IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE JJ.A)

CIVIL APPEAL NO. 22 OF 2015

BETWEEN

MOHAMED FUGICHA……APPELLANT

AND

METHODIST CHURCH IN KENYA (SUING THROUGH ITS REGISTERED TRUSTEES)....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

COUNTY DIRECTOR OF EDUCATION ISIOLO COUNTY.....3RD RESPONDENT

DISTRICT EDUCATION OFFICER ISIOLO SUB-COUNTY.....4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Meru (Makau, J.) dated 5th March 2015) in **PETITION NO. 30 OF 2014)**

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JUDGMENT OF THE COURT

By this appeal, this Court is being asked, to pronounce authoritatively for the very first time as far as we can tell, on the very live and often vexed issue of free exercise of religion in Public Schools in Kenya.

1. BACKGROUND AND PROCEDURAL HISTORY

By a Petition filed before the High Court's Constitutional and Human Rights Division at Nairobi, which was later transferred to the High Court at Meru, the Methodist Church in Kenya, suing through its Registered Trustees (The Church), impleaded as respondents the Teachers Service Commission (TSC), the County Director of Education Isiolo County (CDE) and the District Education Officer Isiolo Sub-County (DEO).

On the facts supporting the Petition, the Church averred that it was the Sponsor of St. Paul's Kiwanjani Day Mixed Secondary School (The School) for which, it provided a five-acre piece of land. The School, founded in the year 2006, had "***a population of 412 students from diverse religious backgrounds***"

and was the best performing school in Isiolo County. It had a school uniform policy prescribed in the admission letter which each student signed upon admission. The respective parents also signed it.

Controversy over the issue of uniform, it was averred, only arose on 22nd June 2014 when, during an Annual General Meeting cum Prize Giving Day, the Deputy Governor of Isiolo County ***"made an informal request that all Muslim girls in the school be allowed to wear* hijab *and white trousers in addition to the prescribed uniform"***. A week later, some ***"unknown people/persons"*** brought the said items into the school and thereafter Muslim girls turned up donning the said items of apparel and open shoes in addition to the school uniform. This led to disharmony and tension.

When asked to revert to the prescribed uniform, the Muslim girls, joined by the boys of their faith "***went on the rampage".*** It was alleged that they "***broke window panes and threatened teachers and Christian students"*** before they walked out of the school and marched to the DEO's office. A month later, the DEO, together with officials from the Ministry of Education and Members of an Interfaith Group, visited the school. After discussion it was "***unanimously agreed***" that the school uniform remain as prescribed in the dress code, but the DEO ***"categorically stated that unless* hijab *and trousers were allowed in the school there would be bloodshed".*** On 30th July 2014, a meeting of the school's Board of Management, (BOM), Parents Teachers Association (PTA) and the Church met and agreed on a return to school formula pursuant to which 214 students reported back to school just before it was closed for the August holidays.

On 27th August 2014, the CDE held a meeting with the Principal, Members of the BOM and the PTA who, however, felt that they were being '*hijacked'*, which the Principal complained about in a letter objecting to directions issued by the CDE on the issue. The CDE proceeded to hold a meeting with parents at the school without the BOM and the PTA at which certain resolutions were arrived at, which, the CDE communicated to the BOM and the Church and directed them to meet before 11th September 2014 "***to decide with finality whether* hijab *and white trousers would be acceptable as part of the school uniform".***

The said meeting was duly held at the school and by a vote of 18 out of 22 present, overwhelmingly voted to maintain the *status quo*. The very next day the CDE held a meeting with a few of her officers and directed that Muslim girls should wear trousers and *hijab* and that the principal of the school be transferred.

The Church considered the transfer of the principal, one GEORGE M. MBIJIWE, who had been the best performer in the County for the previous five consecutive years, to have been "***malicious, irrational, punitive***" for his stand in maintaining school uniform. And it complained to the respondents and the relevant authorities requesting that school rules and regulations be adhered to, the Principal retained, the Church be respected as sponsor of the school and that there be non-interference with its running of the school.

It was further averred that,

"3. The Christian students at the school have felt that the school has accorded Muslim students special or preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya…..

4.The Respondents have erred in failing to play a key role in standardization of school uniforms thus creating economic disparities on religious backgrounds (sic). The respondents' actions have given an impression that the Muslim students have been accorded special and preferential

treatment, a fact that is tantamount to discrimination and the rules of natural justice and the rule of law (sic)"

The Church therefore sought a declaration that the decision to allow Muslim girls to wear *hijab* and trousers was discriminatory, unlawful, unconstitutional and contrary to the school's rules and regulations; and various injunctions to remedy the situation or to provide relief against the said decision.

The Petition was supported by the verifying affidavit of KIMAITA JOHN MACHUGUMA, the Church's Development Co-ordinator of the Isiolo Circuit sworn on 18th September 2014 in which he reiterated and provided documentary proofs for the allegations in the Petition.

In answer to the Petition, the TSC filed a replying affidavit sworn on 3rd November 2014 by its Senior Deputy Director in charge of Teachers Management of Post Primary Teachers, MARY ROTICH. The gist of the affidavit was that the transfer of the school's head teacher was done by the TSC in exercise of its constitutional and statutory functions and was done after a rational consideration of relevant factors without loss, prejudice or injustice to the said teacher. The TSC attacked the Petition against itself as being incompetent for imprecision and an attempt by the Church to usurp the TSC's constitutional, statutory and administrative mandate "***which shall uproot the philosophical concept behind Chapter fifteen Commissions".*** It prayed that the Petition be dismissed with costs.

On behalf of herself and the DEO, MRS. MURERWA SK, the CDE Isiolo County swore a replying affidavit on 17th October 2014 in response to both the Petition and an interlocutory application for injunction filed by the Church. She stated that she did convene a meeting of Senior Education Officers on 10th September 2014 with a view to responding to the issue of wearing hijab and trousers which had caused a lot of unrest at the school. She averred as follows at paragraphs 5 and 6;

"5. THAT in deliberating the issue the meeting was informed by among other issues-

(b) Students of the school had transitioned from Kiwanjani Primary School equally sponsored by the Petitioners where they had been allowed to wear* hijab *headscarf/trousers [and] by being required to cease from adorning (sic) the same, great dissatisfaction arose.

***(c) The neighbouring schools for instance Garbatulla High School also sponsored by the Petitioners, adorned (sic) the* hijab.**

***6. THAT in light of the foregoing, the meeting resolved that itwould be fair and just that the Muslim students be allowed to adorn (sic) the* hijab.**

7. THAT the issue of recommending the transfer of the Principal was resolved after it had become apparent that he would be adamant in effecting the resolutions of the aforementioned meeting. His conduct only served to fun(sic) animosity as opposed to mitigating the situation and was reflected in his contemptuous attitude towards his superiors".

She dismissed as outrageous the allegation that she and her office intended to dissolve the school's BOM and PTA. She urged the dismissal of the Petition and Motion.

The appellant's entry into the fray was by an application filed under Certificate of Urgency on 8th October 2014. In the Motion dated 6th October 2014, the appellant **Mohammed Fugicha** (Fugicha) sought to be enjoined in the proceedings as an Interested Party and/or Respondent to the Petition. He also sought leave to respond to the Church's application for injunction dated 18th September 2014. He prayed that

the conservatory orders granted by the Court on 23rd September 2014 pending the hearing and determination of the Petition be set aside or discharged. He prayed, in the alternative, for an interim order limited to the remainder of that school term allowing the Muslim students at the school to wear the *hijab*; "a scarf and trouser" only.

In his grounds and affidavit in support, Fugicha averred that he was a father to KALO MOHAMMED FUGICHA, AISHA MOHAMMED FUGICHA and SUKU MOHAMMED FUGICHA – all students at the school who were Muslims – and that;

"(e) …wearing of hijab is part and parcel of freedom of conscience, religion, thought and belief as enshrined in Article 32 of the Constitution of Kenya and the same is being restricted and limited and being derogated from its core essential content by the Petitioner contrary to Article 24(2) (e) of the Constitution of Kenya.

Fugicha also raised the following grounds;

(g) THAT Kenya as a member of the United Nations Organization and as a democracy is bound by the United Nations Charter and also bound by the decisions of the United Nations Human Rights Committee the monitoring body created by the 1966 International Covenant on Civil and Political Rights and specifically its General Comment No. 31 in the case of Hudoyberaganova against the state of Uzbekistan [CCPR/82/d/931/2000] which upholds the freedom of Muslim students to dorn (sic) on hijab.

(h) THAT it is the applicant's case that the decision in Republic vs Headteacher, Kenya High School & Anor Ex-parte SMY (a minor suing through her mother and next friend AB [2012] eKLR (THE KENYA HIGH case) against wearing of hijab in school was determined per in curiam and as a consequence it is paramount that after disposal of interlocutory applications, directions do issue referring the matter to the Hon. Chief Justice to appoint a bench of more than one judge to hear the main petition as the Court would be bound by this decision.

(i)THAT the administration at St. Paul's Kiwanjani Mixed Day Secondary School are indirectly forcing Muslim students therein to involuntarily sign a commitment not to wear hijab but to abide by the school uniform and if not, refused entry into the school compound an act which is discriminatory and trampling on the Muslim students rights.

He also swore an affidavit in the same terms and added that his three daughters had been denied entry at the school for wearing the *hijab*, which the school administration felt emboldened to do on account of the conservatory orders issued by the High Court. He asserted the children's legitimate expectation to be allowed to exercise their freedom of conscience, religion, thought and belief by wearing the *hijab*.

By its order made on 15th October 2014, the High Court allowed Fugicha's joinder as an Interested Party in the proceedings. He then swore a replying affidavit on 16th October 2014 in response to the School's application for conservatory orders and injunction dated 18th September 2014. In his said Affidavit, Fugicha averred, *inter alia*, as follows;

"8. THAT the word hijab is an Arabic word literally meaning to cover or a curtain . In Islamic jurisprudence it refers to dress code for women and with respect to school-going children beside the school uniform, customarily the girl students have been a headscarf and a trouser normally plain white in colour covering the legs and the head but leaving the face.

9. THAT I do aver that hijab is religious obligation to all Muslim females who have reached the age of puberty primarily to guard on modesty and decency and being a religious command and a core Islamic faith, belief and practice, it is a sin not to adhere to such a religious command and which to Islamic faith has important religious significance.

10. THAT the forcing of Muslim students not to wear hijab as aforesaid is a painful choice to a steadfast Muslim student to practice and express her religion and Islamic culture and exposes them to suffering in silence and detriment and as such it is exceptionally important and justifiable in the circumstance to be allowed to wear hijab.

….

12. THAT I do aver that wearing of hijab by my daughters and by any Muslim girl students is a manifestation, practice and observance of the Muslim faith and/or religion by those who are steadfast and conscious of their faith (my children included as they are steadfast and are always concerned by not being allowed to wear hijab to which they attach exceptional importance) and as such pursuant to the said constitutional provision a person should not be compelled and/or forced to remove the hijab as it would be forcing the students to engage in an act contrary to the Muslim religion and belief which freedom is protected under our progressive bill of rights.

He further swore as follows;

18. THAT I do aver that it is against the spirit of Article 259 of the Constitution the refusal by the petitioner for Muslim students to wear hijab who are concerned about their modesty and decency as demanded in the Muslim faith, does not promote their dignity or fundamental belief in our religion of Islam, it also does not promote equity by equitably appreciating other persons around us and their religious persuasions and giving them room to practice and manifest their religion. It is an antithesis of inclusiveness by not appreciating the multi cultural aspects of our society and an affront to equality and freedom from discrimination as provided under article 27(1), (4) and (5) of the Constitution of Kenya and which is contrary to the expected interpretation (Article 259 (1) (d)) – a contribution of good governance.

19. THAT I am alive to the fact that the freedom of conscience religion, belief and opinion is subject to limitations but I am advised by my advocates on record Mr. Ali Advocate that Article 24(2) (c) of the Constitution provides that such limitations shall not limit the right or fundamental freedom so far as to derogate from its core or essential content which the actions of the petitioners manifestly are doing and intended to do which will only leave the freedom of conscience, religion, belief and opinion as a paper freedom not protected or given effect.

20. THAT for record purposes, the allegation that a Muslim girl student will look different from those of other faiths if allowed to wear on hijab has no basis as the main school uniform is not affected with the exception of the Muslim head scarf and trouser which are all uniform and plain white in colour. It has not been shown or proved that if such an exemption if granted learning process would be disrupted.

21. THAT I aver that pluralism and diversity can cause tension in any community but authorities cannot purport to remove a cause of tension by eliminating pluralism but they ought to ensure that the diverse groups tolerate and accommodate each other."

The church responded to all those affidavits through a further affidavit sworn by Kimaita John

Machuguma on 21st November 2014. In specific answer to Fugicha's affidavit, the said Machuguma asserted that the *hijab* was a purely uniform issue governed by school rules and not a religious issue as had been made to appear. He also averred that when Fugicha's children reported to the school, they each, with their mother, had signed and agreed to comply with the school rules and regulations.

The court having granted an interim stay of its earlier orders thereby allowing Muslim students at the school "***to wear an* hijab *(a scarf/trouser only)",*** and Fugicha having been enjoined as an Interested Party, the parties recorded a consent order on 21st October 2014 for the *status quo* then prevailing to be maintained until hearing and determination of the Petition. The court granted liberal leave to all parties to file and serve further affidavits within fourteen days and directed that the Petition be determined by way of written submissions to be filed and served in accordance with a time-table it gave. The submissions were thereafter highlighted orally by the parties before the honourable Judge who then considered them and delivered the judgment impugned herein on 5th March 2015.

By that judgment the learned Judge dismissed the school's prayers against the TSC on the question of the transfer of the Principal to another school but on the issue of the *hijab* granted the following orders, as against all the respondents before him;

"***4. An order that the respondents decision to allow Muslim students to wear* hijab*/trousers is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations at St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby issued.***

5. An order of injunction preventing the respondents from allowing Muslims students from wearing* hijab *contrary to the school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary be and is hereby issued.

6. An order of injunction restraining the respondents from interfering with the petitioner in executing its rightful role as a sponsor in respect of the affairs of St. Paul's Kiwanjani Mixed Secondary School be and is hereby issued.

7. A mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of Kiwanjani Day Mixed Secondary School be and is hereby issued.

8. An order of injunction preventing the respondents from dissolving or purporting to dissolve the current Board of Management and parents Teachers Association of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby granted until their term of office expires.

9. General damages – Nil

10. An order that school uniform policy do (sic) not indirectly discriminate against interested party's daughters and other Muslim female students.

11. The interested party's cross petition is defective and is struck out.

12. Costs of the petition to the petitioner".

2. THE APPEAL

Aggrieved by that decision, Fugicha filed a Notice of Appeal and then a Memorandum of Appeal raising some eighteen (18) grounds. They can be summarized that the learned Judge erred by;

- Failing to appreciate the principle of direct and indirect discrimination.
- Misapplying the concept of accommodation in discrimination law inherent in **Article 27(4)** and **(5)** of the Constitution and equating the wearing of *hijab* to a conferment special status.
- Failing to appreciate and uphold the importance of *hijab* as a manifestation of religion protected under **Article 32** of the Constitution.

- Holding that allowing *hijab* amounts to elevating Islam over other religions and contrary to Kenya's secular character and the equality principle.

- Dismissing the cross-petition for non-compliance with the **Mutunga Rules** yet it surpassed the informality test therein.

- Misapprehending the law on the rights and role of a sponsor under **Section 27 of the Basic Education Act, 2013.**

- Ignoring evidence on record that school uniform was contentious.

- Failing to uphold the submission that absent a statute expressly limiting the right to manifest religion any limitation thereon through school rules was illegal.

- Holding that the wearing of *hijab* by Muslim female students was discriminative of Christian and other students.

- Holding that the school is a Christian institution yet it is public.

- Being biased in time allocation for highlighting of submissions and prompting the petitioner on costs.

Arguing the appeal before us, **Ms Moza Jadeed,** learned Counsel appearing with **Mr. Ali Mahmud Mohammed** for the appellant, argued those grounds under six distinct themes corresponding with the written submissions previously filed. On the import of the donning of the *hijab* on the part of female Muslim students, learned Counsel submitted that the learned Judge was in error to hold that it amounted to according special treatment to Muslim girls and concomitantly discriminating against non-Christian girls. In doing so, she contended, the learned Judge wholly misdirected himself on the doctrine of discrimination.

Citing **Article 24 (4)** and **(5)** of the Constitution, **Ms. Jadeed** posited that discrimination can be either direct or indirect and both forms are proscribed by the said provision, whether by the State or by an individual. The said provision is in the following terms;

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

(5) A person shall not discriminate <u>directly</u> or <u>indirectly</u> against another on any of the grounds specified or contemplated in clause (4)".

(Our emphasis)

Counsel argued that it was wrong for the learned Judge to assume that any different treatment is discriminatory since it is trite, in her view, that not all different treatment amounts to discrimination, in the same way as not all similar treatment amounts to equality. She referred to the classic statement on **non-discrimination** that was made by Judge Tanaka in the **SOUTH WEST AFRICA CASE**; [1966] ICJ REP that equality does not mean;

"…absolute equality, namely the equal treatment of men without regard to individual concrete circumstances, but it means – relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal matters differently according to the inequality is not only permitted but required"

(her emphasis)

She also cited the case of **FEDERATION OF WOMEN LAWYERS KENYA (FIDA K) & 5 OTHERS –vs- ATTORNEY GENERAL & ANOR** [2011] eKLR where the High Court held that mere differentiation or inequality of treatment does not *per se* amount to discrimination within the prohibition of the equal protection clause of the Constitution; running afoul it only if it is shown that the differentiation is arbitrary or unreasonable, adding that it was not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

Faulting the learned Judge for merely deploying the term **discrimination** without stating whether it was **direct** or **indirect**, Counsel drew a distinction between the two forms. Direct discrimination occurs, in Counsel's submission, when a policy, law or rule intentionally seeks to treat another person or persons less favourably compared to others because of that person's protected ground or particular characteristic as enumerated in Article 27 of the Constitution. Indirect discrimination on the other hand occurs when a person, policy, measure, or criteria though neutral, nevertheless places another person at a disadvantage compared to others because of their characteristic or protected ground.

Learned Counsel pointed out that the school uniform rule at the school was indirectly discriminatory against Fugicha's daughters as well as other Muslim girls because, even though on the face of it neutral, the rule nevertheless disadvantaged them on account of their religion, which is a protected ground or characteristic. The learned Judge was also wrong, it was contended, to hold that allowing Muslim students to don the *hijab* discriminated against the non-Muslin students without showing how it did and without a prayer having been made, and no protected ground having been disclosed by those others. The learned Judge was faulted for presuming that there was discrimination against the non-Muslim girls without such evidence of the same having been tendered yet the burden of persuading the court remains on the Plaintiff or Petitioner, which the church never discharged. The US Supreme Court decision of **TEXAS DEPT OF COMMUNITY AFFAIRS –vs- BURDINE** 450 US 248 (1981) was cited.

Returning to the theme of indirect discrimination, learned Counsel submitted that a claimant succeeds on it upon proof that a perfect decision or policy nevertheless has negative impacts or consequences on him because of his protected ground. Then only would the defendant or violator be required to show that the decision was actuated by a legitimate aim. Reliance was placed on the proof pattern for indirect discrimination which the learned Judge ought to have followed, but erroneously failed to do so.

This was said to have been set out in the English case of **THE QUEEN** on the application of **SARIKA ANGEL WATKINS SINGH (A child acting by SANITA KIMARI SINGH her mother and litigation friend) –VS- THE GOVERNING BODY OF ABERDARE GIRLS' HIGH SCHOOL AND ANOR** [2008]

EWHC 1865 (Admin) where Justice Silber stated that in considering the claimant's case on grounds of indirect discrimination, it is necessary to go through the following steps, which are;

(a) to identify the relevant 'provision criterion or purpose' which is applicable;

(b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantage;

(c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally; and

(d) whether the policy is objectively justified by a legitimate aim; and to consider (if the above requirements are satisfied) whether this is a proportionate means of achieving a legitimate aim."

Relying on that proof pattern, **Miss Jadeed** submitted that on the present case where the school was claiming that allowing the *hijab* would disadvantage the Christian students, the comparator pool would be the Muslim female students said to enjoy the special treatment. This was in line with the thinking of the South African Constitutional Court in **MEC FOR KWAZULU NATAL, SCHOOL LIAISON OFFICER & OTHERS –VS- PILLAY** CCT51/06 [2007] ZACC 21 in determining whether a rule preventing a Tamil-Hindu girl from wearing a nose stud central to her religious identity was discriminatory on religious and cultural grounds. The Chief Justice, Langa identified the comparator group which was treated better than the claimant as those pupils;

"…whose sincere religious or cultural beliefs or practices beliefs or practices are not compromised by the [uniform] code, as compared to those whose beliefs or practices are compromised".

Counsel submitted that it behoved the learned Judge to determine the particular disadvantage suffered by the Christian students *because they were Christian* before he could permissibly hold that they had been discriminated against by allowing the Muslim girls to wear *hijab*. To demonstrate the application of the approach as part of the proof pattern, she referred to the **SARIKA** case (Supra) where a school policy refused a Sikh girl to wear a Kara, a plain steel bangle of 50mm width and great significance to Sikhs. Justice Silber observed thus at par 56B;

"I believe that there would be 'a particular disadvantage' or 'detriment' if a pupil is forbidden from wearing an item when (a) that person genuinely believed for reasonable grounds that wearing this item was a matter of exceptional importance to his or her racial identity or his or her religious belief and (b) the wearing of this item can be shown objectively to be of exceptional importance to his or her religion or race, even if the wearing of the article is not an actual requirement of that person's religion or race". (emphasis added)

Whereas the school was wholly unable to prove, indeed appears to have made no effort to establish these proof patterns, counsel argued, there was ample proof that Fugicha's daughters were indirectly discriminated against by the uniform policy rules on account of their religion.

Counsel next addressed the distinction between ***accommodation*** and special treatment which she blamed the learned Judge for conflating and confusing. She submitted that accommodation, which involves the granting of exception to the common rule, so as to give effect to a request considered to be of exceptional importance to the seeker's religion, is key to non-discrimination. She cited Langa CJ's observation, that the principle of accommodation demands that ***"…the State, an employer or a school***

must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally". In the instant case, the school did not even stand to suffer any additional hardship or expense since Fugicha's daughters and other Muslim girls were seeking to wear *hijab* and trouser, not in lieu of, but in addition to the school uniform, and had in fact offered that the school itself do choose the colour of the *hijab*. The failure to accommodate Fugicha's daughters' request indirectly discriminated against them in their enjoyment of the right to education on the basis of both religion and dress.

This discrimination was the more serious considering that the school, though sponsored by the church, is a **Public** school and is so registered. The Church was under an obligation as a sponsor to ensure respect for the religious beliefs of those of other faiths by dint of **Section 27** of the **Basic Education Act**. That obligation required that the church and the school ensure that Muslim girls, who made up 68% of the female population, be allowed to wear the *hijab*.

Counsel criticized the learned Judge for erroneously holding that allowing the wearing of the *hijab* amounted to elevating the Muslim religion. She first contended that whereas Kenya is a secular State, it is not founded on hostility to religion. Rather, the Constitution itself in the preamble acknowledges the ***Supremacy of Almighty God*** and contains in its 2nd Schedule the ***National Anthem*** which is a prayer invoking God's Lordship over the nation. The Judge therefore misapprehended the principle of separation of Church and State. She expounded that in principle what is constitutionally forbidden is governmental establishment of religion as well as governmental interference with religion but there is ***"room for play on the joints productive of benevolent neutrality which will permit sponsorship without interference".*** She cited the Canadian case of **ZYLBERBEG vs- SADBURY BOARD OF EDUCATION** 1988 CAN L11 189; the US Supreme Court decision of **ABINGTON SCHOOL DISTRICT –vs- SCHEMP** 374 US 203 and referred to Thomas Jefferson's January 1, 1802 letter to the Danberry Baptist Association of the State of Connecticut in which he posited that **"*while secularism seeks not to elevate one religion over the others, it nonetheless does not proscribe its free exercise."***

Thus, in Counsel's view, what secularism and freedom of religion entails is not a strict wall of separation between State and religion, as there must necessarily be a bridge and a conduit between the two. This is in consonance with reading of all of the constitutional provisions harmoniously, which is a cardinal, principle of constitutional interpretation.

Turning to Fugicha's cross-petition, Counsel termed the learned Judge's dismissal of it as erroneous since it did contain material that met and surpassed the informality test under Rule 10(3) of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** ("the Mutunga Rules"). That informality, argued Counsel, is firmly founded on **Article 22 (3)** of the Constitution which obligates the Chief Justice to ensure the Rules he promulgates keep formalities to the minimum and allow proceedings to be entertained on the basis of informal documentation. The learned Judge was criticized for adopting a strict and erroneous interpretation of Article 22 (3) and rejecting the cross-petition on the basis of failing to state precisely the provision being infringed in law when, in fact, the provision was disclosed and the nature of violation, namely discrimination on the basis of religion was "alive in the entire Replying Affidavit". The learned Judge was characterized as having misapplied himself by wholesale adoption of the **ANARITA KARIMI NJERU –vs- REPUBLIC NO. 1** [1976-80] 1KLR 1272, (**ANARITA**) jurisprudence yet the context is now different, admitting to and encouraging informality for the advancement of access to justice.

Ms. Jadeed rested by faulting the learned Judge for following the decision of Githua J in the **KENYA HIGH** case (supra) and thereby erroneously accepting that attainment of a "***common or uniform"*** identity was a legitimate aim of the school uniform policy. This was incorrect, submitted Counsel,

because objectively the alleged justification was untenable because there was no relationship between the wearing of a limited form of *hijab* and the achievement of academic excellence. It was neither agreed nor empirically proved by the school, it was contended, that the hijab in any imaginable way disrupted teaching by teachers or comprehension by students or the communication between them during the learning process. The **KENYA HIGH** case (supra) was therefore patently bad law, in Counsel's opinion, because it flagrantly failed to consider or wholly misunderstood the doctrine of indirect discrimination and saw allowing the *hijab* as a prelude to instigation for a deluge of demands for different religious attire by other students which might result in students turning up dressed in a mosaic of colours and, according to Justice Githua, this scenario ***"would invite disorder, indiscipline, social disintegration and disharmony in our learning institutions".***

It was suggested that the proper approach is an appreciation that cohesiveness, while evidently a useful value, does not entail or demand elimination of pluralism. Rather, it is about being, as was held in **SARIKA**, (supra***) "first tolerant as to the religious rites and beliefs of others and second to respect other people's religious wishes."*** Indeed, contrary to what **KENYA HIGH** held, it was urged that the Constitution "***rumbles on the values of pluralism, diversity and cohesiveness".*** Thus, far from being a threat to be discouraged, difference ought to be celebrated. In the words of Langa, CJ in **PILLAY** (supra), "***The display of religion and culture in public is not a parade of horribles but a pageant of diversity which will enrich our schools and in turn our country".***

On behalf of the TSC, **Mr. Anyuor,** learned counsel submitted that as the appellants are not raising any ground touching on the transfer of the schools' Head Teacher which the learned Judge held to have been lawful and there is no challenge to that finding by way of cross-appeal, the TSC considered itself improperly enjoined in this appeal. This is not entirely correct, in our view, and there was no error in naming the TSC as a respondent as our Rules require a party in the Court below to be named and served in an appeal unless the court grants excusive dispensation on application.

Speaking as an officer of the Court, and with our leave, **Mr. Anyuor** opined that whereas the wearing of school uniform is an expression of equality, there is a compelling basis for a small section of the community to be allowed to express their religion by wearing religious symbols or attire, in this case the *hijab*, the wearing which the rest of the respondents herein have no problem with. Indeed, he urged this Court to come up with relevant rules on this issue after an inclusive, consultative process involving all stakeholders. He was categorical that the protection of the rights of the minority through appropriate accommodation should be upheld.

(a) The Church's Case

Opposing the appeal, **Mr. Kurauka**, learned Counsel for the Church first reiterated the factual basis of the dispute which we have already set out herein. He submitted that every institution has rules and they are binding on all who join that institution. In the present case both Fugicha and his daughters signed that they would abide by the school rules which include the uniform rules. Counsel was categorical that **"if you don't agree with the Rule you cannot be allowed into the school"**, which, he proceeded to state rather curiously, was "***not dissimilar to other areas of life such as the military***". He conceded that the school was a public institution but sponsored by the Church, which is a Christian denomination.

Counsel proceeded to urge that the issue of the *hijab* has been litigated upon in 'many cases' and nowhere was it, or other religious attire such as the ***Akorinos'*** headscarf, allowed. He defended that exclusionary jurisprudence as being based on a sound policy of uniformity without any indication of preferential treatment for those seeking to appear different. He denied that a refusal of the *hijab* amounted to discrimination and contended that Fugicha's daughters should have raised the issue at the

very point of admission to the school and it was not open for them to raise it later. When we asked him whether the uniform rules or regulations were cast in stone, **Mr. Kurauka** conceded that they were not, but that they can only be amended by the School's Board of Management.

Counsel submitted further that ***"to allow this appeal and permit the wearing of the* hijab *would lead to chaos in the school as students would go on the rampage".*** He did not say which section of the students would do so. He insisted hotly that Fugicha's daughters were free to go to a Muslim School but "***they cannot be allowed to come and evangelize in schools built by other religions***". He added that "***it would not be appropriate to allow religious beliefs to enter into schools"***. He extolled standardization of school uniforms as "***very critical"*** as children ought to grow up knowing that there can be no preferential treatment, but conceded that schools can legitimately make exceptions in certain areas such as diet.

Mr. Kurauka contended that it was not possible to accommodate every person's conscience or else there would be anarchy. To him, uniformity is a key value and there can be no discrimination in equality. He rooted for maintenance of the *status quo* as established by various decisions of the High Court as ***"to disturb it would lead to many suits."***

Surprisingly, Counsel's only comment on the weight of comparative jurisprudence relied on by the appellant was simply that the cases are distinguishable and that the ones from our HIGH COURT that he cited are applicable to the Kenya situation.

Counsel concluded his submissions by asserting that the learned Judge was right to dismiss the appellant's purported cross-petition which had been "sneaked in" via paragraph 34 of the Replying Affidavit instead of Filing a proper cross-petition. This failed to follow the **ANARITA** (supra) test, it was submitted, was fatally defective and therefore properly rejected.

Mr. Kurauka therefore besought us to uphold the various decisions of the High Court on the subject of religious expression in schools and dismiss the appeal with costs.

(b) Appellant's Reply

In her reply, **Ms Jadeed** reiterated that the appellant's cross-petition was competent having passed the informality test. As to the High Court decisions, she urged us to declare them bad law. She repeated her earlier criticism of the **KENYA HIGH** case (supra) decided by Githua J, and extended it to Lenaola J's decision in the **SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED --vs- MINISTER FOR EDUCATION & 3 OTHERS** [2014] e KLR (**THE ALLIANCE HIGH** case) which, in her view, was erroneous in that it failed to interrogate the doctrine of indirect discrimination. She emphasized the importance of the values of diversity and cohesiveness which, in her submission, extend to all spheres of life including schools, which are enriched thereby. This has found statutory recognition in **Section 4 (2)** of the **Basic Education Act** which upholds the principles of cohesiveness and diversity and **Section 27 (4)** of the same which obligates sponsors to respect the religious diversity of others.

Responding specifically to the **J.K. (SUING ON BEHALF OF CK) –vs- BOARD OF DIECTORS OF R. SCHOOL & ANOTHER [2014]**e KLR **(THE RUSINGA SCHOOL**) case relied on by the School and the Church, **Ms Jadeed** submitted that in that case, Mumbi Ngugi, J. did acknowledge the need for protection and accommodation of attire donned for religious or cultural purposes as opposed to fashion which had been the basis for the sought exception, and which she could not grant.

Returning to this appeal Counsel contended that the School Rules, upon which the church placed so

much umbrage, stand in conflict with the Constitution and cannot be sustained. Their apparent neutrality is of no moment, she contended, as they do run afoul the Constitution on account of indirect discrimination. She asserted that the scope of the protected right of freedom of religion under **Article 32** of the Constitution goes beyond merely holding or professing a religion and includes also being able to manifest it. Any limitation on the right is permissible only if it complies with **Article 24** which requires the limitation to be by law, which is statutory law, and to the extent that it is reasonable and justifiable in a free and democratic society. The controlling statute, namely the Basic Education Act contains no such limitation to the right. Accordingly, asserted Counsel, the school rules which are of a stature inferior to a statute, cannot limit or negate Fugicha's daughters' rights under both **Articles 32** and **27 (4)** and **(5).**

The sponsor of a public school, argued learned Counsel, had no higher status and its interests could not override the freedom of religion of the students attending at the school. In the instant case the Muslim students had made a polite request to don the hijab even before the Deputy-Governor raised the issue, but the request was improperly rejected by the school.

3. ANALYSIS

As this is a first appeal, we have gone through the entire record, carefully considered the submissions of learned Counsel and given due attention to the authorities, both local and foreign, cited. We have done so cognizant that we proceed by way of a re-hearing, at the end of which we make our own independent conclusions of law and fact. We accord respect to the findings of the first instance Judge but will not hesitate to depart from those findings if the same are based on no evidence, are arrived at by way of a misapprehension of the evidence or the Judge misdirected himself in some material respect which renders the decision erroneous. Our latitude to depart is greater where, as here, the matter in the court below proceeded not on the basis of oral evidence, which would have given the learned Judge the clear advantage of hearing and observing witnesses as they testified, but by way of affidavits and submissions which are on record. This is the more so where the decision turns on, not so much the peculiarity of highly contested facts, but rather the interpretation of certain provisions of the Constitution. See **Rule 29** of the **Court of Appeal** Rules; **SELLE –vs- ASSOCIATED MOTOR BOAT CO. LTD.** [1968] EA 123; **ABDUL HAMEED SAIF –vs- ALI MOHAMMED SHOLAN** [1955] 22 EACA 270.

Even though the Memorandum of Appeal boasts eighteen grounds of appeal, Fugicha's counsel in written submissions as well as in argument before us has merged and crystallized them into six issues. We on our part will address and determine the first four which we think properly and comprehensively capture the points of contention herein, namely;

"a) whether or not documents relating to the proceedings seeking to enforce the Bill of Rights must be formal.

b) whether or not allowing Muslim female students at the school to wear a limited form of* hijab *(scarf and a pair of trousers) discriminates against the other students (read non-Muslim students)

c) whether or not allowing Muslim female students to wear a limited form of* hijab *elevates Islam against other religions and accords its adherents special status contrary to Article 8 of the Constitution

d) whether a school uniform policy can limit the fundamental freedom of religion contained in Article 32 of the Constitution.

a) ***Formality of Documentation in Human Rights Litigation***

It is common ground that the appellant who was enjoined as an interested party at the High Court upon his application did not file a pleading titled a cross-petition. Rather, his claim as against the church, found expression in the Replying Affidavit to the petition. At paragraph 34 he averred in relevant portion as follows;

"…I am also cross-petitioning that the Muslim students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit of the law under Article 27(5) of the Constitution."

Both at the High Court and before us, the church took issue with this mode of pleading alleged violation of rights terming it, essentially, a non-pleading or one introduced through the back door. This view resonated with the learned Judge who, dealing with it as the last of the six issues he framed, concluded that ***"the … cross petition do not (sic) constitute a cross-petition in any shape or substance to be infringed and has not stated the manner in which the alleged rights they are (sic) alleged to be infringed"***. The rather tortured phraseology aside, the learned Judge took the view that the cross-petition was defective because it did not comply with the ***Mutunga Rules*** promulgated pursuant to **Article 22(3)** of the Constitution. He found it to run afoul **Rule 10(2)** in particular which set out the contents of a petition for the protection or enforcement of rights and fundamental freedoms namely;

- ***The petitioner's name and address***
- ***The facts relied upon***
- ***Constitutional provisions violated, the nature of the injury caused or likely to be caused to the petitioner or person in whose name the petitioner has instituted the suit or in a public interest case to the public, class of persons or community***
- ***Defaults regarding any civil or criminal case involving petitioner or any petitioners which is related to the matters in issue in the petition***
- ***Petition to be signed by the petitioner or his advocate***
- ***The relief sought in the petition."***

Fugicha faults the learned Judge's approach to this issue, and not idly in our view, principally for failing to take congnizance of the Mutunga Rules' progenitor, which is the constitution itself, and which expressly required the Hon. the Chief Justice in formulating rules under **Article 22(3)** to ensure that they met certain specified criteria including;

"(b) formalities relating to the proceedings, including commencement of proceedings, are kept to the minimum, and in particular that the Court shall, if necessary, entertain proceedings on the basis of informal documentation".

With respect to the learned Judge, we are unable to find, in the judgment impugned, any indication that this constitutional command for a minimum of formalities was held in view. We are quite clear in our minds that whereas the Hon. the Chief Justice in making the Rules did set out what a petition ought to contain, it cannot have been his intention, and nor could it be, in the face of express constitutional pronouncement, to invest those rules with a stone cast rigidity they cannot possibly possess. It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by the Constitution when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings

before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer . Within that general rubric of notification to court and respondent, the Constitution, if it says anything at all on this subject, clearly does not lionize form over substance.

Thus, while **ANARITA** and other cases decided prior to the Constitution of 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha's complaints were, against whom they were, and the provision of the Constitution he alleged had been violated or contravened. A proper reading of his entire affidavit did not warrant the draconian striking out of the 'cross-petition', however presented. We respectfully think that the learned Judge erred by non-directing himself to the express provision of **Article 22(3) (b)** and failing to enquire into whether paragraph 34 of the appellant's replying affidavit passed the ***informality test*** envisioned in the constitutional text.

We think that in the circumstances of this case where the appellant was not a petitioner or a respondent joined into the proceedings as an interested party, his position on the litigation and specific complaints were sufficiently captured in **paragraph 34** of his replying affidavit. The entire affidavit fully addresses the specific grievance of violation of free exercise of religion and discrimination and it is evident from the submissions made by the parties that the matter was fully canvassed unimpeded by the apparent want of form. We note that the learned Judge did, in fact, deal with the merits of the appellant's complaints and we shall proceed to do so as well.

(b) Does allowing Muslim Girls to Don the* Hijab *Discriminate Against the Rest"

The church in its petition averred that;

"32. The Christian students have felt that the school has accorded Muslim students special preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya 2010".

On that basis, it prayed for a declaration that the decision by the respondents at the High Court to permit the wearing of *hijab*/trousers was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations.

That there is a standard school uniform for girls at St. Paul's Kiwanjani Mixed Day Secondary School is not in dispute. The uniform, communicated to each new student via the admission letter, comprises ***"checked green skirt, a cream blouse, a pair of white socks and stripes and a green long-sleeved pull-over (with the option of a short-sleeved one) a pair of black leather shoes and a dark green tie".*** The request made by or on behalf of Muslim girls was for them to wear, in addition to the standard uniform, a head covering (*hijab*) and a pair of white trousers underneath the uniform skirts. There is no indication nor was it urged that the Christian or other non-Muslim girls at the school made any requests of their own for any exemption or exceptions from the standard uniform based on their religious persuasions, which were then denied.

That notwithstanding, the learned Judge expressed himself as follows, which is worth reproducing *in extenso*;

"162. That even if it is assumed that the 2nd and the 3rd respondents had powers to prescribe the dress code with the St. Paul's Kiwanjani Day Mixed Secondary School, Isiolo County, urging the rights of only Muslim girl students, it would be in my view discriminatory for them to argue the

rights for girls of Muslims alone. The students in the same school who say for example are Akorinos, and others who are not Muslims, would be discriminated by the respondents actions which would be agitating for Muslim girls to adorn (sic) their religious attire and deny other students from other religions to do so. In my view the respondents as public officials would be discriminating students from other religious background by picking one religious group and support it. The respondents actions offends Article 27(1), (2), (4) and (5) of the Constitution, 2010. I find that the respondents cannot be permitted to impose Islam dress code for Muslim girl students in a manner that is not only contrary to the laid down school rules and regulations and also in discriminatory manner against students who are non-Muslims. There is no suggestion nor evidence that was tendered to the effect that the existing rules and regulations are discriminatory against Muslim girl students or any student.

164. That the respondents in their resolution favoured Muslim girl students and did not consider other religions. In doing so, I am of the view that the officials were discriminatory against non-Muslim students by supporting one religion, that is Islamic Religion.

With the greatest respect to the learned Judge, he appears to have framed and decided a question that was not pleaded or urged before him. We do not understand the case before the High Court to have been one of the school arguing that it was being discriminated against. Less still was it a case of non-Muslim students, whether Christian, Akorino or whatever, contending discrimination. Indeed, none of those non-Muslim students or their parents or guardians sought to be or were enjoined in the litigation. To that extent, the learned Judge patently made speculative and gratuitous pronouncements on behalf of imaginary grievants who had neither presented nor made a case before him.

We think the Judge went too far in making pronouncements that discrimination had occurred against Christian and other non-Muslim students. Those pronouncements were not preceeded by allegations made and proof of them established. As with every matter brought for judicial adjudication, the axiomatic position is that he who alleges must prove. In the case of alleged discrimination, it is absolutely essential that its components be clearly identified and interrogated. The process of arriving at a determination of whether or not there has been discrimination follows a clearly discernible proof pattern. It is a logical exercise not left to mere inclination or hunch.

Permitting the concerned Muslim girls to wear the limited *hijab* certainly did entail treating them differently from the rest of the school population and in a manner which entailed a departure or exemption from the applicable school uniform rules. Did the fact that the Muslim girls were thereby treated differently mean that the other students were thereby discriminated against" Were those other students placed at a disadvantage" We think not.

It is not in doubt that equality is a fundamental right recognized in our Constitution as in those of other modern States. Indeed, as far back as 1945, Sir Hersch Lauterpacht in his ***An International Bill of the Rights of Man*** had boldly asserted thus;

"The claim to equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting point of all other liberties."

In his oft-cited dissent in the **SOUTH WEST AFRICA CASES** (supra) decided half a century ago, Judge Tanaka opined, and we cannot but agree, that the principle of equally before the law is philosophically related to the concepts of freedom and justice and that the content of it is that what is equal is to be treated equally and what is different is to be treated differently, namely proportionately to the factual

difference indicated by the Greek Philosopher Aristotle as ***"justicia commutativa*** and ***justitia distributive."*** So understood;

"[it] does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal …. To treat unequal matters differently according to their inequality is not only permitted but required".

It therefore becomes a desideratum of both justice and logic that equal should be equally treated and unequal unequally treated as called for by the inequality. This immediately and necessarily calls for a level of analysis that is deeper and more nuanced than a mere conclusion of injustice or discrimination on the basis only of different treatment. This is in recognition that justice, fairness or reasonableness may not only permit but actually require different treatment.

This was fully appreciated by a three-Judge bench of the High Court (Mwera, Warsame and Mwilu JJ., as they then were, before they were all elevated to this Court shortly afterwards) in **FEDERATION OF WOMEN LAWYERS FIDA KENYA & 5 OTHERS vs. ATTORNEY GENERAL & ANOR** 2011 eKLR;

"In our view, mere differentiation or unequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

This view also resonates with the views of Justice Albie Sachs in the South African Constitutional Court case of **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY –vs- MINISTER FOR JUSTICE** [1998] ZAAC 15, which we find persuasive;

"The present case shows well that equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of differences. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenization of behavior but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalization, stigma and punishment – At best, it celebrates the validity that difference brings to any society".

Given that understanding, it was plainly erroneous for the learned Judge to conclude that the differential treatment of Muslim girls in allowing them to wear the *hijab* contrary to the general school uniform policy applicable to all students was *ipso facto*, and without more, discriminatory of and against the non-Muslim students. Different it was but not discriminatory and unlawful, leading us to the conclusion that the term 'discriminatory' as used conveyed only the loose meaning of different as opposed to the technical legal meaning which we shall advert to later in this judgment.

That pitfall might have been avoided had the learned Judge sought to establish in the first place, whether the discrimination said to have been suffered by the non-Muslim population in the school was direct or indirect, a distinction which the church made no attempt to make beforehand; and also identified the

exact basis or ground, falling within any of the protected grounds in **Article 27(4)** of the Constitution, upon which the unfair or disadvantageous treatment comprising the alleged discrimination was founded. The protected grounds, on the basis of which the Constitution expressly prohibits any person to discriminate against another directly or indirectly are listed in **Article 27(4)** as including ***sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*** We have anxiously and carefully perused the judgment of the High Court and nowhere have we seen a protected ground in respect of the un-named non-Muslim students were discriminated against. Nor have we been able to glean or identify any from the submissions made by the church both at the High Court and before us. We therefore find and hold that there was no factual or legal basis for the holding by the learned Judge that allowing Muslim girls to wear *hijab* favoured Muslim girl students and discriminated against the non-Muslims.

c) ***Whether Limited* Hijab*, Elevates Islam, According it Special Status Contrary to Article 8***

The question of the legality, propriety and constitutional permissibility of allowing Muslim girls to wear the *hijab* to the school lies at the heart of this appeal. Around it have swirled competing narratives with Fugicha arguing that it is a necessary accommodation to avoid indirect discrimination against Muslim girls, while the church argues that to permit the same would be tantamount to elevating, indeed imposing, the Muslim religion and dress code contrary to the neutrality not only of the school rules, but also of **Article 8** of the Constitution which states in peremptly terms that there shall be no state religion thus capturing the secular character of our democracy.

In dealing with this issue, the learned Judge delivered himself in these terms;

"166. The subject school in this petition I find has not imposed any religious conditions to its students nor preferred one religion over another. The subject school has students from diverse religious beliefs and has not infringed the freedom of worship by restricting school uniform, in fact, the school action is non-discriminatory against any religion".

He then proceeded to cite with approval and state to be good law the decision of Githua J in the **KENYA HIGH CASE** (supra) and in particular a long passage therefrom which he quoted as follows;

"The significant and critical role played by standardized dress codes and observance of rules in controlled environments which one would expect to find in any national secondary school in Kenya or say for example in the Armed Forces cannot be overemphasized. It is not disputed that school uniforms assist in the identification of students and gives them a sense of belonging to one community of students. It promotes discipline, unity and harmonious co-existence among students. It instills a sense of inclusivity and unity of purpose. In my view, the most important role played by a standardized school uniform is that it creates uniformity and visual equality that obscures the economic disparities and religious backgrounds of students who hail from all walks of life.

If the court were to allow the applicant's quest to wear hijab in school, the 48 Muslim girls in the school would look different from the others and this might give the impression that the applicants were being accorded special or preferential treatment. This may in all probability lead to agitation by students who profess different faiths to demand the right to adorn (sic) their different and perhaps multi-coloured religious attires of all shapes and sizes which the school administrators will not be in position to resist if the Muslim students are allowed to wear a hijab. The result of this turn of events would be that students will be turning up in school dressed in a mosaic of colours and consequently, the concept of equality and harmonization brought about

by the school uniform would come to an abrupt end. It goes without saying that this kind of scenario would invite disorder, indispline, social disintegration and disharmony in our learning institutions. Such an eventuality should be avoided at all costs since it is the public interest to have order and harmonious co-existence in school. It is also in the public interest to have well managed and disciplined schools in a democratic society.

It is important to bear in mind that the Republic of Kenya is a secular state. This has been pronounced boldly and in no uncertain terms by Article 8 of the Constitution. This in effect means that no religion is more superior than the other in the eyes of the law. Considering that the Kenya High School, just like any other national school is a secular public school admitting students of all faiths and religious inclinations, allowing the applicant's prayer in this motion would in my opinion be tantamount to elevating the applicant and their religion to a different category from the other students who belong to other religions.. This would in fact amount to discrimination of the other students who would be required to continue wearing the prescribed school uniform."

The learned Judge then went on to categorically hold that there should be no exemption of Muslim girls from wearing school uniform so as to avoid the appearance that they were being given preferential treatment and to also forestall a situation wherein students of other faiths would also make their own demands to be allowed to don different religious attires thereby, in effect making of no effect the school uniform policy.

Other than the minor misdirection in the Judge's misapprehending the request to wear the *hijab* as an "exception from school uniform" when in fact it was a supplementation of the school uniform, his appreciation of the facts and the law was essentially correct but only if tested against direct discrimination. Indeed, the school uniform policy was neutral and applied to all students equally so there was nothing facially discriminatory or offensive of any given religion.

The issue in the litigation before the Judge and indeed on a proper engagement with discrimination jurisprudence could not be fully and satisfactorily determined on the test of direct discrimination alone. Full justice to a complaint of discrimination cannot be attained unless the court goes further to enquire whether a rule, policy or action that appears neutral and inoffensive on the face of it does nonetheless become discriminatory in effect or operation. The classic and earliest formulation of this was United States Chief Justice Burger's, in the celebrated anti-discrimination case of **DUKE –vs- POWER CO**. 401 US 424 1970 at p432 that ***"the starting point of any analysis of a civil rights violation is the consequences of discrimination not merely the motive."*** The framers of the 2010 Constitution and the people in promulgating it were alive to this all-important distinction between direct and indirect discrimination and were careful to proscribe both forms in express terms in **Article 27(4).** For a court to fail to enquire into that aspect, especially where, as here, the indirect character of the discrimination is cited and submitted on, is a serious non-direction and amounts to a reversible error of law. This is especially so considering that, as was opined by Canadian Judge Dickson (later CJ) in **R –vs- BIG M. DRUG MART LTD** [1985] 1 S.C.R. 295 (**BIG M DRUG MART)** case, ***"both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation [or any policy]."***

Referring to a similar provision in the South African Constitution, Langa D.P (later CJ) in the case of **CITY COUNCIL OF PRETORIA V WALKER** [1989] ZACC 1 made this perceptive comment with which we respectfully agree;

"The inclusion of both direct and indirect discrimination, within the ambit of the prohibition

imposed by section 8(2) [our Article 27(4)] of the Constitution, evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of section 8(2) [our Article 27(4)] of the Constitution."

Now, in order for one to establish that one has been the victim of indirect discrimination, it behoves him to go about a four-step process or proof pattern as was stated by Silber, J. of the English High Court of Justice in **SARIKA**. Even though he gleaned the pattern while considering the Race Relations Act and the Equality Act of England, at its heart the pattern is all about how to prove indirect discrimination and we would adopt and accept it as applicable here. The steps are:

"(a) to identify the relevant 'provision, criterion or practice' which is applicable;

(b) to determine the issue of disparate impact which entails identifying a pool for the purpose of making a comparison of the relevant disadvantages;

(c) to ascertain if the provision, criterion or practice also disadvantages the claimant personally;

(d) Whether this policy is objectively justified by a legitimate aim; and to consider, if the above requirements are satisfied, whether this is a proportionate means of achieving a legitimate aim."

As in **SAKIRA** (supra), where it was contended that a school uniform policy that forbade the claimant, a 14 year-old school girl from wearing a *Kara* which is a plain steel bangle about a fifth of an inch wide with great significance for Sikhs was discriminatory of her, it is common ground that ***"the relevant provision criterion and policy"*** under consideration is the school uniform policy. Its prescription as to what girls should wear has already been set out earlier in the judgment.

As for the ***"pool"*** that should be used to compare the disadvantage suffered by Fugicha's daughters by the fact that the school uniform rules did not allow the wearing of *hijab,* otherwise referred to as the ***"comparator group"***, even the learned Judge of the High Court, while not conducting a deliberate pursuit of the proof pattern we espouse, appears to have treated the appellants as the comparator group receiving favourable treatment at the expense of all other students who are non-Muslim. We are of the view that the reverse is the case in that the wider non-Muslim student body is in fact the comparator. It is they that were treated better than the appellants because their compliance with the school rules did not subject them to any disadvantage or burden violative of their religious beliefs or practices. This conclusion is in tandem with the conclusion reached by the English Court of Appeal in **BMA VS CHAUDHARY [2007] IRLR 800**; the House of Lords in **SHAMOON VS CHIEF CONSTABLE OF THE RUC [2003] 2 ALL ER 26** and the Constitutional Court of South Africa in **PILLAY** (supra). In the last case Langa, C.J. stated that the comparator group treated better or more favourably than the claimant was those learners,

"44… whose sincere religious cultural beliefs or practices, or religious beliefs or practices are not compromised by the Uniform Code, as compared to those whose beliefs or practices are compromised."

In the instant case, it was never asserted by the Church that any of the non-Muslim students had complained that the school uniform rules curtailed their religious beliefs or practices.

The third element in the proof of indirect discrimination requires the claimant to prove that the ***"provision, criterion or practice",*** in this case the school uniform policy, puts the claimant at a

particular disadvantage or detriment personal to the claimant. It was Fugicha's contention herein, and we do not see any attempt by the church to deny or controvert it, that the wearing of *hijab* is a matter of great importance and significance to Muslim girls so that denying them the right to wear the same places them in an unfavourable and difficult spot where they genuinely consider that their right to manifest their religion by their mode of dress, which they hold to be of exceptional importance, is curtailed and compromised.

In his replying affidavit sworn on 3rd November, 2014, Fugicha averred thus;

*"**7. THAT I do aver that hijab is an Arabic word literally meaning to cover or a curtain. In Islamic jurisprudence it refers inter alia to a mandatory dress code for females of the age of puberty and above when they are outside the homes or in the company of male strangers. This covering (hijab) covers the whole body save for hands, feet, face.***

8. THAT the purpose of hijab is to identify Muslim females and to allow them to guard their modesty and decency. Modesty is a fundamental tenet within Islam. It is thus sinful for Muslim to flout on their hijab.

9. THAT because of these reasons, hijab is a matter of extreme importance to every practicing Muslim female including my daughters and the female students at Kiwanjani Mixed Day Secondary School.

....

*17. **THAT I do aver that wearing of hijab by my daughter and by any Muslim girl students is a manifestation, practice and observance of the Muslim faith and/or religion by those who are steadfast to their faith (my children included) as they are of exceptional importance and as such pursuant to the said constitutional provision [Article 32] a person should not be compelled and/or forced to remove the hijab as it would be forcing the students to engage in an act contrary to the Muslim religion and belief which freedom is supported under our progressive bill of rights."***

By way of emphasis and reiteration of the exceptional significance of the *hijab* to Fugicha's daughters, there was filed in addition a supporting affidavit by Hammad Mohammed Kassim Mazrui, the Chief Kadhi of Kenya. In it he asserted the obligatory nature of the *hijab* confirmed by notable Islamic jurists and ordained in the Quran. He swore that the *hijab* is not a matter of choice but a religious obligation which should not be hindered. He made the distinction that ***"Indeed the* hijab *is a concept that seeks to maintain chastity and modesty and not merely a code of dress"*** and proceeded to state that it is the instrument by which women are able to effectively participate in society as supported by Islam.

As we have already observed, these averments were unchallenged and we have no hesitation in arriving at the conclusion that barring Fugicha's daughers and other Muslim girls from donning the *hijab* did place them at a particular disadvantage or detriment because the *hijab* is genuinely considered to be an item of clothing constituting a practice or manifestation of religion. It is important to observe at this point that it is not for the courts to judge on the basis of some 'independent or objective' criterion the correctness of the beliefs that give rise to Muslim girls' belief that the particular practice is of utmost or exceptional importance to them. It is enough only to be satisfied that the said beliefs are genuinely held.

In **REGINA WILLIAMSON & OTHERS VS. SECRETARY OF STATE FOR EDUCATION AND EMPLOYMENT [2005]2 AC 246** a case involving the clash between parents' religious beliefs that

children should be subjected to corporal punishment and those children's rights to dignity and personal integrity, Lord Nicholls of Birkenhead of the House of Lords stated the role of the courts thus;

"When the genuineness of a claimants' preferred belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited enquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith 'neither fictitious nor capricious, and that it is not an artifice' to adopt the felicitous phrase of Iacobucci, J. in the decision of the Supreme Court of Canada in Syndicat Northcrest vs Anselem (2004) 241 DLR (44)1,27 para 52. But emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of the individual. As Iacobucci, J. also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising."

Later on in his Judgment the law Lord put his finger on the nature of religious belief which unfits it for others' judgment or certification as follows;

"Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the [European] Convention…[our Constitution]."

It is thus clear to us that all persons, those in authority more so, must approach the issue of religious belief with a measure of deliberate caution and circumspection. A person's religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to one may be of monumental value to another in the realm of religious beliefs. Their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or majority vote. They are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer, but to the believer. This idea was well-captured by US Supreme Court Justice Jackson for the Court in **WEST VIRGINIA BOARD OF EDUCATION V BARNATTE**, 319 US 624, 319 U.S. 638 (1943);

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to … freedom of worship … and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

That view, with which we agree, resonates with Judge Dickson's seminal idea in **BIG M. DRUG MART** (supra) that ***"the Charter [the Constitution] safeguards religious minorities from the 'tyranny of the majority.'"***

We are satisfied on the uncontested evidence on record that the wearing of the *hijab* was genuinely and deeply considered to be a matter of great, indeed exceptional, religious significance to Fugisha's

daughters and the other Muslim girls. Their desire to wear the same to school was not borne of a skin-deep and artificial or passing fashion fad but rather a serious and conscientious attempt to obey a religious requirement and therefore deserving of both respect and protection.

We therefore do not think that the wearing of the *hijab* can be equated to the donning of dreadlocks for a purely cosmetic or fashion purpose as was the case in the **RUSINGA SCHOOL** case. There, Mumbi Ngugi, J rejected a claim by the mother of a 6 year-old kindergarten pupil that a school's refusal to allow him to sport dreadlocks contrary to the school's Code of Conduct was discriminatory. The Judge concluded, and we would agree with the critical distinction she drew in the process, as follows;

"49. I must observe, as submitted by the respondents' counsel, that the petitioner has not asserted that the minor practices the Rastafaria religion, and that therefore there is violation of his freedom of religion and belief guaranteed under Article 32 of the Constitution.

50. Had she so argued and presented evidence in support, then there would have been a basis, on the persuasive authority of decisions such as DZVOVA vs. MINISTER OF EDUCATION, SPORTS AND CULTURE AND OTHERS AHRLR 189 (2wSC 2007), to find that there was violation of the minors' rights under Article 32. In that case, the Supreme Court of Zimbabwe declared that expulsion of a Rastafarian child from the school in the basis of his expression of his religious belief through his hairstyle is a contravention of Sections 19 and 23 of the Constitution of Zimbabwe. A similar finding was made in relation to dismissal from employment of Rastafaria correctional officers who refused to shave their dreadlocks in Department of Correctional Services and Another vs. Police and Provision Civil Rights Union (PPCRU) and Others [[ZALAC 21; 2011) 32 KJ 2629 (LAC)].

51. What appears to be the case in the matter before us is that the petitioner has made a choice of hairstyle for fashion rather than religious or cultural reasons. She has the right to make this choice. However, while wearing dreadlocks for cultural or religious reasons is, in any view, entitled to protection under the Constitution and should be accorded reasonable accommodation; the sporting of dreadlocks for fashion or cosmetic purpose is not, and an institution such as the respondent is entitled to prohibit it in its grooming code."

(our emphasis)

Proportionality and Justification

Turning now to the twin questions of whether first, the school uniform policy is justified by a legitimate aim and, second, whether the ban of the *hijab* is a proportionate means of meeting that aim, we think that the first does not present much difficulty while the second will inevitably lead to a discussion of the principle or doctrine of accommodation for completeness.

In the **KENYA HIGH** case (supra) Githua, J did capture the utility of school uniforms in the passage we quoted and we would have no difficulty agreeing with it save for the unfortunate use of the military as an example. We think that given the constitutionally recognized limitations of rights that apply to persons serving in the Kenya Defence Forces and the National Police Service **(Art. 24(5))** the analogy was not particularly germane or felicitous. The uses of school uniforms cannot be gainsaid, however Nyamu, J. (as he then was) in **NDANU MUTAMBUKI & 119 OTHERS vs. MINISTER FOR EDUCATION & 12 OTHERS** [2007]e KLR spoke of them, thus, though he may have overstated;

"School uniforms and discipline do constitute and have been generally required as part and

parcel of the management of schools and further constitute basic norms and standards in any democratic society. No doubt the hallmark of a democratic society is respect for human rights, tolerance and broadmindedness. In the case of schools, nothing represents the concept of equality more than school uniforms. Unless it is an essential part of faith it cannot be right for a pupil to wake up one morning and decide to put on headscarf as this derogates from the hallmarks of a democratic society and violates the principles of equality…."

Mr. Kurauka argues essentially that the aims of the standardized school uniform are salutary and self-evident. To him, the uniform applicable to all students signifies equality without preferential treatment. In this he joins many who ***"believe that school uniform plays an integral part in securing high and improving standards, serving the needs of diverse community promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style."*** See **BEGUM, R.** (on the Application of) -**vs- DENBIGH HIGH SCHOOL [2006]2 ALL ER 487; [2007] AC 100**.

Fugisha does not dispute or deny the propriety or utility of a school uniform policy. Indeed, this case is not about whether or not the church should have in place a uniform policy for the school. If anything, the record shows that Fugicha's daughters and other female Muslim students did make attempts to and were always willing to comply with the school uniform policy seeking only to add a limited form of hijab and of colours and design that would not be outlandishly at clash with the prescribed school uniform.

What is on contest in this case is the school's refusal to either relax or enforce the uniform policy in respect of the Muslim students in a manner as would allow them to have the *hijab* ***in addition to*** the uniform. To our mind, the justification that the respondent church and the school are required in law to prove is not the need for school uniforms or a policy on the same, which is uncontested, but rather the failure to grant necessary exemptions therefrom. The burden to prove that justification rests with the person who is alleged to have discriminated, in this case the church and its school. In **JFS** (supra) Murby J stated the alleged discriminator's burden as one to show;

"164. … that the measure in question corresponds to a 'real need' and that the means adopted must be 'appropriate' and 'necessary' to achieving that objective. There must be a 'real match' between the end and the means. The court 'must 'weigh the justification against its discriminatory effect' with a view to determining whether the seriousness of the alleged need is outweighed by the seriousness of the disadvantage of those prejudiced by the measure always bearing in mind that the more serious the disparate impact the more cogent must be the objective justification."

It is upon the court to embark on a careful examination of the reason offered for any discrimination, a duty that reposes on them ***'as guardians of the right of the individual to equal respect'*** in the words of Land Hoffman in **R (CARSON) -vs- SECRETARY OF STATE FOR WORK AND PENSIONS [2006] 1 AC 173 at 182-183.**

Looking at the reasons proferred by the Church as to why the school would not allow the wearing of the *hijab*, they include those set out on the face of its Notice of Motion dated 18th September, 2014, and the supporting affidavit of KIMANA JOHN MACHUGUMA as;

a) ***the need for the Sponsor to be respected and allowed to execute its rightful role in the school affair***

b) the Christian students at the school have felt that the school has accorded Muslims special or preferential treatment and discriminated against them

c) the respondents' actions are unreasonable and tantamount to disrupting school programmes

d) the wearing of hijab by Muslims while non-Muslim students were the prescribed school uniform was causing tension and disharmony in the school.

e) the issue was put to the vote in a meeting of the school's BOM, PTA and the Sponsor on 9th September attended by 22 members and 18 voted for the status quo (no hijab) 3 voted for the hijab and 1 recommended longer skirts for girls.

Those reasons were reiterated by Mr. Kurauka in his submissions before us in which he painted a rather ominous picture of potential breakdown of harmony and an end to tranquility should the Muslim girls be allowed to wear the *hijab*. ***"If you allow this appeal, it will be chaotic as students will go on the rampage"*** he warned. He went on to assert that ***"the Muslim students can go to Muslim schools if they wish and wear the* hijab *but cannot be allowed to come and evangelize in schools built by other religions"*** and that ***"it would not be appropriate to allow religious beliefs to enter into schools"*** and also that ***"it is not possible to accommodate every persons" conscience or else there would be anarchy."***

With great respect to Counsel, we are far from persuaded by the reasons given by the Church and which the learned Judge accepted wholesale as is plain from his adoption of the finding and reasoning of Githua J in the **KENYA HIGH CASE** (supra). Similar arguments were advanced by the respondents in the **SAKIRA** case (supra) and we think that Silber J's answer in rejecting them provides a more coherent and persuasive perspective;

"80. I cannot understand why a decision to prevent the claimant from wearing the Kara would prevent bullying or would be difficult to explain [to the other students who must adhere to the school uniform policy]. The only reason might be ignorance on the part of the school first about the importance of a Kara to Sikhs and second in understanding why a decision by the claimant to wear it should be treated with respect."

Silber J then made reference to the case of **SERIF –VS- GREECE [2001]31 EHRR 20** where the European Court of Human Rights domiciled at Strasbourg had stated emphatically the duty of educational institutions to educate their communities of the values of pluralism and the indispensability of toleration as the cure for the feared tensions;

"53. Although the Court recognizes that it is possible that tension is created in situations where a religious or the communities becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities on such circumstances is not to remove the cause of the tension by eliminating pluralism but to ensure that competing groups tolerate each other."

We do not better them to echo Judge Silber's own words on the subject;

"84.Therefore, there is a very important obligation imposed on the school to ensure that its pupils are first tolerant as to the religious rites and beliefs of other races and religious and second to respect other people's religious wishes. Without those principles being adopted in a school, it is difficult to see how a cohesive and tolerant multicultural society can be built in this country. In any event, in so far as the intention of the uniform policy is to eliminate bullying, there is no rational connection between the objective and eliminating signs of difference."

Judging from the Petition, the motion, the supporting affidavits and the submissions made before the High Court and before us, the Church does not seem to have internalized the intrinsic value of heterogeneity and heterodoxy. It has not seen difference or diversity as a good to be embraced, celebrated and encouraged. Rather, it has approached the matter from the rather narrow stricture, prism or blinkers of the need for discipline and uniformity and seems to consider its position as Sponsor of the school as a sufficient reason to sift out and eliminate difference or plurality in religious expression or manifestation. And this is notwithstanding that it consciously admitted into the school, which is a public school, students of faiths and religions other than its own. It is no answer to say that religion has no room in schools or that those who find difficulty abiding by the restrictions of the school uniform code may well leave and join schools of their own religious persuasion. Such an attitude evinces an intolerable deficit of constitutionalism and, moreover, flies in the face of the guiding principles that govern the provision of basic education in this country. Those principles as set out in **Section 4** of the Basic Education Act, **No. 14 of 2013** include –

"(e) Protection of every child against discrimination within or by an education department or education (sic) or institution on any ground whatsoever

....

(i) promotion of peace, integration, cohesion, tolerance,and inclusion as an objective in the provision of basic education

(j) ***elimination of hate speech and tribalism through instructions that promote the proper appreciation of ethnic diversity and culture in society***

(k) imparting relevant knowledge, skills, attitudes and values to learners to foster the spirit and sense of patriotism, nationhood, unity of purpose, togetherness, and respect

...."

For the school to not only entertain and condone, but actually propound those arguments also speaks to a signal failure to appreciate and to effectuate part of its statutory duties. The same statute; in **Section 59** enumerates the functions of the Board of Management as including to;

"(i) provide for the welfare and observe the human rights and ensure the safety of pupils, teachers and non-teaching staff at the institution;

(k) promote the spirit of cohesion, interpretation, peace, tolerance, inclusion, elimination of hate speech, and elimination of tribalism at the institution ...."

Some of the arguments made by the Church as Sponsor in the matter before us are cause for no little concern as they seem to be entirely at variance with the specific role and duty of a sponsor in relation to students or pupils who adhere to a religion, faith or denomination different from that of the Sponsor. **Section 27** imposes on a Sponsor the obligation of;

"(d) maintenance of spiritual development while safeguarding the denominations or religious adherence of others."

To our mind this is a duty requiring a sponsor to rise above and go beyond the narrow parochialism and insularity of its own religion or denomination and respect the equal right of others to be different in

religious or denominational persuasion. It is a call to broadmindedness and respect for others including those whose creeds and the manner of their manifestation may be unappealing or baffling. It is a duty to uphold the autonomy and dignity of those whose choices are discordant with ours and acknowledgment of heterodoxy in the school setting as opposed to a forced and unlawful artificial and superficial homogeneity that attempts to suppress difference and diversity. The people of Kenya in the Preamble to the Constitution proclaim that we are ***"Proud of our ethnic, cultural and religious diversity and determined to live in peace and unity as one indivisible sovereign nation."*** That is an ethos that it is incumbent upon all schools to teach to students from an early age. The determination to live in peace and undivided in spite of diversity at the macro national level must be translated and lived at the micro level of school communities.

Diversity is further amplified in **Article 10(4)** the Constitution which declares that among the national values and principles of governance, which are binding on ***"all persons whenever any of them makes or implements public policy decisions"*** is ***"(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."***

All of these provisions and pronouncements in the Constitution are not mere platitudes. They are not words devoid of significance. Rather, they are firm commitments made by the people of Kenya as part of their vision of the society they wish to live in. They are mutual and reciprocal promises made by and to all Kenyans and they have binding force of law. It is the duty of courts in interpreting the Constitution to ensure that the values which find even further explicit expression on the Bill of Rights are given the broadest meaning and vivified as living, active essentials and not lifeless forms on parchment. Courts must breathe life into the constitutional text and must avoid stifling and constrictive constructions that lead to atrophy and the sapping of its life and vibrancy.

Indeed, the Constitution itself gives an explicit interpretative command in **Article 259(1)**; it shall be construed or interpreted in a manner that –

"(a) promotes its purposes, values and principles

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights

(c) permits the development of the law

(d) contributes to good governance."

In obedience to that explicit direction, we are clear in our minds that the view we have taken that the Muslim girls ought to have been allowed to wear the *hijab* promotes the values and principles of dignity, diversity and non-discrimination. We also advance the law by making a definite finding that what the school did to Fugicha's daughters amounts to indirect discrimination, a concept on which there appears not to have been any judicial engagement from the jurisprudence that has so far flowed from the High Court. We affirm, endorse and uphold the rights of equality and freedom of religion as set out in **Articles 27** and **32** of the Constitution.

We now turn to the doctrine of **accommodation** which we believe will not only lead to development of the law on non-discrimination and freedom of religion in the country but should also, if properly understood, appreciated and applied, contribute to good governance of our schools thus entrenching constitutional and democratic principles.

Accommodation

In contrast to the hardline and fixed position advanced for and on behalf of the Church that Muslim female students should under no circumstances be allowed to wear the *hijab* in obedience to what they honestly and genuinely believe to be their religious duty, a more pragmatic approach is that of accommodation which ought to uphold school uniform while at the same time permitting exceptions and exemptions where merited. Even though the principle of accommodation has not been pronounced on or affirmed by courts in this country as far as we are able to discern, it is not new in comparative jurisprudence. The South African Constitutional Court and High Court have expressed themselves on it on many occasions in matters religion, especially in the context of education and employment. See for instance, **PRINCE –VS- PRESIDENT, CAPE LAW SOCIETY AND OTHERS [2002] 2ACC 1; MINE (PTY) LTD SECUNDA COLLIERIES 2003 (6) SA 254(W); PUBLIC SERVANTS ASSOCIATION OF SOUTH AFRICA AND OTHERS –VS- MINISTER OF JUSTICE AND OTHERS 1997 (3) SA 925(T).** Chief Justice Langa in **PILLAY** attempts to delineate the content of the principle of accommodation thus (at para 73);

"At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms."

The Canadian Court of Appeal in ***R –vs- VIDEOFLICKS*** [1984] 48 O.R. (2d) 395 held, which would hold true of Kenya, that;

"[The Constitution] determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogenous requirements."

The perils of peripherization, which essentially shuts out persons whose religious convictions cannot allow them to do certain things or require them to do things and behave in certain ways that are different from the dominant views conduct or practice of the majority, was poignantly captured by the South African Constitutional Court which proposed a balancing act in **CHRISTIAN EDUCATION SOUTH AFRICA V MINISTER OF EDUCATION** [2000] ZACC II; 2004(4) SA 757 (CC) as follows;

"The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such society can cohere only if all its participants accept that certain basic norms and standards are binding. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

Even though the degree to which the mainstream is required to be inconvenienced or put to expense so as to accommodate the minority religious believers has differed from jurisdiction to jurisdiction with the United Supreme Court stating in **TRANS WORLD AIRLINES –vs- HARDISON 432 US 63 (1977) at 84** that an employer should incur only a *"de minimis"* cost while its Canadian counterpart has been emphatic that the duty to accommodate demands the putting of more than negligible effort in **CENTRAL OKANAGAN SCHOOL DISTRICT NO. 23 –vs- RENAUD 1992 CAN LII 81 (SCC.) [1992] 2 SCR 970**,

there is consensus that there is a definite duty to accommodate. We think, as did the South African Constitutional court in **PILLAY** (supra), that the effort required to accommodate has to be more rather than less if the end of diversity is to be meaningful. We are justified in this view by the phraseology employed in **Article 32** of the Constitution. The text goes beyond stating a persons right to ***"manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship"*** to also state at **sub-article (4)** that ***"a person shall not be compelled to act, or engage in any act; that is contrary to the persons' belief or religion."*** Taken together, the two sub-articles create a double duty to accommodate in the form of allowance or accommodation of practice, manifestation or observance that may be different from the majoritarian norm and an exemption from any act which may impinge on and violate the person's belief or religion.

Asserting the indispensability of accommodation in **PILLAY**, (supra) the Chief Justice stated, and we are inclined to agree with his reasoning, thus; (at par 78);

"Two factors seem particularly relevant. First, a reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose , but which nevertheless has a marginalizing effect on certain portions of society.

Second, the principle is particularly appropriate in specific localized contexts such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck."

We are of the same view with regard to the donning of the *hijab* in the case at hand. We find and hold that the school ought to have worked out a reasonable accommodation to enable the Muslim girls to wear the *hijab* considering, especially, that there was a willingness to agree on the colour of such *hijab* so as to rhyme and not overly clash with the school uniform. This thinking also accords with that of the Canadian Supreme Court in **MULTANI –vs- COMMISSION SOLAIRE MARGUERITE BOURGEOYS** [2006] 1SCR 256.

It matters not that Fugicha, in common with the parents of all students did sign the letter of admission together with their daughters when they joined the school binding them to abide by school rules and the stipulated school uniform. We think it to be plainly notorious that with secondary education being so competitive, and from the nature of things, it is impractical and fanciful to expect that a parent and/or a new student joining a school in Form One will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.

We are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions *ex post facto*. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates.

We also think that an education system or any school administration that by word or deed violates the rights of students or condones their violation by others and otherwise diminishes their importance is a danger to the present and future fate of the Bill of Rights, the rule of law and the culture of democracy for true it is that ***"what monkey see, monkey does."*** In violating rights or showing them to be minor irrelevancies, mere inconveniences or optional extras, such schools inculcate a culture of disregard of or contempt for rights and the students graduating from those schools will in their future adult lives be a whole army of rights-abusers steeped in audacious and odious impunity, instead of their defenders. We must set our face firmly against such an eventuality that involves a grave dimunition and dilution of the constitutionally-protected right to have one's inherent dignity protected **(Article 28)** and reaffirm the command in **Article 21(1)** to observe, respect, protect, promote and fulfill the fundamental rights and freedoms in the Bill of Rights.

We think, with respect, that the justification cited by the school and accepted by the learned Judge, who followed in the footsteps of Githua, J in the **KENYA HIGH** case (supra) for the rejection of the plea for *hijab* was hollow and unconvincing. We cannot accept that perfect uniformity of dress, pleasing to the eye and picture-perfect though it be, can be a fair, proportionate or rational basis for discrimination. There does exist a perfect and comprehensive rejoinder to the fear repeated by our Judges that permitting Muslim girls to wear *hijab* would lead to a flood gate of similar demands by other religious groups leading to students ***"arriving in a mosaic of colours"*** and bringing ***"equality and harmonization"*** to ***"an abrupt end"*** and be a harbinger of ***"disorder, indiscipline, social distegration and disharmony in our learning institutions".*** That answer was famously given in pellucid fashion by Chief Justice Langa in **PILLAY** (supra), with which we fully concur and so adopt;

"107. The other argument raised by the school took the form of a 'parade of horribles' or slippery slope scenario that the necessary consequence of a judgment in favour of Ms. Pillay is that many more learners will come to school with dreadlocks, body piercings, tattoos and loincloths. This argument has no merit. Firstly, this judgment applies only to bona fide religious and cultural practices. It says little about other forms of expression. The possibility for abuse should not affect the rights of those who hold sincere beliefs. Secondly, if there are other learners who hitherto were afraid to express their religions or cultures and who will now be encouraged to do, that is something to be celebrated, not feared. As a general rule, the more learners feel free to express their religions and cultures in school, the closer we will come to the society envisaged in the Constitution. The display of religion and culture in public is not a 'parade of horrible' but a pageant of diversity which will enrich our schools and in turn our country. Thirdly, acceptance of one practice does not require the school to permit all practices. If accommodating a particular practice would impose an unreasonable burden to the school, it may refuse to permit it."

(d) *School Rules*

It is clear from what we have said so far that in a free and democratic society, it is woefully insufficient for school administrators to adopt an absurd inflexibility when it comes to enforcement of school rules to govern various aspects of life. The absurdity springs from an imposition and execution a policy of uniformity that fails to have in contemplation, and take into account individual difference and circumstances that may present a compelling case for exemption. This is the more so, as we have stated repeatedly, when the exemptions are sought on the foundations of freedom of religion and the right to non-discrimination, be it direct or indirect.

Speaking as an officer of the Court learned counsel, **Mr. Anyuor** very candidly and helpfully submitted before us that whereas school uniforms are important as expressions of equality, there will always be a

small section of the school community that should be allowed to express their religion by wearing distinct dress such as the *hijab* in this case. He indicated that the 2nd and 3rd respondents, (the TSC and the Education Directors) are "quite happy to have the *hijab* worn" in schools. We think he is right in that submission. He went on to urge us to direct the Ministry of Education to come up with rules to guide schools countrywide in dealing with this issue ensuring that it engages and secures participation of all the relevant stakeholders so that the concept of accommodation can be clarified and entrenched. Indeed, the Ministry should do so in exercise of its regulatory and oversight powers as set out in the Basic Education Act. However, what rules or regulations the Ministry may come up with can only be necessarily general and probably deal with the policy aspect and may take a while to complete.

Furthermore the formulation of case-specific and school sensitive rules or regulations can only be effectively done at the individual school level where the peculiar circumstances and specific diversities of its population and its dynamiccs may be captured and addressed. Participatory democracy, so essential in creating rational communities, is critical and schools should therefore embrace and actuate the same.

In the **PILLAY** case, Justice O'Regan criticized the subject school, and the same criticism may fairly be leveled against the church and school in this case, as well as a vast majority of schools in Kenya who have not formulated clear or any rules for exemptions from the school Code of Conduct, Rules, Regulations or Regimes. Said the Judge, which we find persuasive;

"173. The unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption. Schools are excellent institutions for creating the dialogue about culture that will best foster cultural rights in the overall framework of our Constitution. Schools that have diverse learner populations need to create spaces within the curriculum for diversity to be discussed and understood, but also they need to build processes to deal with disputes regarding cultural and religious rights that arise.

….

176. In this regard I conclude that the school failed in its obligations to the learner. Where a school establishes a code of conduct which may have the effect of discriminating against learners on the grounds of culture or religion, it is obliged to establish a fair process for the determination of exemptions. This principle requires schools to establish an exemption procedure that permits learners, assisted by parents, to explain clearly why it is they think their desire to follow a cultural practice warrants the grant of an exemption. Such a process would promote respect for those who are seeking an exemption as well as afford appropriate respect to school rules. An exemption process would require learners to show that the practice for which they seek exemption is a cultural practice of importance to them, that it is part of the practices of a community of which they form part and which is in a significant way constructs their identity. The school's authorities would in this way gain greater understanding of and empathy for the cultural practices of learners at the school."

O'Regan, J proceeded to agree with her Chief Justice that the court do make an order calling upon the school to effect amendments to its Code of Conduct to provide for granting of exemption from it in the case of religious and cultural practices. She also added, which we find practical and worthy of adoption, that;

"Once they have been adopted, the school should provide a place in its curriculum for the Code

of Conduct to be discussed with all learners in the classroom. That discussion should include a discussion of the principles on which exemptions from the rules are granted and the process whereby it happens. In particular, it seems important to stress that school rules should ordinarily be observed. Where processes are established for exemptions to be granted, they must be followed. Encouraging observance of rules is the first step towards establishing civility in an institution."

We do not conceive of a system of exemptions consistent with the principle of accommodation as a nullification of rules or an invitation to a-free-for-all when it comes to school uniform or the observance of discipline and the other dictates of the school routines. It is not every fanciful, capricious or whimsical request for exemption that will be countenanced or granted. Rules clearly do have their place but they cannot be allowed to infringe or intrude upon the space occupied by religion and belief or make of no effect the express protection granted by the Constitution to the manifestation of the same through "***worship, practice, teaching or observance, including observance of a day of worship"*** as expressly stated in **Article 32(2).** In the hierarchy of norms and the relative weight to be attached thereto, school rules rank way below the Constitution and it is incumbent upon those who formulate and enforce them to ensure that they align and accord with the letter and spirit of it, failing which they would be null, void and of no effect whatsoever. It must be remembered that such rules are not in consonance with the very clear principles for permissible limitations to the fundamental rights and freedoms as stipulated in **Article 24** of the Constitution. Where they conflict with the Constitution it is an altruism that it rules, and they are voided to the extent of the conflict or inconsistency.

This is the proper doctrinal and normative approach with which the High Court ought to have approached the issue of religion in schools in the matter before us. In so far as the **KENYA HIGH**, and the **ALLIANCE HIGH** (supra) cases cited before us by the church did not give full effect to the principles we have engaged with and in particular paid no or insufficient attention to the proscribed **indirect discrimination** and the principle of **accommodation** as the answer to the problem of discrimination, we are unable to accept them as a persuasive guide on how the matter before us should be decided. It is quite clear that the said decisions suffer from a deficit of wider, deeper analysis and turn a full blind eye or are silent on indirect discrimination. They give scant attention to the principle of accommodation with the effect that their conclusions are materially flawed. They therefore cannot aid the Church herein. They also contain some dicta that seem to take too far the notion of secularism in a manner suggestive of hostility to religion that is discordant with the letter and spirit of the Constitution and the most progressive jurisprudence on the subject. They thereby lose their persuasive quotient and must with justification be characterized as being *per in curriam* and therefore no longer good law.

We reiterate and adopt the essential and intimate link between freedom of religion and the cherished dream of a truly free society that was captured by Judge Dickson in **BIG DRUG MART LTD** (supra) thus;

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter [Article 27 of the Constitution]. Freedom must surely be founded on respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is

compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter [the Constitution] is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

To force students to abandon or refrain from a practice or observance dear to them and genuinely held as a manifestation of their religious convictions, as happened herein, violates their conscience, is the antithesis of freedom, is unconstitutional and is therefore null, void and of no force or effect.

4. DISPOSITION

Given our finding and holding herein, this appeal succeeds to the extent that;

(a) the High Court's order that the decision to allow Muslim students to wear *hijab*/trousers is discriminatory, unlawful and unconstitutional is set aside.

(b) the order of injunction preventing the respondents from allowing Muslim students to wear *hijab* contrary to school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby quashed and set aside.

(c) The mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of St. Paul's Kiwanjani Day Mixed Secondary School is set aside to the extent that it prohibits Muslim female students from wearing the *hijab*/trousers in addition to the school uniform.

(d) The order that the school uniform policy does not indirectly discriminate against the interested parties Fugicha's daughters or other Muslim female students is set aside and substituted with an order that the said uniform policy indirectly discriminates against the interested partys' daughters and other Muslim female students in so far as it prohibits and prevents them from manifesting their religion through the practice and observance of wearing the *hijab*.

(e) the order striking out the interested party's cross-petition as defective is set aside and substituted with an order allowing the said cross petition.

(f) The order granting the costs of the petition to the petitioner is set aside and substituted with a order that each party do bear its own costs

We in addition direct as follows;

(1) That the Board of Management of St. Paul's Kiwanjani Day Mixed Secondary School do immediately initiate, after due consultation with its stakeholders in particular the parents and students a process of amendment of the relevant school rules touching on the school uniform so as to provide for exemptions to be granted to accommodate those students whose religious beliefs require them to wear particular

items of clothing **in addition to the school uniform**.

(2) This judgment be immediately served upon the Cabinet Secretary for Education for his perusal and consideration with a view to formulating and putting in place rules, regulations and/or directions after due consultations for the better protection of the fundamental right to freedom of religion and belief under **Article 32** of the Constitution and equality and freedom from discrimination under **Article 27** of the Constitution for all pupils and students in Kenya's educational system.

(3) Each party shall bear its own costs of this appeal.

We conclude this judgment with an explanation that it is delivered later than the date on which it was first reserved and outside of the period set by the Rules of this Court due to pressure of work and the voluminous amount of case law and other material with which we had to engage in what is clearly a case of great public importance raising fundamental questions of first impression. We are most grateful to counsel appearing before us for their industry in assembling jurisprudence from within the jurisdiction and further afield and for their cogent and incisive submissions which were of great assistance. If there is any authority we have not referred to, it is not for our non-consideration of it, but out of satisfaction that the point is otherwise already amply made.

Dated and delivered at Nyeri this 7th day of September, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR