proceedings as the 4th interested party.
9. Finally, the Centre for Reproductive Rights was joined to the proceedings as a Friend of the Court.

Background

10. At the time the events forming the basis of this petition occurred on or about 4th and 10th July 2010, the petitioners were class six pupils

at Jamhuri Primary School. The 1st respondent was then a teacher at the school, as well as the Deputy Head teacher of the School. The 1st respondent was alleged to have had carnal knowledge of the petitioners, and disciplinary action was taken against him by the TSC. The alleged acts of the 1st respondent were reported at Solai Police Station under OB No 21/15/9/2010 where the petitioners were issued with P3 forms. The 1st respondent was charged in **Nakuru Chief Magistrates Court Criminal Case No 224 of 2010** with defilement of the children contrary to Section 8 (1) as read with Section 3 of the Sexual Offences Act No 3 of 2006. At the time of the hearing of the petition, the criminal case had been concluded and the 1st respondent acquitted.

11. The petitioners instituted the petition primarily against the 1st respondent for the alleged acts of defilement seeking, inter alia, compensation for damage caused to the minors. They claim damages against the 2nd, 3rd, and 4th respondents jointly for compensation as employers and principal of the 1st respondent. They have also sued the State on allegations of failure to put in place measures and implement steps geared towards curbing emerging and continuing cases of sexual abuse against children in schools in Kenya.

The Petitioners' Case

12. The petitioners' case is contained in their petition dated 21st December 2011 which is supported by an affidavit sworn by J. K. M

on 24th November 2011, as well as affidavits sworn by the minors, W. J. and L. N. on the same day. The petitioners also filed submissions dated 8th October 2012. Their case was presented by their Learned Counsel, Mr Chigiti.

13. In their affidavits in support of the petition, the petitioners detail the alleged defilement of the minors, as well as the events leading to his charging in court in Nakuru Chief Magistrate's Criminal Case No. 224 of 2010.
14. J. K. M. the aunt and guardian of the 2nd petitioner, avers that the minor with whom she resides, as well as the 1st petitioner, were standard six pupils at Jamhuri Primary School. She avers that on or about 4th July 2010 at around 7.00 a.m. the 2nd petitioner informed her that she had been invited by the 1st respondent to attend the Nakuru Agricultural Society of Kenya (ASK) show alongside other students. She states that she later noticed that the 2nd petitioner's behaviour was becoming weird. She contacted S. C. M, the 1st petitioner's mother, who informed her that the 1st petitioner's conduct had also changed, and that she was very withdrawn.
15. J. K. M avers that upon further probing, the 2nd petitioner confessed to her that she and the 1st petitioner had been defiled by the 1st respondent on numerous occasions and diverse dates in a class room, staff room and in his house. She reported the matter to the

Headmaster of the school in August 2010, who reported the matter to the District Education officer (DEO), a Mr. Gatheri, and it emerged that the minors had not been taken to the ASK show on 4th July 2010 but to the 1st respondent's house.

16. J. K. M avers that she was later informed by a **Ms. Rahab Wanjiru**, who is in charge of Girl Child Welfare at Jamhuri Primary School, that the 1st respondent had actually been transferred from another school due to the same allegations he is facing in respect of the petitioners.
17. She subsequently reported the matter to the police at Solai Police Station, and the 1st respondent was thereafter charged with the offence of defilement of the children contrary to section 8(1) as read with section (3) of the Sexual Offences Act. It appears that the 1st respondent had attempted to settle the matter amicably through elders.
18. It is her deposition that the 1st and 2nd petitioner were taken to the Solai District Hospital, and were thereafter ordered by the Court to be taken to a juvenile home for protection, counselling and recuperation, as a result of which they missed several days of school.
19. In their affidavits, the minors, W. J. and L. N, state that they were pupils, aged 12 and 13 respectively, who were at the material time in class six at Jamhuri Primary School. They aver that in July 2010, a new Deputy Head teacher, the 1st respondent, was brought to their

school, where he taught Kiswahili. They state that in the same month, he invited them to his house. They state that they innocently went to his house; that he then went to his farm and came back with potatoes which he ordered the 2nd petitioner to peel while he told the 1st petitioner to mop his house. He also ordered the 2nd petitioner to prepare lunch, which she did. The petitioners also make averments with respect to their defilement by the 1st respondent. The 1st petitioner states that he attempted to defile her in a toilet in his house, while the 2nd petitioner states that she was defiled in a corridor of the 1st respondent's house as she mopped his house.

20. There is some inconsistency in the two affidavits with respect to what exactly transpired at the 1st respondent's house. This could be explained by the fact that the depositions were taken more than a year after the events complained of. What emerges, however, is that the 1st respondent did invite the two minors to his house, made them do housework for him, including cleaning his house, ironing his shirts and cooking for him, and that he was alone with each of them during which he defiled the 2nd petitioner and attempted to defile the 1st petitioner.
21. The 1st petitioner avers that later, on 30th July 2010, the 1st respondent attempted to rape her in a classroom at the school, an occurrence she says was witnessed by some students through a window. The petitioners also confirm that the incidents were reported to the area Chief in August 2010 and that in September 2010, they

recorded statements at the Solai Police Station, following which the 1st respondent was charged with defilement.

22. The petitioners aver that they have missed classes on several occasions either to attend court, the hospital or as a result of the experience they went through; that the 1st respondent used a lot of physical force, violence and threats on the petitioners as a result of which they have suffered a lot of physical and emotional trauma and pain. They state that they have been exposed to sex at an early age and their reproductive health rights and dignity as young school girls has been taken away by the person who is supposed to have been empowering and educating them.
23. In their submissions, the petitioners argue that teachers are under a duty to take care of the academic needs, development and progress of a student, which includes engagement in extra curriculum activities such as visiting the annual ASK Show. They submit, further, that the teachers are in a unique relationship with their students that is based on trust and are under a constant obligation not to abuse the trust.
24. They contend that teachers, as guardians of innocent and vulnerable children, are in particular under a duty not to engage their students in inter-alia sexual intercourse, sexual assault, touching, use of suggestive language, gestures, inducement and threats. It is also their contention that schools and all learning institutions are under a

duty at all times to exercise due diligence in order to ensure that students do not suffer any harm as a result of negligence or for failure to uphold a high standard of care towards the student.

25. The petitioners submit that the 1st respondent breached the foregoing duties and obligations when he defiled the petitioners. It is also their case that the 2nd, 3rd and 4th respondents are vicariously liable for the 1st respondent's conduct as they failed to discharge their duty to protect the petitioners by failing to provide a safe learning environment, thus allowing the petitioners' rights to be violated.
26. According to the petitioners, before joining the 2nd respondent, the 1st respondent is said to have been involved in similar unbecoming behaviour. They argue that the 2nd and 3rd respondents should have known this before engaging him at Jamhuri Primary School, but that this was not done, and no due diligence mechanisms were applied by the respondents to ensure that the children were not exposed.
27. The petitioners further submit that the defilement of the minors took place in a manner that amplifies the degree of institutional negligence on the part of the school and the TSC; that the defilement by the same teacher took place, unattended to, on several occasions and in different places against more than one student. They submit therefore that the late detection of the acts of the 1st respondent by the other respondents amounts to negligence on their part.

28. The petitioners contend that as a result of the 1st respondent's conduct, they suffered and continue to suffer inter alia; pain and suffering, actual bodily harm, emotional pain and agony, exposure to sexually transmitted diseases and HIV/AIDS, early pregnancy and marriage, early child birth, and abortion, stigma, premature parentage, mental anguish and loss of school time. They reiterate that they have missed school on numerous occasions; and further, that the 2nd petitioner has in fact dropped out of school and now stays at home as a result of the stigma and trauma occasioned by the defilement. They submit that the 2nd petitioner now stands disadvantaged as she will most likely never go back to school and her future has been ruined.
29. It is the petitioners' case that the 3rd respondent has explicitly admitted the existence of mischief committed by the 1st respondent in the whole country. In order to arrest the mischief, the 3rd respondent had issued **TSC/CIRCULAR No. 3** dated 29th April 2010 pursuant to an emerging concern over the increase in cases of physical, psychological and sexual violence against students. According to the petitioners, the circular enjoins teachers, including the 1st respondent, to, inter alia, eschew sexual abuse against students.
30. They submit that the circular has, however, failed to guarantee or create a safe academic environment for the girl child in Kenya to enjoy the right to education and health; and that this has resulted in

a failure on the part of the 3rd respondent to discharge its statutory duty to protect the petitioners and other girl students from any form of harm or injury. It is also their submission that the TSC, in a further, unequivocal admission and confirmation that the mischief of teachers defiling students is of public concern, carried out a media report in the Daily Nation on 13th October 2011 in which it announced the launch of a website to publish names of teachers who have defiled students; and that in the said report, the TSC indicated that there was a sharp increase in the number of reported cases of defilement, rising from 121 cases reported in 2009/2010 to 164 cases reported in 2010/2011.

31. While conceding that the TSC had taken commendable action in launching the website and releasing the circular, it was their contention that the acts of the 3rd respondent were incomplete as they laid emphasis on the disciplinary measures taken against rogue teachers but were not directed at the rights of the students to education or health.
32. The petitioners rely on various reports which they submit demonstrate the shocking trends in cases of defilement against children in Kenya. In this regard, they cite a media trend and case study released by the CRADLE titled "**Healing the Scars"- Milestones, Lessons and Prospects - Case and Media Trends Report on Violence against Children, 2010**". They submit that

according to this report, by February 2010, 600 defilement cases had been reported in Kenya.

33. It is also the petitioners' contention that the Kenyan criminal justice system and the attendant legislation such as the Sexual Offences Act are tailored at punishing offenders; that the petitioners and other girl students who are victims of defilement do not get any guarantee or protection of their right to education and health from the justice system; that although the petitioners and other students who are victims of defilement by teachers can pursue damages under private law in a Civil Court, they cannot get any reliefs or remedies for violation of their constitutional rights to education and health from the civil courts.
34. The petitioners further argue that many defilement cases are usually settled through the payment of livestock in what is commonly referred to as "kangaroo courts" and that the deal is usually struck between the offending teacher and the girls' parents; that as a result the young girls are converted into a tool of trade; and that the said "kangaroo courts" which apply repugnant customs and practices have no legitimate powers to attend to the issues of the violation of the girl child's constitutional right to education and health as envisaged under Article 43 of the Constitution.
35. They maintain that the conduct of the 1st respondent offended both the constitutional rights of the petitioners as well as the

TSC/CIRCULAR No 3/2010 dated 29th April 2010. It is also their case that the act of the 1st respondent offends **Article 12** of the **International Convention on Economic, Social and Cultural Rights, Articles 14 (1) and 16 (1)** of the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 3 (1), (2), (3), 19 (1) (2) and 37** of the **Convention on the Rights of the Child, Articles 3 (2) and 5** of the **African Charter on Human and People's Rights, Articles 4 (1) and 16 (1) (2)** of the **African Charter on the Rights and Welfare of the Child.**

36. With respect to jurisdiction on the matter, the petitioners submit that their claim can be considered both from the perspective of a tort in negligence and as a claim of human rights violation; and further, that the Court has a constitutional obligation to protect and promote constitutional rights under Articles 23 and 165. They argue, in the alternative, that the court can consider the concept of negligence independently from the universal human rights under the international instruments as read alongside the constitutional rights of the petitioners. They rely on the decision in **Donoghue -vs- Stevenson (1932) ALL ER Rep 1; [1932] AC 562**, specifically the dictum by Lord Atkins in support of their arguments on the duty of care in the law of tort/delict of negligence.

37. The petitioners further cite **Peter Williams, The Legal Liability of an Employer for Acts of Sexual Abuse Committed by an**

Employee: Recent Development in Australian Law and the Australian decision in the case of **New South Wales v. Lepore; Samin v. Queensland; Rich v. Queensland (2003) 77 ALJR 558; (2003) HCA 4 (6 February 2003)** with regard to the issue of vicarious liability for acts of sexual abuse committed by teachers against students to support their argument that the other respondents are vicariously liable for the sexual abuse committed by the 1st respondent against them. They submit that the 1st respondent performed the acts of defilement while in the course of his employment; hence the vicarious liability of the 2nd – 4th respondents. They also rely on the decision in the case of **Bazley –vs- Curry (1999) 174 DLR (4th) 71; [1999] 2 SCR 534.**

38. It is their case that the connection between the petitioners and the 1st respondent was well established: the 1st respondent was the petitioners' deputy head teacher and Kiswahili teacher; that he had responsibilities that go with his titles and position; that he was tasked with the duties of teaching the petitioners and taking them to the agricultural show and, given that relationship, there was a high degree of power and intimacy in the relationship between teacher and victim brought about by those responsibilities and duties.
39. The petitioners further submit that given their age, their particular vulnerability, and the nature and circumstances of the sexual misconduct, there was a clear demonstration that the respondents should shoulder the liability in their different capacities either as the

principal-vicariously and the agent-directly. They submit further that the mischief of child defilement by teachers is on the increase and the time has come for Kenyan courts to join courts in other jurisdictions in dealing with the vice.

40. With respect to the criminal case against the 1st respondent, the petitioners argue that it is independent from the present matter and the fact that there is a criminal case in existence cannot be said to deny the petitioners their constitutional rights. They contend, further, that the standard of proof in criminal cases is beyond reasonable doubt as opposed to that in human rights cases which is usually on a balance of probability. They submit further that Article 165 (3) of the Constitution grants this Court unlimited jurisdiction over criminal and civil matters and it is their case that the present Petition can proceed concurrently or independently from the criminal case.
41. The petitioners further submit that while the events complained of occurred under the repealed constitution, the petition can stand on the basis of Article 19 and Section 6 of the Sixth Schedule. They cite the decisions of the High Court in **Patricia Asero Ochieng –vs- Attorney General Petition No 409 of 2009**, **R –vs- The Head Teacher Kenya High Girls and Another Misc. Case No 318 of 2010** and **Fredrick Gitau –vs- The Attorney General, Petition No 157 of 2011** in which the court dealt with violations that occurred under the repealed constitution.

42. With respect to their claim for damages, the petitioners submit that the defilement has left them with emotional and physical scars which they have to live with for many years. They ask the court to award them general damages of Kshs 5,000,000 each from the respondents jointly and severally. They rely on the decision of the High Court in Lusaka in the case of **R. M. K. vs Edward Hakasenke and Others 2006/HP/0327** in which the court awarded a minor damages of K45,000,000, approximately US \$14,000, and ask the court to grant them the following substantive orders:

a)

b) ***A Declaration that all acts of sexual and gender based violence against the 1st and 2nd petitioners and all students amount to violation of the right to education as provided for under Article 43(1) of the Constitution and Section 7 of the Children Act.***

c) ***A Declaration that all acts of sexual and gender based violence against the 1st and 2nd petitioners and all students amount to violation of the right to health as provided for under Article 43(1) of the Constitution and Section 7 of the Children Act.***

d) ***A Declaration that all acts of sexual and gender based violence against the 1st and 2nd petitioners and all students amounts to inhuman and degrading treatment as guaranteed under Article 28 of the Constitution;***

- e) Declaration that all acts of sexual and gender based violence against the 1st and 2nd petitioners and all students' amounts to inhuman and degrading treatment as guaranteed under Article 29(f) of the Constitution;***
- f) A Declaration that all schools and school teachers are at all times under the legal capacity of a guardian and that they are under a duty to protect all the students from sexual and gender based violence or harm by vogue teachers.***
- g) A Declaration that the respondents have failed in its duty to protect the students as provided for under Articles 27 of the Constitution.***
- h) An Order for compensation.***
- i) An Order that this is a public interest Petition.***
- j) Costs***
- k) Any other or further orders or direction as this court may deem fit to grant.***

Submissions by the Interested Parties

43. Three of the interested parties supported the petitioners' case and filed affidavits and submissions in reply. Liverpool VCT, which was permitted to participate in the proceedings as the 3rd interested party, did not appear at the hearing of the matter, and there were no pleadings or submissions filed on its behalf on the court record.

Submissions by Cradle

44. The Cradle supports the petitioners' case and filed an affidavit sworn by its then Executive Director, Eric Ogwang, and written submissions dated 29th February 2012. Its submissions focus on the state's obligations with respect to the rights of children. It submits that Kenya is a State party to, among other international and regional human rights instruments, the **African Charter on The Rights and Welfare of the Child** (hereafter **African Children's Charter**). Consequently, Kenya therefore has a tripartite typology of human rights obligations that it shall respect, protect and fulfil the rights of all within its jurisdiction.
45. Its obligation to respect rights requires Kenya to refrain from any action that would interfere with an individual's enjoyment or to make it difficult for the person to satisfy those rights by his/her own efforts; the obligation to protect, which requires the prevention of violations of human rights by third parties and imposes on the state the obligation to put in place laws and policies that prevent violations of rights by any person, to deter persons from violating rights of others and to provide effective remedy to persons whose rights have been violated. It is also Cradle's submission that the state is under a duty to put in place sufficient laws, policies and programmes to protect children against abuse, neglect and exploitation and to compensate and rehabilitate victims.

46. Cradle therefore asserts that the state has a duty to protect the petitioners' rights under Article 43; to take the necessary measures to facilitate, promote and provide for the realization of human rights which entails, with respect to children, the obligation to facilitate the progressive realization of children's survival and development rights.
47. Cradle cites several provisions of international and regional covenants which it states casts obligations on the state with respect to the rights of the petitioners, inter alia Article 1 (1) of the African Children's Charter; the African Charter on Human and People's Rights, and the International Covenant on Economic, Social and Cultural Rights. It is its submission that the state is bound by the provisions of these conventions by virtue of Articles 2(5) and 2(6) of the Constitution.
48. Cradle argues that the state is in violation of **Articles 11 (3) (d), (e), 14 (1), 27 (1) (a)** of the **African Children's Charter**. It cites the case of **Nubian Children –vs- Kenya (Communication No 002/2009 at paragraph 69)** in which the African Children's Committee found the government of Kenya to be in violation of numerous Articles, including the said Article 11 (3) of the African Children's Charter. It has also relied on the decision in **Purohit and Moore –vs- The Gambia, (Communication No 241/2001 at paragraph 80)** in which the African Commission on Human and People's Rights held that the enjoyment of the human right to health,

which is guaranteed under the African Charter on Human and People's Rights, is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all other fundamental human rights and freedoms.

49. Additionally, Cradle calls in aid the case of **Free Legal Assistance Group and Others –vs- Zaire, (Communication No 25/89, 47/90, 56/91, 100/93)** in which the African Commission on Human and People's Rights emphasised that the failure to provide access to institutions of learning through closure of universities and secondary schools would amount to a violation of the right to education under **Article 17** of the **African Charter on Human and People's Rights**. It the court to:

a) Declare that all acts of sexual and gender based violence against the 1st and 2nd petitioner and all students amount to violation of their right to education as provided for under Articles 11 (1) (3) (d) and (e) of the African Children's Charter.

b) Declare that all acts of sexual and gender based violence against the 1st and 2nd petitioner and all students amounted to a violation of their right to the highest attainable standard of health as provided for under Articles 14 (1), 27 (1) (a) of the African Children's Charter.

c) Grant orders as prayed in the Petition.

Submissions by COVAW

50. The Coalition on Violence against Women filed an affidavit sworn by its Executive Director, Ms. Saida Ali, on 14th March 2012 and submissions dated 22nd May 2012. Ms. Ali avers that COVAW has encountered many girls whose education and advancement as women has been hampered by sexual abuse, which is a violation of their physical and mental rights. In its submissions dated 22nd May 2012, COVAW basically echoes the submissions filed by the Cradle, as well as the authorities relied on therein.

Submissions by the Girl Child Network

51. The 4th interested party filed an affidavit sworn by its Executive Director, Mercy Musomi, and submissions dated 17th May 2012. It echoes Cradle's submissions with respect to Kenya's obligations under international and regional human rights conventions. It submits further that by ratifying the Convention on the Rights of the Child in 1990, Kenya committed itself to guide, protect and support children; and as a consequence, children should be given a chance to grow in a safe environment as the Convention places on the state the obligation to protect the rights of the child using all available measures.

52. The 4th interested party submits further that the State, through the Teachers Service Commission and the 1st respondent, has failed in its obligation of providing a safe school environment and has exposed

the petitioners not only to sexual and gender based violence but also to the risk of being infected with HIV/AIDS by the 1st respondent who is expected to be a responsible and trusted guardian.

53. The 4th interested party also submits that it is the sole responsibility of the state to implement the human rights of the petitioners to enjoy their right to education and health. It emphasises that Kenya has ratified both international and regional Conventions that protect the interest of the children generally, but those of the girl child in particular. It argues that most of the time the girl child is vulnerable and the State should therefore endeavour to put in place mechanisms to protect her from violations of any nature. The 4th interested party urged the court to make an order for compensation in favour of the petitioners.

The Response to the Petition The Case for the 1st Respondent

54. The 1st respondent opposed the petition and filed two affidavits, one sworn on 4th April 2012 and another on 6th November 2012. He also filed two sets of submissions, one set filed by the 1st respondent in person on 4th April 2012, and a second set of submissions filed on his behalf by the firm of Moses Odawa & Co. Advocates on 6th November 2012. Despite various attempts to serve the 1st respondent, however, he did not appear at the hearing of this matter, nor did anyone from the law firm which had filed the second set of submissions on his behalf.

55. The gist of the 1st respondent's case as set out in his affidavits and submissions is that the petition is premature as the criminal case had not been heard and concluded at the time the petition was filed. It is his submission further that it is malicious and speculative and aimed at punishing him for crimes he never committed; that it is also aimed at using him as an experiment to serve as an example and a warning to wrong doers without due consideration of his constitutional rights.
56. The 1st respondent denies that he ever had any relationship with the petitioners other than that of a teacher and a pupil, and that on the 4th of July 2010 when the alleged defilement took place, the petitioners went to the show and not to his house as alleged.
57. The 1st respondent further argues that the allegation by the petitioners that he sexually abused them, without proof, as well as their demand for compensation from him, is a violation of his constitutional rights. He contends that until the case against him then pending before the Chief Magistrate's Court in Nakuru was determined against him, he had a right to be presumed innocent until proved guilty as stipulated under Article 50 (2) (a) of the Constitution, and the petition was therefore a violation of his rights under Article 50, yet this right was one of the rights that could not be derogated from in view of the provisions of Article 25.

58. With respect to the evidence placed before this Court in support of the petition, the 1st respondent argues that the medical reports relied on do not disclose the offence he has been accused of. He also terms the averments in the affidavits of the petitioners as pure lies orchestrated by the next friend of the petitioners in order to smear his reputation in a cold hearted revenge mission. It is his averment that the medical evidence in the P3 form, contradicts the averments in the affidavits that the minors had been defiled. It is also his contention that the minors appear to have been coached on what to say as their testimonies and accounts in the affidavits in support of the petition conflict with the findings of experts in the field and totally discredits their allegations.
59. With respect to his transfer from one school to another, it is his contention that such transfer was in line with the TSC Regulations and not on disciplinary grounds or any other reason other than the normal transfer. He further denies that the petitioners have been affected as they allege, and that if they have, it is not out of his wrong doing. He concedes, however, that the TSC Circular TSC/CIRCULAR No. 3/2010 was indeed sent to all relevant stakeholders in regard to the protection of pupils from sexual abuse but avers that it was not sent to him in particular in relation to the present matter.

60. The 1st respondent argues that this petition has breached his right to dignity under Article 19 (2), 28 and 50 (2) of the Constitution by referring to him as a paedophile, that the reference amounts to an attack on his honour and person, violates Article 12 of the Universal Declaration of Human Rights; and that it is cruel and degrading treatment contrary to Article 29 (d) and (f) of the Constitution. It is his contention that should he be acquitted in the criminal proceedings against him, this petition would be null and void and a waste of the Court's time.
61. He further argues that he has a right to an effective remedy under Article 8 of the Universal Declaration of Human Rights for acts violating his rights and urges the court to exercise its mandate under Articles 165 (3) (b) and 23 (1), (3) of the Constitution and declare that the petitioners have violated his rights. He asks the Court to dismiss the petition with costs and order the petitioners to compensate him for irreparable damage that has been caused to his person, dignity, reputation and self-esteem.

The Case for TSC

62. The case for the 3rd respondent, which was presented by its Learned Counsel, Mr. Sitima, is set out in the affidavit in reply sworn by Mr. Simon Musyimi Kavisi on 21st March 2012 and submissions dated 9th July 2012. While Mr. Sitima indicated in the proceedings that he

appeared for the 2nd and 3rd respondents, his submissions dwelt only on the position of the TSC.

63. TSC submits that as a constitutional commission, it derives its objects and authority from Article 249 (1) of the Constitution, as well as the provisions of the Education Act, the Code of Regulation for Teachers published pursuant to Section 6 of the Education Act and the Teachers Service Code of Conduct and Ethics published pursuant to Section 5 (1) of the Public Officers Ethics Act No 4 of 2003. It further submits that it has a broad constitutional and statutory mandate which includes the exercise of disciplinary power over teachers who breach, inter alia, the provisions of the Code of Regulations for teachers.
64. TSC presented a qualified opposition to the petition. Mr. Sitima submitted that the principle that the petitioners seek to interrogate is noble and has its basis in the moral principles of men that society should protect the vulnerable. It was his submission, however, that the petition should fail as the petitioners had not satisfied the criteria set by the Constitution with respect to matters such as this.
65. According to the TSC, its policies reflect the interests of children, and it concedes that it has the duties that the petitioners enumerate in their petition. It denies, however that it has abandoned its duties, or that its systems are inadequate

66. In his affidavit, Mr. Kavisi avers that on or about 1st November, 2010, TSC received information through its agents that the 1st respondent, while teaching at Jamhuri Primary School, breached the provisions of the Code of Regulations for Teachers in that on diverse dates, he had carnal knowledge of the petitioners. TSC commenced investigations into the allegations with a view to ascertaining the veracity of the allegation. It recorded statements from, the petitioners, as well as from various other persons in the school management. It also sent a team of officers headed by the District Quality Assurance and Standards Officer to the school to investigate the matter.
67. It is its case that it carried out disciplinary proceedings against the 1st respondent, and as a result of the proceedings, it dismissed him and struck him off the register of teachers. TSC contends that once it had exercised its constitutional and statutory authority, which is limited to overseeing the professional conduct of teachers across the country, and exercising disciplinary powers on such errant teachers, and having exercised its disciplinary power by dismissing the 1st respondent and removing his name from the register of teachers, it had conclusively discharged its constitutional duty and become *functus officio*.
68. TSC also submits that in exercise of its constitutional duty as a regulator of the teaching profession, it has published a Code of Conduct and Ethics and distributed it to schools across the country in a concerted effort to ensure that its employees, including the 1st

respondent, are sensitized and warned against any form of professional misconduct. It submits further that on or about April 2010, after realising the increased trends of sexual offences on the part of teachers it issued **Circular No 3/2010** dated 29th April, 2010 to provide comprehensive guidelines on the expected conduct between teachers and students of the opposite sex with a view to curb the increased sexual violence against students.

69. It contends that the circular was duly disseminated to all schools in form of pamphlets, and that apart from publishing policy documents, TSC has always treated cases of sexual offences against students seriously and administered stern punishments to the offending employees. It is its case therefore that in taking decisions in this matter, the TSC did not confer any privilege or special treatment to the 1st respondent.
70. TSC further states that in the period 2009 to 2011, it has punished, by way of dismissal and de-registration, about 175 teachers on account of sexual-related offences. It is its contention therefore that it has discharged its mandate within the set constitutional boundaries by promoting and protecting the interests of the girl child. It contends that a declaration that it has failed to discharge its mandate would be unwarranted in the circumstances, and it prays that the petition be dismissed with costs.

The Case for the 4th Respondent

71. The Attorney General filed Grounds of Opposition and submissions dated 4th May 2012. Its case was presented by Learned Counsel, Mr. Obura.
72. In the Grounds of Opposition, the AG argues that the petition is speculative, premature, and anticipatory and lacks legal basis, and that it does not warrant the grant of the prayers that the petitioners seek. It is its case, further, that the reason for attributing the acts of the 1st respondent against the government has not been set out; that the petition lacks clarity and precision in setting out the alleged violations; and that there is private law under which the petitioners could seek redress. It is its contention that this petition does not raise any constitutional issues as the petitioners have not shown how their fundamental rights have been violated by the government.
73. The AG makes submissions in consonance with those of TSC with respect to the TSC's mandate of exercising disciplinary control over and termination of the employment of teachers. The AG submits that the government, through the Constitution, has set up the TSC with the mandate to enhance and protect children from rogue teachers and that **Circular No. 3 of 2010** issued by TSC has provided comprehensive guidelines with a view to curbing increased sexual violence against students.

74. The AG agrees with TSC that the Commission has acted in accordance with its mandate; that when it received information about the allegations against the 1st respondent, it commenced investigations, and as a result of the said investigations, the 1st respondent was dismissed from service. The AG therefore submits that the petitioners have not in any way demonstrated that TSC did not carry out its mandate, nor have they demonstrated that the investigations carried out were not in a fair and just manner.
75. It is the AG's case that the petitioners have not demonstrated that they do not have a legal remedy available to them against the 1st respondent; and the fact that the 1st respondent was charged with defilement of the children in Nakuru Chief Magistrate's Court Criminal Case No. 224 of 2010 shows that there was a remedy available to the petitioners.
76. With regard to the alleged violation of the right to education, the AG submits that the government has put mechanism in place to ensure that the right to education is accorded to every child in Kenya and the petitioners have not demonstrated that due to the alleged acts of the 1st respondent, they have been denied the opportunity to go back to school or study. It is his case that from the petitioner's bundle of documents, the head teacher of the 2nd respondent has made efforts to ensure that the petitioners are back to school, which the AG contends is the responsibility not just of the state but of parents and guardians of the children, and the community at large.

77. The AG relies on the decision in **Prof. Julius Meme –vs- Rep, High Court of Kenya Misc. Criminal Appeal No 495 of 2003, Rawal, Njagi & Ojwang JJ** in which the case of **Anarita Karimi Njeru –vs- Republic** was cited to advance its argument that the petitioners needed to plead with precision the alleged violation of constitutional rights. He submits that the petition discloses no violation of constitutional rights and should be dismissed with costs.

Submissions by the Amicus Curiae

78. The Centre for Reproductive Rights filed submissions dated 22nd March 2012. In the submissions, the Amicus notes the key components of the TSC circular TSC/CIRCULAR NO: 3/2010 in which the TSC has stated its concern with the increased cases of physical, psychological, and sexual violence against students, and has further recognized that these types of violence violate students' human rights wherever they occur. The Amicus further observes that the circular lays down certain actions that head teachers, TSC employees, agents, or teachers, and schools in general, should take to deal with cases of sexual abuse. Among the things that the circular prohibits is sending pupils to teachers' houses for any reason whatsoever. The Amicus notes that the TSC circular clearly applies to all schools, public and private, in Kenya.

79. The Amicus submits that while the justice system and the law, particularly the Sexual Offences Act, deal with the criminal aspect of the violence, once the offender is in prison, the psychological and

financial assistance that the survivor of the offence requires is not taken into account. The Amicus submits therefore that the Sexual Offences Act does not adequately heed Article 39 of the Convention on the Rights of the Child, which requires State Parties to make provision for rehabilitation of children who are victims of sexual abuse.

80. The Amicus further observes that there is an extremely high incidence of sexual violence against children, a large number perpetrated by teachers, and many of which go unreported. It cites the reasons for failure to report as including the intimidation of survivors of sexual violence by education officials and offenders, the stigma surrounding sexual abuse, and the practice of paying the student's parents monetary compensation, as well as "offenders offer[ing] to marry the girls."
81. The Amicus further cites reports which indicate that some teachers were serial sexual offenders who molested girls from one school to another since, when they were caught, they were simply transferred and no action was taken against them.
82. Among these reports is a 2009 Kenyatta University study of more than 1,200 girls in 70 schools across 10 Kenyan districts which found that when girls were impregnated by teachers, 45 per cent of teachers suffered minor consequences, typically either a demotion or a transfer to another school; an estimated 30 per cent of teachers

faced no consequences; while 25 per cent were sacked. It contrasts this position with the fate of the girls: an estimated 76 per cent of girls impregnated by their teachers dropped out of school, many others got married, others procured abortions, while others committed suicide. According to the study, only 1 per cent of those who left were able to re-join school.

83. The Amicus further observes that according to the study, while 22 per cent of teachers who impregnated girls were arrested, convictions of teachers who abuse children are rare, mainly due to the fact that unless a girl is pregnant, sexual abuse is difficult to prove; and further, that stigma means many families would rather keep the abuse quiet; and further, that teachers often pay families to keep the cases out of court. See IRIN News Analysis: Sex Abuse in Kenyan Schools, May 30 2011, available at <http://www.irinnews.org/Report.aspx?ReportID=92845>.

84. The Amicus recommends that the state should take certain steps to prevent sexual violence against students in both public and private educational settings, and to ensure that survivors of sexual violence receive both redress and remedy, including the necessary key reproductive health services. It should, among other things, ensure that both public and private schools understand their obligations to prevent and report sexual violence and to ensure that survivors of sexual violence receive treatment immediately. The Amicus further recommends that the government ensure that all health care

providers are trained to recognize and treat emotional, physical, and sexual abuse among youth, including providing referrals and confidential, non-judgmental counselling.

Determination

85. I have considered the respective pleadings and submissions of the parties in this matter. I note that the genesis of the petitioners' claim is the alleged violation of their rights by the 1st respondent, who was the Deputy Head teacher of their school, and was also their Kiswahili teacher. They allege that he defiled them on various dates in July 2010 and caused them physical, emotional and psychological harm and trauma. Aside from laying a claim against the 1st respondent, the petitioners also accuse the state and the TSC of failing to protect their rights and those of other school going children by failing to protect them from sexual abuse by persons in the position of the 1st respondent. They therefore allege that the state and TSC are vicariously liable for the violation of their rights by the 1st respondent.
86. The response by the state is that this petition is premature and discloses no violation of constitutional rights. The TSC argues that it has taken all the statutory steps imposed on it by the Constitution and statute by, among other things, issuing a circular with respect to sexual defilement by teachers and prohibiting all forms of contact between pupils and teachers; and further, by carrying out disciplinary measures against the 1st respondent and dismissing him from

employment. It is therefore its case that it is not liable for the acts of the 1st respondent.

87. The 1st respondent has also launched his own attack against the petitioners. He argues that this petition is a violation of his constitutional rights under Article 50 in view of the fact that he was already being prosecuted for the alleged offence. While he appeared in Court at the initial stages and filed documents in support of his case, he did not thereafter appear to present his case. The Court was, however, informed that he had been acquitted.
88. In considering this matter therefore, and bearing in mind the issues identified by the parties and their respective submissions, I will address my mind to five main issues:
- i. Whether this Court has jurisdiction to entertain the petition and grant the orders sought;**
 - ii. Whether the petitioners have established a violation of their constitutional rights by the respondents;**
 - iii. Whether the 2nd - 4th respondents are vicariously liable for the violation of the petitioners' rights by the 1st respondent;**
 - iv. Whether the petitioners have violated the 1st respondent's rights;**
 - v. What remedies (if any) to grant to the petitioners and/or 1st respondent.**

Jurisdiction

89. The importance of jurisdiction was succinctly articulated by the Court of Appeal in the case of **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** in which it stated as follows:

"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

90. Ojwang J. (as he then was) expressed similar sentiments with regard to jurisdiction in **Misc. Application No.639 of 2005 Boniface Waweru Mbiyu v Mary Njeri & Another** when he stated:

"The entry point into any court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question."

91. The claim before me is expressed to be brought under Article 22 (1) of the Constitution, which grants to every person the right to ***"institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied,***

violated or infringed, or is threatened.” Under Article 23 (1), the Constitution gives the High Court the jurisdiction, ***“...in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights.”***

92. Article 165 (3) provides inter alia that:

Subject to clause (5), the High Court shall have –

(a) Unlimited original jurisdiction in criminal and civil matters.

(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened.

93. The 1st respondent has challenged the jurisdiction of the Court, contending that if the petitioners are of the view that their rights have been violated and seek compensation, there are courts that have jurisdiction to grant such compensation.

94. The petitioners allege violation of their fundamental rights under the Constitution as well as under international instruments to which Kenya is a party. They allege, primarily, violation of their rights to health and education guaranteed under Article 43 (1) (a) and (f) of the Constitution, but also violation of their right to dignity and non-discrimination under Articles 27 and 28, as well as the protection from torture and other cruel and degrading treatment under Article

29. The interested parties support the petitioners' case and hinge their averments and submissions on implementation of the constitutional provisions in Article 43 in light of the State's obligation under international human rights instruments.

95. It cannot therefore be seriously disputed that the present petition is properly before this Court. The Court is properly clothed with jurisdiction under Articles 23 (1) and 165 (3) of the Constitution to deal with the issues raised and, if satisfied that the petitioners have established their claim, grant appropriate relief. The reliefs sought by the petitioners also fall under the provisions of Article 23, which provides at sub-article (3) that:

In any proceedings brought under Article 22, a court may grant appropriate relief, including –

(a) A declaration of rights;

(b) An injunction

(c) A conservatory order;

(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;

(e) An order for compensation; and

(f) An order of judicial review.

96. It is therefore my finding, and I do hold, that this Court has the jurisdiction to determine the issues raised in this petition.

97. Two questions however, do arise in respect of the petition. The first is whether or not the alleged violation of rights complained of, which

took place before the promulgation of the 2010 Constitution, would bar the grant of relief, as the Constitution does not have retrospective application-see **Joseph Ihuo Mwaura & 82 Others-vs- The Attorney General Petition No. 498 Of 2009**. However, as the Court observed in the above decision, the Court has the jurisdiction to grant relief should it find that first, the rights in question were protected under the repealed constitution and, secondly, that the violations in question are continuing violations. See also the case of **Abdalla Rhova Hiribae & 3 Others –vs- Attorney General & 6 Others HCCC No. 14 of 2010**.

98. The second question is whether this petition, a constitutional petition alleging violation of rights, is the most appropriate procedure and forum for litigating the issues in dispute. It appears to the Court that the present claim would have been better canvassed as an ordinary civil suit in tort so that the issues in dispute could be canvassed by way of oral evidence. Further, the claim is essentially a claim in negligence. The 1st respondents did argue that there are other courts which can deal with such matters as are raised in this petition. In turn, it was submitted on behalf of the petitioners that their claim can be considered as a claim in tort, or from the perspective of human rights violations. However, there was no serious challenge to the petition with regard to form, and in light of the provisions of Articles 22, 23 and 159, and given the fact that the alleged acts of negligence by the respondents, if found to be established, would

have the effect of infringing on the petitioners' rights, the Court is satisfied that no prejudice has been caused to any party by the present form.

Whether The Petitioners Have Established a Violation of their Constitutional Rights by the Respondents.

99. In considering this issue, I do so from two perspectives. The first relates to the alleged violation by the 1st respondent, which, according to the petitioners, gives rise to the second violation, that by the 2nd - 4th respondents for their alleged failure to take steps to protect the petitioners and other pupils from sexual violation by their teachers. This, in turn, raises the second level of liability of the 2nd - 4th respondents: their vicarious liability for the acts of the 1st respondent.

Violation by the 1st Respondent

100. In dealing with this issue, I take cognisance of two facts. First, the Court was informed by Counsel for the petitioners that the 1st respondent was acquitted by the trial court seized of Nakuru Chief Magistrate's Court Criminal Case No. 224 of 2010. The second important fact is that the 3rd respondent, in its disciplinary proceedings against the 1st respondent, found him culpable and dismissed him from employment, and it also struck him off the register of teachers.

101. In his averments and submissions in opposition to the petition, the 1st respondent has made much of the apparent contradictions in the petitioners' case. He points out that the allegation of defilement in respect of the 1st petitioner, for instance, is not supported by the medical evidence contained in the P3 medical report.
102. The Court has noted these inconsistencies. Indeed, it notes from the evidence of the 1st petitioner, W.J., contained in her affidavit in support of the petition, that she consistently talks of an attempt at defilement, not defilement. With respect to the 2nd petitioner, L.N., the Court notes that the medical report set out in the P3 form suggests that defilement did take place.
103. I must emphasise, however, that this is not a criminal court. The court seized with the jurisdiction to adjudicate on the 1st respondent's culpability under the criminal law has heard the case against him, and on the evidence before it weighed against the standard of proof required in criminal cases, that is the standard of guilt beyond reasonable doubt, found him not guilty.
104. On the other hand, as is evident from the affidavit of Mr. Simon Musyimi Kavisi sworn on behalf of TSC, as well as the annexures thereto, the 3rd respondent carried out investigations, and after hearing all the parties involved in the matter, reached the conclusion that the 1st respondent had materially breached the Code of Regulations for Teachers, and it therefore made the decision to

dismiss and deregister him as a teacher. According to the TSC, this is the most severe form of punishment provided under Regulation 66(6)(c) of the Code of Regulations for Teachers.

105. The petitioners have submitted that the outcome of a criminal trial is not binding on a court dealing with a civil claim or, as in this case, a court considering alleged violation of constitutional rights. As observed earlier, the standard of proof in a criminal prosecution is beyond reasonable doubt, which is an entirely different and much higher standard from that which a civil court should require of a party before it.
106. I have before me two positions with respect to the culpability of the 1st respondent: the acquittal by the criminal court, and the finding of culpability with respect to the Code of Regulations by the TSC which, in the disciplinary proceedings before it, investigated the matter, interviewed the petitioners, heard the 1st respondent, and arrived at the conclusion that he had breached its Code of Regulations for Teachers. Its determination was that such breach was sufficiently serious not only to merit dismissal from employment, but also his deregistration as a teacher.
107. Can this Court take either of the two decisions in respect of the 1st respondent as a basis for finding him liable in respect of the defilement claims in this matter? With respect to decisions of courts seized of a criminal matter, whether a convictions or acquittal, the

case of **Hollington v. F. Hewthorn & Co. [1943] 1 K.B. 587** in which it was held that a criminal conviction could not be admitted into evidence in a subsequent civil proceeding as proof of the facts of the conviction, offers some guidance.

108. In that case, the defendant had been involved in a road accident in which the plaintiff's son had died, and had been convicted of careless driving. The plaintiff, as the personal representative of his son, sued for damages for negligence, and sought to rely on the conviction as *prima facie* evidence that the defendant was driving carelessly at the time. While rejecting the conviction as evidence but finding for the plaintiff on other grounds, the Court expressed itself as follows:

"On the defendant's appeal the plaintiff claimed that the judge had been wrong to reject the conviction as such prima facie evidence. Relevance is the main consideration determining whether or not evidence is admissible. The conviction was inadmissible on two grounds; first, that the opinion of the court exercising the criminal jurisdiction as evidenced by the certificate of conviction was not relevant; second, as hearsay evidence it did not comply with the best evidence rule. As to the first ground: "In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim

for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision."

109. With respect to an acquittal, in **Spadigam (J.) vs State of Kerala, (1970) ILLJ 718 Ker**, the High Court of Kerala observed as follows:

[7] I do not think that judgment of a Criminal Court acquitting an accused on the merits of a case would bar disciplinary proceeding against him on the basis of the same facts, or that the Judgment would operate as conclusive evidence in the disciplinary proceedings. The reason for it is not far to seek. A criminal court requires a high standard of proof for convicting an accused. The case must be proved beyond reasonable doubt. The acquittal of an accused by a Criminal Court only means that the case has not been proved against him beyond reasonable doubt. Such a standard of proof is [not] required for finding a person guilty in a disciplinary proceeding.

110. I have considered the averments by the plaintiffs and their guardians. I note their fairly consistent averments with respect to the events that took place on 4th July 2010 when they were asked by the 1st respondent to visit his home; made to perform domestic chores for him, and defiled. I note that the petitioners did not report the events, and only the fact that the guardians noted the change of behaviour brought out the fact of defilement. I also note that the 1st

respondent was, according to the petitioners, only charged in Court after his efforts to have the matter resolved amicably failed, an averment he has not denied.

111. On the material before me, I am satisfied that the 1st respondent did indeed commit the acts that he was accused of. His employer, the TSC, found him culpable of breaching the Code of Conduct and Ethics, and not only dismissed him from employment but struck him off the register of teachers. At the very least, even though the acts of defilement were not proved against him in the criminal trial where proof beyond reasonable doubt is required, on the balance of probability test, I find that the 1st respondent did defile the petitioners.
112. It is indeed difficult not to conclude, from the evidence adduced by the petitioners, that at the very least, the 1st respondent, a deputy Head Teacher in charge of minors, committed acts amounting to sexual assault against the petitioners, or conducted himself inappropriately as a teacher in respect of his charges, so much so that his employer found it justifiable to not only dismiss him from employment but to deregister him as a teacher. I note that the 1st respondent has not challenged either his dismissal or his deregistration.

113. Does his conduct amount to violation of the petitioners' rights under Articles 27, 28, 29 and 43 of the Constitution? The Constitution that was in force in July, 2010 is the 1963 Constitution. While it contained non-discrimination provisions and guaranteed the right to freedom and security of the person, it did not contain the guarantee to human dignity contained in Article 28, nor the socio-economic rights contained in Article 43.

114. It has been held, with respect to the application of the 2010 Constitution to events that occurred prior to its promulgation, that it would only apply to situations where the violation was a continuing violation. In the case of **Joseph Ihuo Mwaura & 82 Others -v- The Attorney General Petition No. 498 Of 2009** Majanja J, observed as follows:

"The Constitution promulgated on 27th August 2010 is not retrospective hence its provisions would not apply to matters that occurred before the effective date of the Constitution. Unless otherwise provided, the provisions of the Constitution, 2010 cannot govern matters done under a different legal regime."

115. It must be acknowledged, however, 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, the right to education, non-discrimination and the right to dignity, were guaranteed to children under the Children Act. These rights were also

guaranteed under the International Convention on the Rights of the Child, which had been domesticated through the Children Act.

116. The Convention on the Rights of the Child provides as follows at Article 19:

- 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.**
- 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.**

117. The petitioners have produced in evidence a report, annexed to an affidavit sworn by their Counsel, Mr. Chigiti, on 5th November 2013. The report is from Amani Counselling Centre and Training Institute and is compiled by a Ms. Mary Karanja, a Child Therapist. It is dated

4th October 2012, two years after the occurrence of the events the subject of this petition. Ms. Karanja states that she held seven (7) sessions with each of the petitioners. She identified the presenting problem for each of them as defilement by their teacher, and noted that the petitioners suffered the ordeal of defilement repeatedly, at least three times for one of the girls. She has noted the anger and frustration felt by the petitioners, and the stigma and mockery they have experienced at the hands of their fellow pupils and some of their teachers.

118. It is undisputed that aside from the fact that the Sexual Offences Act expressly criminalises defilement, it is, and was at the time it was perpetrated against the petitioners, a violation of their rights as children to subject them to defilement or any form of sexual abuse.
119. In addition, the right to dignity guaranteed under Article 28 is, in my view, a continuing one. Where a teacher defiles a child, leading to its experiencing emotional and psychological trauma, to feelings of being an outsider in society, and as somehow to blame for the acts of the perpetrator, as detailed in the Counsellor's report in respect of the petitioners, that, in my view, amounts to violation of the right to dignity and self-worth of the victim of abuse, which is continuous in its effects.

120. With regard to the alleged violation of the right to education, it is the petitioners' case that as a result of the acts of the 1st respondent, the education of the petitioners was affected, and that the 2nd petitioner eventually dropped out of school. The implication is that the psychological consequences of the alleged defilement were so severe that they affected the petitioners' performance in school, and in the case of the 2nd petitioner, resulted in her dropping out of school. It is not clear whether the 2nd petitioner ever resumed her education in another school, the evidence before the Court being only that she dropped out, as attested by the letter from the Headmaster of the 2nd respondent seeking to know why she had not been in school.
121. I agree with the petitioners and the interested parties, as well as the Amicus Curiae, that the consequences of sexual violence against minors are severe: they can affect their physical and emotional well-being, and expose them to the risk of contracting sexually transmitted illnesses, thus affecting their right to health. In addition, the fact that their psychological well-being was affected is a clear violation of their right to health, which is defined as including the highest attainable standard of physical and mental well-being.
122. As submitted by the Amicus and is evident from the various studies and reports relied on by the petitioners, Amicus and the interested parties, there is a need to provide psycho-social support to children in the position of the petitioners who are adversely affected by the unlawful acts of sexual abuse committed against them by the 1st

respondent and who, as in the case of the 2nd petitioner, find it difficult to continue with their education. The evidence before me suggests that this has not been done in the case of the petitioners, and thus there is evident an infringement of the petitioners' right to education, as well as their right to health.

123. I therefore find and hold that the acts of the 1st respondent resulted in a violation of the petitioners' right to dignity, health and education, for which violation the 1st respondent is liable in damages.

124. I now turn to a consideration of the second aspect of the petitioners' claim, that against the 2nd-4th respondents.

Violation of the Petitioners' Rights by the 2nd-4th Respondents

125. The petitioners argue that the 2nd, 3rd and 4th respondents violated their rights and are culpable for such violations in two respects. The first relates to their alleged failure to put in place policies and mechanisms to protect the petitioners from violation by persons in the position of the 1st respondent. The second relates to what the petitioners see as the vicarious liability of the 3rd and 4th respondents for the acts of the 1st respondent.

Violation as a Result of Failure to Put in Place Appropriate Policies

126. The petitioners are aggrieved by what they perceive to be the failure of the respondents to properly discharge their duties under the Constitution of Kenya and international human rights instruments

with respect to their rights to education and health. They aver that the 3rd and 4th respondents failed to discharge their duty to protect them by failing to provide a safe learning environment; and that the state, through the TSC, has failed in its obligation of providing a safe school environment and has thereby exposed the petitioners not only to sexual and gender based violence but also to the risk of being infected with HIV/AIDS by the 1st respondent. The petitioners also question the steps taken by the state, as well as the measures put in place by the state, for the protection of minors within the school environment.

127. While acknowledging that TSC has indeed put in place a circular with regard to the rights of minors not to be subjected to any form of sexual violence, they feel that such measures are insufficient. They further contend that the circular has failed to guarantee or create a safe academic environment for the girl child in Kenya to enjoy the right to education and health, which they contend is a failure on the part of the respondents to discharge its statutory duty to protect the petitioners and other girl students.
128. It is also their contention that while the TSC carried a media report in the Daily Nation on 13th October 2011 announcing the launch of a website to publish names of teachers who have defiled students, its efforts are incomplete as the website makes no reference or mention of the students' right to education and health. They are aggrieved that the TSC lays a lot of emphasis on the disciplinary measures that

are meted out on rogue teachers, but little on the rights of minors who are subjected to violence by the teachers.

129. The petitioners have a similar complaint with regard to the criminal justice system and attendant legislation like the Sexual Offences Act. Their contention is that the system and legislation are tailored at punishing offenders, but that the victims of defilement such as the petitioners do not get any guarantee or protection of their right to education and health from the justice system.
130. TSC's position is that it has done all it can do in the circumstances, and has discharged its constitutional and statutory duty to the petitioners and other children in school. It has published a Code of Conduct and Ethics for teachers, and distributed it to all schools and teachers across the country; it states that it treats all cases of sexual offences against students seriously and administers stern punishments. With respect to the 1st respondent, as already noted, it has dismissed him and removed him from the register of teachers. In addition, TSC states that it has partnered with the Kenya Police and forwarded all sexual abuse related cases to the police to commence criminal proceedings against the culprits, and has entered into partnership with civil society groups working to protect the rights of children to ensure that public schools are safe for children to access education.

131. Yet, the 3rd respondent acknowledges that there is a problem, a serious problem, with defilement of children. It is its evidence that in the period 2009 - 2011, it has punished by way of dismissal and de-registration a total of 175 teachers, on account of sexual-related offences. Coupled with the statistics adduced by the interested parties and the Amicus, it is clear that the problem of defilement and sexual abuse of children generally is a serious problem, that needs to be addressed with all the tools and means that are in the 3rd and 4th respondents' control.
132. It is evident that the state through TSC has and is still taking some steps to ensure the provision of a safe and conducive learning environment for children in Kenya. The TSC circular referred to earlier in this judgment, which all parties acknowledge is in place, is intended to ensure the realisation of such an environment, and the launch of the website indicating the teachers who have been found guilty of abusing pupils is further testimony of the good intentions of TSC.
133. However, the good intentions of the State and TSC are, in my view, limited in two respects. First, as this case demonstrates, there is insufficient enforcement of the circular and the Code of Ethics. If students and pupils are still compelled by teachers to go to their houses and perform domestic chores for them, as the petitioners were, and in the process, are subjected to sexual violence, then the

state, the TSC and those in charge of institutions, such as school heads, are failing in their duty to protect children.

134. In addition, the steps taken by the state and TSC are in many respects limited, and no doubt ineffectual. For instance, are students and pupils aware of the contents of the circular that prohibits school teachers from having any contact with them outside what is required of a normal teacher-pupil relationship? Are they aware that there is a prohibition against teachers inviting students to their houses? How many institutions and parents have access to the TSC website on teachers who are de-registered for breach of the Code of Ethics and Regulations for teachers? Is the website still up and functioning today?
135. Secondly, there is clearly a failure, as the petitioners submit, in providing support and remedies for children who may be subjected to sexual violence by their teachers. While prosecution and dismissal of offenders is a step in the right direction, it does not deal with the psychological trauma and stigma that the victims of such violence experience. I did not hear the state or the TSC refer to any policy or process for ensuring counselling or other psychological support for victims of sexual violence. It appears that the state views its role as limited only to punishing offenders, not addressing the needs of the child victims of such offences.

Whether the 3rd and 4th Respondents are Vicariously Liable for the acts of the 1st Respondent

136. Having found that the 1st respondent defiled or otherwise sexually abused the petitioners, I now turn to consider whether the respondents are liable vicariously for the violation of the minor's rights by the 1st respondent.
137. The petitioners contend that before joining Jamhuri Primary School, the 1st respondent was alleged to have been involved in acts similar to what he is accused of by the petitioners. They contend further that the 2nd – 4th respondents should have known this before engaging him as a teacher at the 2nd respondent, that no due diligence mechanisms were applied by the respondents to ensure that the children were not exposed, and consequently, they are vicariously liable for his acts.
138. The petitioners have cited various authorities in this regard which I have referred to earlier in this judgment. Among these is the article by **Peter Williams** titled "**The Legal Liability of an Employer for Acts of Sexual Abuse Committed by an Employee: Recent Development in Australian Law and New South Wales v. Lepore; Samin v. Queensland; Rich v. Queensland (supra)**" with regard to the issue of vicarious liability for acts of sexual abuse committed by teachers against students. They have also referred the Court to the principle of vicarious liability as defined in **D Gardiner and F McGlone, Outline of Torts (2nd ED, 1998) 394-406**, to

the effect that an employer is liable for the torts committed by an employee in the course of his or her employment, even though the employer has done nothing wrong in the circumstances.

139. Black's Law Dictionary defines vicarious liability as

"Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties."

140. It is not in dispute that the 1st respondent is an employee of the 3rd and 4th respondents, who, at the time the defilement of the minors took place, had been deployed to serve as a teacher in the 2nd respondent, where he was also the Deputy Head Teacher.

141. I have considered the petitioners' submissions with respect to the liability of the respondents, particularly the 3rd and 4th respondents, as the 1st respondent's employers, for his acts of sexual abuse of the petitioners, against the authorities relied on by the petitioners.

142. I agree with the petitioners that the 2nd – 4th respondents are under a duty to ensure that pupils who are in educational institutions and therefore under their care, who are young and immature and therefore vulnerable, are protected from harm. In particular, the 2nd – 4th respondents are under a duty to safeguard pupils from sexual abuse by their teachers. Should they fail to do this, they are, first,

liable for failing in their duty of care to the pupils, but are also vicariously liable for the unlawful acts of the teacher(s) found to have sexually abused the pupils.

143. This is particularly so where, as alleged by the petitioners, though no evidence was adduced to support the contention, a person such as the 1st respondent, who is alleged to have committed sexual violence against minors, is moved from one school to another, either as a disciplinary measure, or for any other reason, when it is known to the employer that he is or is suspected to have been sexually abusing those under his charge. The Court notes the fact from various studies, which the TSC tacitly concedes, that many teachers are serial offenders, who abuse students in one school and are often transferred to other schools, where the abuse continues. See **the Kenya Education Rights Update, November 2009**, which captures the results of a study undertaken by TSC and the Centre for Rights Education and Awareness (CREAW).
144. While it is acknowledged by TSC and the state that the problem of sexual abuse of children is rampant, it would appear that no-one has yet sought to hold them civilly liable in damages for such abuse. At any rate, I have not been able to find any local decision in which the civil liability of a perpetrator, such as the 1st respondent, or the duty of the employer, has been considered. I have, however, considered decisions from other jurisdiction which are of persuasive authority.

145. In the Canadian case of **B. (A.) v. D. (C.), [2011] B.C.J. No. 1087,2011 BCSC 775**, the court held as follows:

"Board EF owes a duty of care to its students to protect them from unreasonable risk of harm at the hands of other members of the school community....The standard of care to be exercised by school authorities in providing for the supervision and protection of students for whom they are responsible is that of the careful and prudent parent. This was set out by the Supreme Court of Canada in Myers v. Peel County Board of Education, [1981] 2 S.C.R. 21."

146. The Court further stated that

[131] "Employers are sometimes held vicariously liable for the acts of their employees even when the employer did not act negligently. The question of vicarious liability for sexual assaults committed by employees has been the subject of several cases in the Supreme Court of Canada. Two companion cases are the starting point for the analysis: Bazley v. Curry, [1999] 2 S.C.R. 534; and Jacobi v. Griffiths, [1999] 2 S.C.R. 570 ("Jacobi/Griffiths")."

[132] The Supreme Court of Canada confirmed that the test for vicarious liability is governed by the Salmond test, which provides that employers are vicariously liable for (a) employee acts authorized by the employer; or (b) unauthorized acts so connected with authorized acts that

"they may be regarded as modes (albeit improper modes) of doing authorized acts".

147. In the Zambian case of **R. M. K. vs Edward Hakasenke and Others 2006/HP/0327**, the plaintiff, who was a minor aged 13, sued through her guardian and next friend seeking damages in negligence against the defendants for breach of their duty of care to her, and a declaration that the government is responsible for all school going children in the care of its agents, such as teachers, school authorities and any other person in its employment during the time the schools are in session and with regard to all related matters over which such agents have control. She also sought damages for personal injury and emotional distress caused to her as a result of the first defendant's wrongful and unlawful act. The claim was brought against a teacher who had raped her, the school she attended and in which the defendant was a teacher, the Ministry of Education as well as the Attorney General. As in the case before me, the defendant teacher had lured the young girl into his house, on the pretext that he would give her past examination papers.

148. The Court found in favour of the plaintiff, holding that a teacher is employed, selected, and paid by the Ministry, is regulated in the performance of his duties by the Ministry, and can be suspended or dismissed by the Teaching Service Commission of Zambia.

149. I am persuaded by the reasoning in these decisions. The TSC, in particular, is fully aware of the enormity of the problem of sexual abuse and defilement of minors, particularly girl children, by teachers. I note from the **Kenya Education Rights Update of November 2009** that the report compiled by TSC and CREAM, which I have already referred to, indicates that in a five year period between 2003 and 2007, over **12, 660** girls were sexually abused by male teachers. The report concludes that the Ministry of Education Quality Assurance and Standards Department is not doing its work effectively,
150. I am satisfied that in the present case, the 3rd and 4th respondents are vicariously liable for the unlawful acts of the 1st respondent, who sexually abused the petitioners, who were placed under his care. Indeed, I would go so far as to say that the TSC, the State and any educational or other institution in which teachers or other care givers commit acts of sexual abuse against those who have been placed under their care is vicariously liable for the wrongful acts of its employees.
151. In the English case of **Lister & Ors v Hesley Hall Limited (2001) 2 All E.R 769**, the House of Lords held that the employer of the warden of a residential boarding annex for children with emotional and behavioural difficulties could be held liable for the intentional acts of the warden on the basis of the principle of vicarious liability. The employer had been sued for financial compensation for acts of

intentional sexual abuse committed by the warden against a number of the children. Lord Millet observed in that case at page 800 as follows:

"Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."

152. The above sentiments, in my view, apply with equal force to our situation: it is just that we have not cared enough to call into account those who abuse the vulnerable, or to place a duty 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.
153. I believe that public policy considerations dictate that those in charge of educational and other institutions be held strictly liable for abuses committed by those whom they have placed in charge of vulnerable groups such as minors in educational institutions. It is not enough to prosecute those found to have breached the duty of care, and to have intentionally committed criminal acts against minors. The

institutions are under a duty to ensure that there is no room for abuse by those they have placed in charge of these vulnerable groups.

154. In the circumstances, it is my finding and I hold that the 3rd and 4th respondent are vicariously liable for the unlawful acts of the 1st respondent against the petitioners.

Violation of the Rights of the 1st Respondent

155. The 1st respondent alleged that this petition violates his rights under Article 50, under which he is entitled, as an accused person, to be presumed innocent; and that the petitioners have maligned him and caused him untold psychological trauma. He also alleges violation of his right to dignity under Article 28 of the Constitution, as well as violation of his rights under various provisions of, among others, the Universal Declaration of Human Rights and the African Charter on Human and People's Rights.

156. The Court observes that the petitioners lodged a complaint regarding their alleged defilement by the 1st respondent, and the State found sufficient evidence to justify his prosecution. The employer, TSC, upon hearing the parties, found that a breach of regulations justifying dismissal and removal from the register of teachers had been made out. I have not been able, from the averments and submissions of the 1st respondent, to find a violation of his rights by the petitioners.

In the circumstances, I can only conclude that no such violation has been established.

Disposition and Reliefs

157. In light of my findings on the various issues set out in the judgment, I am satisfied that the petitioners have made out a case of negligence against the respondents, and of violation of their constitutional rights by the 1st respondent. My findings, for the avoidance of doubt, are as follows:

- 1. I find and hold that the 1st respondent violated the rights of the petitioners guaranteed under Article 28 and 43(1) of the Constitution.**
- 2. I find and hold that the 2nd – 4th respondent are vicariously liable for the unlawful acts of the 1st respondent.**

158. The petitioners have sought various orders and declarations against the respondents. In light of my findings set out above, I am satisfied that they are entitled to the prayers that they seek. I therefore grant the declarations that they sought as follows:

- a) I declare that all acts of sexual and gender based violence against the 1st and 2nd petitioners and all students amount to violation of the right to education as provided for under Article 43(1) of the Constitution and Section 7 of the Children Act.***

b) I declare that all acts of sexual and gender based violence against the 1st and 2nd petitioners and all students amount to violation of the right to health as provided for under Article 43(1) of the Constitution and Section 7 of the Children Act.

c) I declare that all schools and school teachers are at all times under the legal capacity of a guardian and are under a duty to protect all students from sexual and gender based violence or harm by teachers.

159. The petitioners have also prayed for compensation from the respondents for the breach of their constitutional rights. I have considered the petitioners' case with respect to the damage they suffered as a result of their violation, particularly in the case of the 2nd petitioner whom, I am concerned to note, appears to have dropped out of school.

160. As has been observed by our courts with respect to the award of damages, they do not compensate for the injury suffered, particularly, as in this case, by a minor whose emotional and psychological wellbeing has been adversely affected. I note in particular the report of the Counsellor on the impact of the defilement on the minors, and the fact that the consequences will continue to blight their lives for many years to come.

161. However, in the present circumstances, damages are the only remedy that the Court can offer. In view of my finding above in respect of the vicarious liability of the 3rd and 4th respondents, such damages should not only be borne by the 1st respondent, as the perpetrator, but also by his employer, the State through the TSC, which has failed to adequately exercise its duty of care to the petitioners.
162. With respect to the 1st respondent and others similarly situated, it is important to send the message that any teacher who violates his duty as a teacher, who abuses the trust of parents who leave their vulnerable children in his charge, and who turns, like a wolf, against them, will be held civilly liable, even though he may escape criminal culpability.
163. I am conscious that I have made reference in this judgment to teachers of the male gender in view of the fact that the perpetrator if the acts of sexual violence, the 1st respondent, is male. I appreciate that there may be female teachers who also abuse pupils under their care. The evidence before me and the reports placed before the Court by the parties, however, suggest that girl children are predominantly the victims, and that male teachers are the abusers. Needless to say, the findings of this Court would apply with equal force to all teachers, regardless of gender, who sexually abuse children under their care.

164. With respect to the State through the TSC, it must up its game with respect to protection of minors. It cannot shuffle paedophiles from one school to another, and finally, content itself with dismissals. It has to put in place an effective mechanism, whether through an inspectorate department within TSC or the Quality Assurance Department within the Ministry, to ensure that no-one with the propensity to abuse children is ever given the opportunity to do so. Dismissal, and even prosecution, while important, can never restore the children's lost innocence.
165. In the circumstances, I make as against the respondents jointly and severally, and in favour of each of the petitioners, a global award of the following amounts:
- i. For W. J. the sum of Kenya Shillings Two Million (Kshs 2,000,000)**
 - ii. For L.N. the sum of Kenya Shillings Three Million (Kshs 3,000,000)**
166. The petitioners shall also have interest on damages from the date hereof until payment in full.
167. I note that at the time the events the subject of this petition occurred, the petitioners were minors aged 12 and 13 respectively, and should now be aged 16 and 17 respectively. I therefore direct that the above awards, upon payment, be deposited in an interest-earning account in trust for them and be utilised to further their

education or training with a view to their being able to make a sustainable living for themselves.

168. The petitioners shall also have the costs of this petition jointly and severally against the respondents.

Dated, Delivered and Signed at Nairobi this 19th day of May 2015

**MUMBI NGUGI
JUDGE**

Mr. Chigiti & Ms. Mosoni instructed by the firm of Chigiti & Chigiti & Co. Advocates for the petitioners.

No appearance for the 1st respondent.

Mr. Allan Sitima instructed by the firm of Allan M. Sitima & Co. Advocates for the 2nd and 3rd respondent.

Mr. Obura for the Attorney General.

Mr. Waiyaki instructed by the firm of Waiyaki & Associates & Co. Advocates for COVAW

No appearance for 1st & 3rd interested party

Ms. Judy Okal for Amicus Curiae