



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**PETITION NO. 41 OF 2015**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLE 2(6), 10, 19, 20, 21(3), 22, 23, 24, 27, 32 AND  
56 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**A B H.....PETITIONER**

**AND**

**1. THE BOARD OF MANAGEMENT (Particulars Withheld) HIGH SCHOOL**

**2. THE COUNTY DIRECTOR OF EDUCATION**

**TAITA TAVETA COUNTY being sued through THE HON. ATTORNEY- GENERAL**

**3. THE CABINET SECREATRY MINISTRY OF EDUCATION**

**SCIENCE & TECHNOLOGY being sued through THE HON. ATTORNEY-GENERAL**

**4. THE HON. ATTORNEY-GENERAL.....RESPONDENTS**

**AND**

**NATIONAL COHESION & INTEGRATION COMMISSION.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

**A. THE PARTIES**

1. The Petitioner herein, A B H, is a mother of a student, who like her mother, professes the Muslim faith. The Petitioner says that her daughter was suspended from (Particulars Withheld) Girls' High School, situate in Taita Taveta County for allegedly refusing to attend Christian service on Sunday 21<sup>st</sup> June, 2015 a ground which the First Respondent denies and says the suspension letters were due to disobedience of school authority and negligence to school routine, and no student's rights as enshrined

in Article 32 of the Constitution of Kenya were contravened.

2. The Petitioner says that the suspension of the Muslim girl students at (Particulars Withheld) Girls' High School on 22<sup>nd</sup> June, 2015 for refusing to compulsorily attend Christian worship is not consistent with their Islamic faith and is a gross violation of the law and that it cannot go unchallenged.

**3. The First Respondent** is the Board of Management of Bura Girls' High School, and is sued for failure to protect the human rights and promote the best interest of the child.

**4. The Second Respondent** is the County Director of Education, Taita Taveta County and is sued through the Attorney-General, for failure to carry out his duties under Section 54(7) of the Basic Education Act, 2013, being the office charged with the responsibility of admissions, discipline, auditing of the basic education institutions, management and monitoring of education programs, management of basic education and implementation of education policies which are all geared towards ensuring quality standards pursuant to Section 4 of the Act, and that they are guided in discharging their duties by principles of non-discrimination, promotion of peace, integration, cohesion and inclusion amongst others.

**5. The Third Respondent** is the Cabinet Secretary, Ministry of Education, Science and Technology in the Republic of Kenya conferred by the Basic Education Act with supervisory and general powers in consultation with the National Education Board to regulate anything relating to basic education, and is sued through the Attorney-General.

**6. The Fourth Respondent** is the Attorney-General of the Republic of Kenya and is sued as a party being the Chief Legal Advisor of the Government of Kenya and the proper party in all proceedings relating to the Government Departments, pursuant to the provisions of the Government Proceedings Act, [Cap 40, Laws of Kenya].

7. The National Cohesion and Integration Commission was enjoined as an **Interested Party** on the grounds that integration and cohesion starts at childhood, and what better place, than at national schools such as Bura Girls' High School.

### **THE APPLICATION FOR INTERIM ORDERS**

8. The Petitioner's Application for interim orders to lift the suspensions of the thirty eight (38) girl students of the Muslim faith were declined by the court as such orders would unnecessarily interfere with the orderly management of the school by the First Respondent, the Board of Management of (Particulars Withheld) Girls High School in consultation with the County Director of Education. The court did however direct the First Respondent to re-admit those students who were suspended, and who agreed to abide by the Regulations and Rules of (Particulars Withheld) Girls' High School. The court was informed that most of the suspended students had reported back to school and were attending class and other activities of the school.

9. Having dealt with those preliminaries, I now turn to the respective cases of the Petitioner, the Respondents and the Interested Party.

### **THE PETITIONER'S CASE**

10. The Petitioner's case was argued by Mr. Mwanzogo who relied upon the averments in the Amended Petition, the Affidavit of A B H in support of the Petition sworn on 15<sup>th</sup> July, 2015. Counsel also relied upon the written submissions dated 7<sup>th</sup> September, 2015 and the five hundred and four pages bundle of

authorities in support of the Petition.

11. The Petitioners say that their daughters hid in a class room to avoid being forced to attend a Christian service during the month of Ramadhan. The students were subsequently suspended on the grounds of negligence and disobedience to the school authority.

12. Mr. Mwanzogo submitted that the question in their Petition is the school's insistence to adhere to Catholic traditions, including attending Mass and prayers and other traditions of the Catholic Church. Counsel pointed out that there was a contradiction in the affidavit of Jonathan Mulatya Nyamai the County Director of Education that he received information that some thirty eight students had been suspended, and not that they had been suspended in consultation with the County Director of Education.

13. Counsel submitted that the suspension of the students did not just erupt, it had been building up with regard with the wearing of hijabs during prayer time and during the fast. Counsel submitted the issue had been raised at the School Board meeting on 8<sup>th</sup> September, 2014 as well as the minutes of the Board Meeting of 14<sup>th</sup> October, 2014 where Muslim parents had raised objection to attending Catholic Mass, and the wearing of hijab. Counsel submitted the Petition was not to obtain orders to regulate the school, but rather, a line of last defence of the Petitioners' children's/girls rights.

14. Counsel asked the rhetorical questions whether it was in order after promulgation of the Constitution of Kenya 2010 to require students to attend Mass, or to propagate a particular religion but that what was more alarming, for students to hide in a store or to have spiritual nourishment in a Mass" Was there another way" A student admitted to a public or national school should not be compelled to a particular way of doing things, that it is not reasonable for students who have been fasting from 4.00 a.m. to break the fast between 10.00 -11.00 p.m." They should not endure that suffering in the name of the school regulations, that the school should not be subject to regulations made in by-gone days.

15. Mr. Mousa also appearing with Mr. Mwanzogo, addressed the specific provisions of the Constitution, commencing with Article 32(4) of the Constitution, which provides that **"a person shall not be compelled to act or engage in any act that is contrary to the person's belief or religion."**

16. The Petitioner contends that forcing her daughter to attend Sunday worship because it is part of the Catholic tradition of the school contravenes Article 32(4) of the Constitution. Counsel submitted that the attendance of Sunday Mass by all students regardless of their religious persuasion, is not merely a forum at which moral instruction and life skills are imparted. Counsel relied on the case of **ZYLBERGERG vs. SADBURY BOARD OF EDUCATION 1988, CAN LII 189, (ON.C.A.)** in which the majority Judges of Appeal found it as unconstitutional Section 28 of the Regulations requiring a public school to open and close each school day with religious exercises which consisted of the reading of the scriptures or other suitable prayers. In that case the Applicants, parents of children in an elementary school – public school of the Sadbury Board of Education, sought a declaration that Section 28(1) of the Regulations is of no force and effect because it violates the guarantee of freedom of religion in Section 2(a) of the Canadian Charter of Rights and Freedoms. The Schools' Board opened its meetings with the National Anthem, the Lord's Prayer and, in some schools, readings from the Scriptures. The application was dismissed at the trial but was allowed by the majority, in the Court of Appeal.

17. Counsel rejected the Respondent's argument that the Petitioner's daughter had signed an undertaking to abide by the schools regulations which identified the sponsor as the Catholic Church and that Catholic traditions must be followed. Counsel submitted that though Section 4(1) of the Basic Education Act is in tandem with Article 10 of the Constitution, the Schools' Rules are not, and are by forcing non-Catholic students to attend to Catholic Mass and traditions unconstitutional.

18. The Petitioners were also concerned with the manner of dress of the school uniform. The Muslim girl students prefer to dress in hijab, scarf and trouser, to manifest their faith in line with Article 27(4) & (5) of the Constitution unlike the school blouse and skirt. Counsel submitted that this was indirect discrimination, contrary to Article 27(4) & (5) of the Constitution. Counsel relied on the South African court's decision in **MEC FOR EDUCATION: KWAZULU NATAL & FOUR OTHERS vs. NATHAN PILLAY & 3 (AMICUS CURIAE) CCT:51/06**.

19. Counsel concluded that allowing the Muslim girls to wear the hijab would promote equality in terms of Article 27(5) of the Constitution. Counsel therefore urged the court to allow the Petition.

### **THE INTERESTED PARTY'S SUBMISSIONS**

20. The Interested Party's case was argued by Mr. Musyoki and relied on the written submissions dated 23<sup>rd</sup> November, 2015 and filed on 24<sup>th</sup> November, 2015 and based on the Affidavit of Hassan S. Mohammed, the Secretary to the National Cohesion and Integration Commission (the Commission) sworn on 6<sup>th</sup> August, 2015 and filed on 6<sup>th</sup> August, 2015. The Commission's submission in essence was that the current rules of (Particulars Withheld) Girls' High School, are in breach of Articles 27 (on grounds of discrimination), Article 32(4) (the freedom of conscience, religion, through belief and opinion), and 53 (failure to promote national principles and values enshrined in Article 10 of the Constitution) and are to that extent unconstitutional.

21. The Commission's counsel also submitted that the Rules and Regulations of (Particulars Withheld) Girls' High School are also contrary to the provisions of the Children Act, 2003 and in particular Sections 4, 5 and 8(1) thereof. The Secretary also depones by way of opinion that the school rules and practices are "**based on archaic law and practices which have no place in the modern constitutional dispensation**".

22. For those reasons counsel urged the court to allow the Petition, with costs to the Petitioner.

### **THE FIRST RESPONDENT'S CASE**

23. The Respondents' case was argued by Mr. C. Kanjama. Counsel for the First Respondent relied upon **inter alia** (i) the Replying Affidavit of Assumpta Mbinya Kasyoki sworn and filed on 10<sup>th</sup> July, 2015, (ii) the Replying Affidavit of Assumpta Munyao sworn and filed on 9<sup>th</sup> November, 2015 in reply to the Affidavit in support of the Amended Petition, (iii) the written submissions of Muma and Kanjama counsel for the First Respondent dated 17<sup>th</sup> November, 2015, and filed on the same day, and (iv) the Response to the Amended Petition by Muma and Kanjama dated 19<sup>th</sup> November, 2015, and filed on 20<sup>th</sup> May, 2016.

24. The First Respondent's case is that the Amended Petition is improper and unmerited because it does not raise any constitutional issue based on religious discrimination or any form of contravention of the right to freedom of conscience, religion, belief and opinion whatsoever. The complaint is merely about obedience and attendance to school rules and regulations, and that any prayers sought if granted would lay waste the well-meaning efforts of the school to nurture good character development and discipline of minor students which is a mandate of school administration.

25. On the question of fact, the First Respondent states that contrary to the assertions in paragraphs (11) and (12) of the Amended Petition, the 38 students who were rounded up were not observing worship in the Holy month of Ramadhan in the dangerous school store, that the five (5) Christians rounded up were certainly not observing any religious fast, and the actions by the 38 of them were purely

a case of disobedience to school rules and routine, that the allegations by the Petitioner that all the suspended students were Muslims is therefore false and malicious.

26. The First Respondent also denied paragraph 13 of the Amended Petition that the students were suspended by the Deputy Principal. It was the School Principal who suspended the students, after consultation with the County Education Office, and of the 38 girls suspended, 5 girls were non-Muslims.

27. The First Respondent also denied paragraphs 16, 17 and 18 of the Amended Petition, the school does not force students to subscribe to its “**self-approved and proclaimed set of religious beliefs**”, and that the school neither discriminates unfairly against Muslim students nor does it impose religious beliefs on them.

28. In answer to paragraphs 16 and 17 of the Amended Petition, the First Respondent also said that school rules which require all students without exception to observe a standardized dress code, (school uniform, thus limiting Muslim students' right to wear a hijab) were made pursuant to powers donated to the school under Section 11 of the Basic Education Act. The First Respondent avers that the uniform instills a sense of uniformity, equality, inclusivity and unity of purpose and observes economic and religious disparities of students who hail from different walks of life; and that any deviation therefrom would disrupt the normal and smooth running of the school, with the risk of giving an impression that Muslim students have been accorded special or preferential treatment, a fact that is tantamount to discrimination of other students.

29. The First Respondent also pleads that contrary to the contentions in paragraphs 21, 22, 23, 24 and 25 of the Petition, the school in line with the obligations under Article 21 of the Constitution, observes, respects, protects and promotes enjoyment of freedom of religion as enshrined under Article 32 of the Constitution, and that it has demonstrated this through the appreciation of diversity of religions and other beliefs amongst its students.

30. The First Respondent concludes that prayers and orders sought in the Amended Petition are untenable and should not be granted since Articles 27 and 32 of the Constitution cannot be applied selectively to favor Muslim students over others. It therefore prayed that the Amended Petition be dismissed in its entirety with costs.

## **THE SECOND AND THIRD RESPONDENTS' SUBMISSIONS**

31. The Second and Third Respondents' case was argued by Miss Lutta Senior State Counsel, through **firstly** a Preliminary Objection, Grounds of Opposition dated 3<sup>rd</sup> July, 2015, and filed on 6<sup>th</sup> July, 2015 against both the Petition and the Notice of Motion dated 30<sup>th</sup> June, 2015 which sought interim orders against the suspension of the Petitioners' children, **secondly**, the Replying Affidavit of Jonathan Mulatya Nyamai, the County Director of Education of Taita Taveta County, the Second Respondent, sworn on 10<sup>th</sup> July, 2015 and filed on 13<sup>th</sup> July, 2015, and **thirdly** the submissions of the Attorney-General filed on 19<sup>th</sup> July, 2015.

32. The Respondents' case is that the Amended Petition is improper, baseless and an abuse of the court process; that the Amended Petition does not raise any constitutional issue based on religious discrimination or any other discrimination in any manner whatsoever. The issue, this deponent avers, is merely adherence to school rules and regulations and that any orders granted would ravage the (school's) efforts to nurture good character development and discipline of the minor students which is a motto of the school administration.

33. This deponent also deponed that the parents of the affected students, and their parents signed an undertaking to abide by the rules and regulation of the school as a condition of admission. He averred that upon receiving information on the suspensions of students, and reasons therefor, he confirmed the suspension, and directed the summoning of an urgent School Board to deliberate the matter. Such meeting was held on 4<sup>th</sup> July, 2015, where conditions were laid out for re-admission of the suspended students that students who agreed to abide by the school rules were re-admitted.

34. This Respondent depones that there were 78 students of Islamic faith, and religious nurturing was done by Asia Osundwa, a teacher at the school who is a patron of Islamic students. The Islamic students have a room designated as a Mosque, for access at will by students who profess the Islamic faith, the school provides a special diet to Islamic students during the Holy month of Ramadhan, they are given a special treat and travel to Voi town using the school bus to celebrate the end of the fast, during the feast of **Idd-UI-Fitr**, and concludes that suspended students were re-admitted to the school after agreeing to abide by the school rules.

35. This deponent also reiterates the department's commitment to adherence to the welfare of all students, and that no provision of the Constitution was breached and that this was established and confirmed, by County Quality Assurance and Standards team, and reiterated that no regulations or rights were breached by the action to suspend the students. The deponent also averred that the circumstances of the suspension have been totally misconstrued.

36. On the question of wearing the hijab, this deponent averred that the purpose of the school uniform are clear, for achieving equal, neutral and common identity, and that allowing part compliance with the school rules would mean bias against other students. He concluded that in the interest of justice and for the sake of order and adherence to the law, order and good governance of schools, that the Petition and the Notice of Motion be dismissed with costs.

37. In this regard counsel also relied on the list of authorities filed on 15<sup>th</sup> July, 2015, being –

1. Nairobi H.C. Petition No.290 of 2012, RWT (suing through next of friend and grandmother ) vs. SNS School [2013]eKLR;
2. Nairobi H.C. Petition 84 of 2014, RCK suing through next friend KRC) vs. KSI School [2014]eKLR;
3. Nairobi H.C. Petition No. 421 of 2012 Seventh Day Adventist Church (EA) Limited vs. the Minister of Education & 4 Others [2012]eKLR;
4. Nairobi H.C. Petition No. 82 of 2012 Nyakama Gekara vs. Attorney-General'2012]eKLR;
5. Nairobi H.C. Judicial Review No. 318 of 2010 Re Ex parte MY (a minor suing through her mother and next friend AB) vs. Head Teacher, Kenya High School &Another [2012]eKLR.

### **ANALYSIS OF SUBMISSIONS**

38. In his submission, Mr. Kanjama counsel for the First Respondent, the Board of (Particulars Withheld) Girls High School, opined that the issue before court for determination is a delicate matter and urged the court not to treat it as a clash between religious faiths or government and religion but as a matter of finding a right balance among people who hold different faiths in a multi-cultural society.

39. The relationship, counsel submitted, is thus between the state and religion in the new Constitution.

In this regard the basic constitutional provision is Article 32 of the Constitution which is very much similar to the provision of the former Constitution on freedom of religion, and therefore there has been no dramatic change in Kenya, with regard to freedom of religion, conscience, thought, belief and opinion and perhaps minor adjustments to the new framework. The critical provisions which the court would need to determine are Articles 24 on limitation of rights, Article 27 on freedom from discrimination and Article 30 and the preamble to the Constitution on the supremacy of the Almighty God of all creation and the preamble conclusion, “**God bless Kenya**”.

40. Article 8 of the Constitution declares that there shall be no state religion, and Schedule Two sets out the National Anthem which refers to **God of all creation** and Schedule Three on National Oaths and Affirmations which recognize those who take oaths, show knowledge and acknowledgment of a **supreme being**. It was counsel's submission that it is for this reason that Article 9 prescribes national holidays and also acknowledges that only Parliament can designate national holidays like the Christian holidays which have continued to be part of our national tradition. Likewise the Constitution recognizes under Article 45(4) the power of Parliament to enact legislation on marriage under any tradition or system of religious, personal or family law, and Article 170 with regard to Kadhi's courts.

41. The entire constitutional framework counsel submitted, discloses very clearly that it requires of the state and the public square a positive incorporation of religion and spiritual dimension of man, and that Article 8 states that there shall be no state religion, and it merely prohibits the state from consistent and continuous preference for one religion to the exclusion of others in any and in all situations.

42. However, counsel submitted that on a case by case basis, the Constitution recognizes depending on the circumstances the state and religion agree to co-exist. If the state were to demur to religion in the public square, this will damage national cohesion. The respect in the public square will contribute to national cohesion, and that is what a harmonious and holistic interpretation of the Constitution will conclude, and that is what Parliament understood when it enacted the Basic Education Act and the Children Act.

43. Section 4(e)(i) (k) (l) and (s) of the Basic Education Act sets out the guiding principles of basic education and summarize that the Basic Education Act recognizes that in regard to children, the paramount consideration as per Article 53 of the Constitution is the best interest of the child, and that education is not merely [education] it includes holistic and inclusiveness, and discernment.

44. Where the interests of religion (even of the fervent believer) go against the interest of the child, the latter would be paramount, so that children are treated differently from adults in right to religious worship. Counsel gave the example of patients requiring blood transfusion, a negation by a parent would be overridden by the will of the child to have blood transfusion and would mean that the right of the child under Article 53, is superior to the right of the parent.

45. Section 27 of the Basic Education Act provides the role of the school sponsor in the spiritual formation of the child.

46. In the case of public schools which have a sponsor, (Section 43(1)(a)) Government has entered public/private partnerships. In terms of paragraph 25 of the Replying Affidavit of Assumpta Muniyao sworn on 9<sup>th</sup> November, 2015, the First Respondent is an incorporated body and is on facilities developed and owned by the sponsor, the Catholic Church which is known for its emphasis and thoroughness in education standards which can only be obtained by creating a non-antagonistic atmosphere of learning. Its interest is in the holistic formation of the children in its schools. Counsel submitted that it is quite critical that, that interest is upheld to encourage sponsors to continue offering

their facilities for this materially beneficial arrangement.

47. Counsel submitted that every community has certain values including the values of the state of Kenya (Article (10) of the Constitution), and the Basic Education Act which recognize the necessity of transmitting these values to the children. Section 59 of the Basic Education Act provides that for establishment of a Board of Management of a school, including establishing Rules for operation of its establishment, that every school, the stakeholders should approach the Board of Management and raise their concerns, and unless a stakeholder demonstrates that they have taken all steps to engage the Board of management, they should be denied any relief from the court, for in doing so, they are inviting the court to be the manager and not Principal of the School.

48. Counsel also invoked Sections 4, 5 and 6 of the Children Act which are relevant as they provide for the best interest of the child in all matters, equal treatment of children, and the right to education. Counsel submitted that under paragraph 11 and 12 of the Replying Affidavit of Assumpta Munyao, that the Petitioner, of her own free will chose the First Respondent's school, knowing its culture, its rules, and its traditions and agreed to be bound by them, that the school Rules are made for the benefit of the entire community of the Institution, and take into account the unique circumstances and environment of the Institution and the type of people involved, that the school has a mixture of multi-religious students including Seventy-Day Adventists who worship on Saturday when the school has activities, and were not complaining.

49. Counsel referred to paragraphs 18 and 19 of the Replying Affidavit of the Principal, and submitted that the school offers Mass for Catholic students every Tuesday and Thursday every week and that non-Catholics are exempted from attending and opt either to go and offer their own prayers or go to class to study where they are monitored, and that the school Rules are to ensure safety of all students by stating where the student should be at any one time.

50. Counsel explained that the Sunday Catholic Service which in Catholic language is called "Mass" is two-fold after the usual Mass like that of Tuesday and Thursday, the sponsor who is usually a Priest commonly called a Reverend Father, addresses all the students on the issue of morality, obedience to parents, obedience to school, obedience to elders and government and who generally tries to **nurture good citizens** that the sponsor does not try to convert anybody because he knows the freedom of worship and freedom of conscience, and that the students being under 18 years of age, they need a lot of character molding which is essential to children at that age.

51. On the question of prayer, counsel submitted that the "**Catholic Mass**" is a form of prayer. There are other prayers, there are public prayers, at public meetings, at public gatherings and public assemblies and institutions that is a salutary habit of prayer, when prayer takes an appendage as a public activity, it cannot be treated as violating the religious beliefs of any particular faith. For instance if Parliament prays, Cabinet prays and if the proportionality test is applied, it is not possible to find out among those present what religion they profess, if one chosen to pray, that prayer would not convert an atheist or other non-religious person to a particular religion. To go the way of the Petitioner would be the way of dismantling of the public prayer.

52. Counsel was of the view that if the sole purpose of the public gathering was prayer, and adherence to that particular congregation, then looked at from that perspective, the Petitioner would have a case. But a school is a public gathering that takes 24 hours or 18 hours depending on whether it is a boarding or day, and involves prayer at some time, then that prayer is constitutional. Holy Mass is a public prayer which is part of the 24/7 time which imparts moral formation on the school's students. Counsel concluded that there is danger when parents agitate against prayer in schools.



53. Counsel discerned two issues, the fact issue and the legal question public prayer as a manifestation of religion.

54. On the fact issue, counsel contended that there was no doubt the Petitioner's child failed to obey school rules, the Respondent's counsel said and asked the court to decline prayers (d) and (e) of the Amended Petition.

55. On the legal question, counsel submitted that a comparative analysis of cases in other jurisdictions show two approaches, one is a radical approach, a "rigid" secular approach that draws religion a place in the public square which is alien to the Respondents. The second approach is the approach found in the United Kingdom and the European countries, and is also to be found in Kenya.

56. In this regard counsel relied upon Articles 1, 2, 3 and 5 of the United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion (proclaimed by the General Assembly resolution No. 36/55 of 25<sup>th</sup> November, 1981). These Articles say –

#### **Article 1**

**1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.**

**2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.**

**3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.**

#### **Article 2**

**1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.**

**2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.**

#### **Article 3**

**Discrimination between human beings on the grounds of religion, or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.**

#### **Article 5**

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

56. Likewise counsel referred to the publication by the United Kingdom's Equality and Human Rights Commission 9EHRC 2012) (How far is Britain" An assessment of how public authorities protect human rights) at pages 317 (11) – 318(13), 324 (21) and 326 (22) where the authors say –

**“The holding of any belief, however unattractive, is protected, though some standards apply to those beliefs whose manifestation is protected: in Williamson the House of Lords suggested that while everyone is entitled to hold whatever beliefs he wishes:**

**When questions of “manifestation” arise...a belief must satisfy some modest, objective minimum requirements. The belief must be consistent with basic standards of human dignity or integrity...The belief ...must possess an adequate degree of seriousness and importance...it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification...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 convention...**

**The right to manifest a belief is a qualified right and is subject to limitations as set out in Article 9(2). Interferences with the manifestation of belief may consist, for example, of uniform policies at work or school, or requirements to work at certain times or carry out certain tasks. Limitations and an individual's freedom to manifest his or her religion or belief are only permissible if prescribed by law and necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.**

**Article 9 places the following obligations on the state:**

requiring the state not to interfere in the right of individuals and organizations to hold religious and non-religious beliefs.

to secure enjoyment of Article 9 rights by ensuring they are protected in law, and there are sanctions if they are infringed, and by preventing or remedying any breach by its own agents or institutions.

Article 9 closely related in its wording and values to the right to freedom of expression under Article 10, and to freedom of association under Article 11. The European Court of Human Rights differentiates between 'beliefs' protected by Article 9, and 'opinions' and 'ideas' protected by Article 10, although in some cases there may be some overlap. Article 9 is also supported by Article 2 of Protocol 1, which protects a right of parents to have their children educated in accordance with their beliefs."

57. Counsel also relied on the case of **NYAKAMBA GEKARA VS. THE ATTORNEY-GENERAL S. G. MUTUNGU, THE CHAIRMAN P.T.A. THE KENYA HIGH SCHOOL and ROSEMARY C. SAINA, THE PRINCIPAL & SECRETARY, P.T.A. THE KENYA HIGH SCHOOL [2013]eKLR**, where the court cited the cases of **Republic vs. Head Teacher, Kenya High School, ex parte MY (a minor), Judicial Review Application No. 318/2010 (Nbi)**, which was a case in which the applicants sought *inter alia* the Muslim students in Kenya High School should be allowed to wear the hijab while in school. Githua J held –

**"respondent's limitation of the applicant's right to outwardly manifest her religion by wearing a hijab in school was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."**

58. In **NDANU MUTAMBUKI and 119 OTHERS vs. MINISTER OF EDUCATION & 12 OTHERS [2007]eKLR** a case involving the right to wear or not to wear headscarves by students while in school, Nyamu J stated as follows –

**"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 get up one morning and decide to put on headscarf as well, this derogates from the hallmarks of a democratic society and violates the principle of equality. In weighing the individuals fundamental right under Section 78 against those of the others, I find myself unable to disregard the weight of these basic standards and norms and in my view they do tilt the scales in favour of a finding of no infringement in the circumstances of this case..."**

59. Counsel also considered Article 32 along with Article 8 of the Constitution. Article 8 provides –

**"There shall be no state religion" and as I understand it, a State religion: is a religion established by law as the only official religion of a state. The import of the provision is that no religion shall have prevalence over any other and no particular one should be seen as the one each citizen is obligated to follow including on the observance of a day of worship"**

60. It was counsel's further submission that the minority have two options, conform or opt out. Counsel relied on the case of **Seventh Day Adventist Church (East Africa Limited vs. Minister for Education & 3 others [2014]eKLR** paragraph 18 where it reiterated the argument by the Interested Party –

**“18. It is the case that under Education Act, Boards of Governors have been granted the power to manage public schools whereas the Minister for Education promulgates the regulations relating to requisite standards of a school in order to ensure a conducive learning environment. It argues that the policies and rules devised by any Board of Governors have to balance competing interests with a view of ensuring that the religious beliefs of one group are not given preference over those of another and the same applies in the educational needs of students.”**

61. Counsel finally relied upon Article 259(1) on interpretation of the Constitution, and urged the court to find that the Board acted reasonably, there is no prohibition against public prayer, a sense of proportionality be adopted, the First Respondents respects religious diversity, and consistently grants opportunity to children of different faiths to manifest their religion.

### **SUBMISSIONS OF THE SECOND, THIRD AND FOURTH RESPONDENTS**

62. The Petition was opposed by the Attorney-General on behalf of itself, and on behalf of Cabinet Secretary, Ministry of Education, Science and Technology as well as the County Director of Education, Taita Taveta County, and relied on the submissions made by the First Respondent, and the authorities relied upon by the First Respondent.

63. In a nutshell, counsel submitted that there was no demonstration at all that the Petitioner's child's religious beliefs were breached. Counsel submitted that this was a case of indiscipline and breach of school rules by the children who were found hiding in a wrong place at a wrong time.

64. Counsel submitted that the school Rules and Regulations were in conformity with the Constitution having been made by the First Respondents pursuant to the provisions of the Basic Education Act, counsel urged the court to apply the conformity principle, and any rules, regulations and actions in conformity with the Basic Education Act, cannot be regarded as unconstitutional. Counsel submitted that the First Respondent is a National School and among the best performing schools in the County and that the only way it holds that position is because it maintains a holistic tradition of education. The role of the Sponsor is anchored in the Basic Education Act. Counsel too relied on the decision in the case of **Republic vs. The Head Teacher, Kenya High School and the Board of Governors, Kenya High School** (supra) whose circumstances are similar to the Petition herein.

65. On issues affecting a minor the main concern of the court is the welfare principle under Article 53 of the Constitution, and Section 4 of the Basic Education Act, and the Rules and Regulations being challenged are in the child's best interest.

66. Counsel submitted that there is clear mechanism for settlement of disputes that is through the School's Board of Management. The regulations are made for the maintenance of public order. Any interference by the court would be against the principle of separation of powers, and the rule of law. The rules are in conformity with the limitations under Article 24 of the Constitution, and that there is no discrimination against the Petitioner's child's religion. Counsel prayed that the Petition be dismissed with costs.

### **SUBMISSIONS IN REPLY BY COUNSEL FOR THE PETITIONER**

67. In reply to submissions by counsel for the Respondents, counsel for the Petitioner restated that the issue in the Petition relates to the interpretation of Articles 24 (limitation of rights) and 27 (discrimination). Counsel submitted that there is misunderstanding of the principle of discrimination and equality. In counsel's view, there was no doubt that the Rules and Regulations by (Particulars Withheld) Girls' High School provide for compulsory attendance of Mass, and that this is not consistent with the faith of the Petitioner's child, and other Muslim students, and that this was in particular contrary to Article 34(4) of the Constitution which provides in mandatory terms that no person may be compelled to act or engage in any acts which are contrary to the person's belief or faith or religion, and that the school Rules provide for such compulsory attendance of the Catholic Mass, and that this is confirmed by paragraphs 20, 22, 26 and 28 of the First Respondent's Principal's Replying Affidavit.

68. Counsel reiterated that the school Rules must conform to the national values and principles under Article 10 of the Constitution and the Basic Education Act for fostering tolerance and fundamental freedoms. Counsel relied on the case of **SELBERG vs. EDUCATION BOARD** which addressed that aspect of discrimination at paragraph 3 thereof including coercion. These counsel submitted are manifestations of discrimination and misconception of the principles of equality and thus contrary to Article 27(4) and (5) of the Constitution which prohibit direct and indirect discrimination of any person, on the grounds set out under sub-article (4) – dress, religion, belief. The principle of equality counsel submitted, demands the treatment of what is equal, equally, and what are unequal as unequal, that the Muslim faiths and Christian faiths are unequal, and that they must be given leeway to manifest their beliefs.

69. On the question of dress, counsel urged the court to look at the case of PILLAY (paragraph 107) in the speech of Langa, CJ regarding religious diversity should not be taken as a **“parable of the horribles but a pageant of diversity, which would enrich our schools and in turn the country”**.

70. While acknowledging that fundamental rights are subject to limitation under Article 24, counsel submitted that the Respondents had not shown that their rights would be prejudiced if the Muslim students are accommodated, and thus cases cited by the Respondents be distinguished from the present case.

71. On public prayer, counsel replied that public prayer on public holidays and the Catholic Mass are not synonymous that the Mass is not a prayer but that it is a ritual. It is not in the best interest of the child in terms of Article 53, of the Constitution. In summary, counsel submitted, the Petitioner's child did not waive their right to religion when they entered (Particulars Withheld) Girls' High School. Any law which is inconsistent with the Constitution is null and void, and that since no statute under Article 24 has been enacted to limit the right to religion or manifestation thereof, the Rules and Regulations of (Particulars Withheld) High School are unconstitutional and should be so declared, counsel urged.

#### **INTERESTED PARTY'S REPLY TO THE SUBMISSIONS BY THE RESPONDENT**

72. Counsel for the Interested Party reiterated earlier submissions that the Rules and Regulations of Bura Girls' High School are unconstitutional.

#### **REPLY BY COUNSEL FOR THE FIRST RESPONDENT TO THE SUBMISSIONS BY COUNSEL FOR THE PETITIONER AND THE INTERESTED PARTY**

73. Counsel for the First Respondent reiterated **firstly** that the Board of Management is the proper organ to consider the diverse interests of the school. Where it has demonstrated that it has acted lawfully or where it has not demonstrated it has violated any law, it would not be proper to find fault in the Rules.

**74. Secondly**, counsel urged, the principle of proportionality provides that you cannot have every adherent to have opportunity to pray at public prayer. The best person to manage the school, is the sponsor. Counsel urged that the Petition be dismissed with costs.

### **ANALYSIS AND DETERMINATION**

75. Having set out the rival contentions in the foregoing paragraphs of this Judgment, I am of the view that there are only two major issues for determination in this Petition. **Firstly**, whether the right to freedom of religion to students who profess the Muslim faith as guaranteed by Article 32 of the Constitution was violated by the Respondents. **Secondly**, whether the right to freedom of religion in the context of the Petition is absolute or is qualified under Article 24 as read together with Article 53(d) and 27 of the Constitution.

76. The collateral but relevant issues, raised by counsel for the First Respondent are **firstly**, whether the First Respondent can be represented by the Attorney-General, **secondly**, whether the decision by the First Respondent to suspend students at (Particulars Withheld) Girls' High School for disobedience to school rules and negligence to school routine is justified, **thirdly**, whether the rules and regulations requiring every student to attend the school church service contravene Article 32 of the Constitution of Kenya 2010 and **fourthly**, whether there are limits to the freedom of conscience, religion, belief and opinion as guided by Article 24 of the Constitution, and **fifthly**, whether the Muslim girls at (Particulars Withheld) Girls' High School should be allowed to wear hijab while in school. I will commence with the collateral issues.

### **WHETHER THE FIRST RESPONDENT CAN BE REPRESENTED BY THE ATTORNEY-GENERAL**

77. The First Respondent was represented by the Attorney-General when the matter first began. The First Respondent subsequently appointed the firms of J S Kaburu and Muma and Kanjama Advocates to represent it in this Petition. It however remains correct that under Article 156 of the Constitution, the Attorney-General being the principal legal advisor to the Government has authority, with leave of the court to appear as a friend of the court in any civil proceedings in which the Government is not a party as stipulated in Article 156(5). The Attorney-General of course appears in its substantive position when he is sued as a party on behalf of the Government in terms of Section 13 of the Government Proceedings Act [Cap 40, Laws of Kenya). It is also correct that the Attorney-General would also act for a public body which is aided by the national government. I am supported in this opinion by the decision of Lenaola J, in **OKIYA OMTATA OKOITI & ANOTHER vs. THE ATTORNEY-GENERAL & 8 OTHERS** (Constitutional Petition No. 446 of 2013) where the learned Judge held –

**“the Attorney-General has also a mandate to represent the national interest in court in proceedings and where the commissions are minded to seek his representation I see no bar to either ....to hold otherwise would be impractical and illogical given the structure of our Constitution...”**

### **OF WHETHER THE RIGHT OF FREEDOM OF RELIGION IN THE CONTEXT OF THE PETITION IS ABSOLUTE OR IS QUALIFIED UNDER ARTICLE 24 AS READ WITH ARTICLE 53(D) AND 27 OF THE CONSTITUTION, AND WHETHER FREEDOM OF RELIGION TO STUDENTS WHO PROFESS THE MUSLIM FAITH AS GUARANTEED BY ARTICLE 32 OF THE CONSTITUTION WAS VIOLATED BY THE RESPONDENTS**

78. I have combined these two issues because they are two sides of the same coin. I do so being conscious of the delicate and emotive nature of religious fervor and being called upon to decide a matter

upon which there are strong feelings whichever way the decision takes. It is important to bear in mind and to observe on the outset, while interpreting any provision of the Bill of Rights that human rights are of equal status, and therefore equal importance. The court therefore walks upon a tight rope and must maintain a balance between the competing claims, keeping in mind the universal principle that every person while exercising his own rights must not hurt or harm other person's rights, or put differently your right starts where mine stop. The ancient Romans who spoke Latin put it thus – *“sic utere tuo ut alienum non laedas”*

79. As Lenaola J as he then was (now Judge of the Supreme Court), said in **Seventh Day Adventist Church East Africa Limited vs. Minister for Education & 3 others** (supra) –

**“...This is a useful formula for resolving conflicts of rights in a constitutional concept like the one before me.”**

80. Balancing conflicting rights is, not always the only strategy for uncovering a fair median designed to uphold both in a limited degree. For instance in **CHRISTIAN EDUCATION SOUTH AFRICA vs. MINISTER FOR EDUCATION (CCTA/100 2000)**, Sach J stated as follows with regard to the difficulties of proportionality analysis in the area of religious rights –

**“The most complex problem is that the competing interests to be balanced belong to completely different conceptual and essential orders. Religious conviction and practice are generally based on faith. Counter-availing public or private concerns are usually not and are evaluated mainly according to their reasonableness. To the extent that the two orders are to be separated with the religious being sovereign in its domain and the state sovereign in its domain, the need to balance one interest against the other is avoided. However religion is not always merely a matter of private individual conscience or canonical sectarian practice. Certain religious sects do turn their backs on the world, but many major religious regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytize through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behavior from their members and have been witness to the exercise of power by state, and private agencies. They promote music, art and thereafter they provide halls for community activities and conduct a great variety of social activities for their members and the general public. They are part of the fabric of life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a way of life of a people temper and culture.**

**[34] the result is that religious and secular activities are, for purposes of balancing frequently as difficult to disentangle from a conceptual point of view as they are separate in day to day practice. While certain aspects may be said to belong to citizen's Caesar and others to the believers of God, there is a vast area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way.”**

81. I entirely agree with the learned Judge, and in this Petition the starting point is what we call principles of interpretation. In **JOHN HARUN MWAU & 3 OTHERS vs. ATTORNEY-GENERAL & 2 OTHERS** (Petition No. 65 of 2011), the court referred to one such principle of interpretation–

**“that a broad and liberal interpretation is required for constitutional interpretation. It is essential that the constitution is not interpreted in a narrow and legalistic way, but generously, and**

**purposely, so as to give effect to its spirit, and that is particularly true of these provisions that are concerned with protection of constitutional rights.”**

82. Likewise the Constitution should be interpreted as an integrated whole so that no single provision of the Constitution is segregated from others and considered alone, but all provisions bearing upon a particular subject are brought into view and to be interpreted so as to achieve the greater purpose of the Constitution – **Smith Dakota vs. North Carolina 192, US [1940] LED 448.**

83. Article 159(1) of the Constitution lays out the framework of applicable principles while interpreting the Constitution. The Article provides –

**“159(1) This Constitution shall be interpreted in a manner that –**

- (a) promotes its purpose, values and principles;**
- (b) advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;**
- (c) promotes the development of the law;**
- (2) ....”**
- (3) every provision of the Constitution shall be construed according to the doctrine that the law is always speaking and ....”**

84. In addressing the rights under Article 32 of the Constitution, Article 8 has also to be considered. It provides that **“there shall be no state religion”**, and a **“state religion”** means a religion established by law as the only official religion of a state (www.mariam – website.com dictionary/state Religion). The import of this provision is that no religion shall have prevalence over any other, and no particular one should be seen as one each citizen is obligated to follow including in the observance of worship.

85. In addition neither Article 8, 32 nor 260 of the Constitution define “religion” and the enjoyment of that right, but in **Human Rights Review 2012** (supra), in an analysis of Article 9 of the European Convention on Human Rights which is, in Article 9(1) word by word the same as Article 24(1) of our Constitution, the authors noted as follows –

- a. the right to hold as distinct from the right to manifest religious and other beliefs in an absolute right;**
- b. the right to manifest a belief is a qualified right and limitation is permissible if it is prescribed by law and can be justified as necessary in a democratic society in the interests of public safety, the protection of public order, health or morals and the protection of the rights and freedoms of others**

86. In **R [WILLIAMS] vs. SECRETARY OF STATE FOR EDUCATION AND SKILLS [2005]2AC 246**, Lord Nicholls said –

**“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilized society individuals respect each other’s belief. This enables them to live in harmony.”**



87. And on “manifestation” which is the crux in the case of **Nyakamba Gekara vs. Attorney-General & 2 others** (supra) and in this case, the House of Lords in the **William’s case** (supra), said –

“...when questions of “manifestation” arise, ...a belief must satisfy some modest, objective minimum requirements. The belief must be consistent with basic standards of human dignity or integrity...The belief must possess an adequate degree of seriousness and importance ... it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The beliefs must also be coherent in the sense of being intelligible, and capable of being understood. But again, too much must not be demanded in this regard. Typically religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification... 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 Constitution.”

88. The authors of the **Human Rights Review** (supra), following the discussion in “**R Williams**” made following remarks which are relevant to this case –

“The holding and manifestation of beliefs, may be intrinsically bound up with each other. Manifestation can occur through worship, teaching and proselytism, observation by wearing symbols or special clothes or by eating or avoiding certain foods. The right to manifest a belief is a qualified right and is subject to the limitations set out in Article 9(2). Interferences with the manifestation of belief may consist for example of uniform policies at work or school, or requirement to work at certain times or carry out certain tasks. Limitations on an individual’s freedom to manifest his or her religion or belief are only permissible if prescribed by law and necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.”

89. Further Article 9 places positive and negative obligations upon -

a. the negative obligation requiring the state not to interfere in the right of individuals and organizations to hold religious and non-religious beliefs;

b. “positive obligation”, to secure enjoyment of Article 9 rights by ensuring they are protected in law, and there are sanctions if any are infringed, and by preventing or remedying any breach by its own agents or institutions..

90. The European and Human Rights Commission in submissions to the European Court of Human Rights also stated that balancing competing interests is a proper approach to be taken by any court in such matters, and for example that –

a. some forms of manifesting belief such as wearing religious clothing or jewellery are likely to have a limited impact on other people (quite the opposite of what Githua J held (Republic vs. Head Teacher, Kenya High (supra) and

b. an employee may legitimately refuse to accommodate an employee’s religious beliefs where such accommodation would involve discrimination on the basis of other protected characteristics including the protected rights of non-discrimination of others.

91. Counsel relied on several decisions which supported the contrary view such as **SYLBERGERG vs. SADBURY BOARD OF EDUCATION** (supra), where the parents of children enrolled in elementary public schools of Sadbury Board of Education sought a declaration that Section 15(1) of the regulations

is of no force and effect because it violates the guarantee of freedom of religion in Section 2(a) of the Canadian Charter of Rights and Freedoms. The school of the Board would open with the National Anthem, the Lord's Prayer and in some schools, readings from the Scriptures. The Application was dismissed at trial and appealed to the Court of Appeal.

92. The majority of the five Judges allowed the appeal that the applicants are entitled to a declaration that Section 28(1) of the Regulations is of no effect. The majority court held that the recitation of the Lord's Prayer, which is a Christian prayer, and the reading of the Scriptures from the Christian Bible imposes observances upon non-Christian pupils and religious observances as on non-believers. Section 28 imposes on religious minorities a compulsion to conform to the practices of the majority, and the evidence in this case supports this view.

93. However, dissenting Lacourciere J.A. said –

**“Section 28(1) has a secular educational purpose with a religious component. Exercises with a religious component which are aimed at fostering moral principles, encouraging honesty, integrity and good citizenship constitute a worthy educational goal. Section 28 does not seek to compel participation in exercises with a religious component by all public school children for an exemption is granted in broad terms.”**

94. In that case Regulation 28(1) and (10) provided –

**“28(1)a public school shall be opened or closed each school day with religious exercises consisting of the reading of the scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayer.”**

And sub-regulation (10) said -

**(10) No pupil shall be required to take part in any religious education where his parent or where the pupil is an adult, the pupil applies to the Principal of the school that the pupil appeals for exemption of the pupil therefrom.”**

95. Counsel also relied upon the Canadian case of **HER MAJESTY THE QUEEN vs. BIG M. DRUG MART LIMITED [1985]1R.C.S. 295**. The Respondent Big M. Drug Mart Limited, was charged with unlawfully carrying on the sale of goods on Sunday contrary to the Lord's Day Act. The Respondent was acquitted at trial. The Court of Appeal dismissed the appeal. The constitutional question before the court was (i) whether the Lord's Day Act, and essentially Section 4(1) infringed the right to freedom of conscience and religion guaranteed in the Charter; (ii) were justified by Section 1 of the Charter, and (iii) were enacted pursuant to the criminal law (s. 91 (27)) of the Constitution Act, 1867 dismissing the Appeal the court held –

**“The Lord's Prayer Act to the extent that it binds all to a sectarian Christian ideal, works a form of coercion inimical to the spirit of the Charter. The Act gives the appearance of discrimination against non-Christians. Religious values rooted in Christian morality are translated into a positive law binding on believers and non-believers alike. Non-Christians are prohibited from carrying out otherwise lawful moral and non-moral activities. Any law purely religious in purpose which denies non-Christian the right to work on Sunday denies them the right to practice their religion and infringes their religious freedom. The protection of the religion and the concomitant non-protection of others impacts a desperate impact destructive of religious freedom of society.”**

**96. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION vs. ABERCROMBIE & FITCH STORES, INC, (NO. 1486)**, October year 2014, decided July, 2015) concerned the right of a Muslim to wear a headscarf, the Respondent (Abercrombie) refused to hire Samantha Elauf, a practicing Muslim because the headscarf that she wore pursuant to her religious obligation conflicted with Abercrombie's employee dress policy. Whereas the District Court found in favour of the Equal Employment Opportunity Commission, the appellate court reversed that decision. On appeal, Thomas J agreed with the decision of the Tenth Circuit (Appeal Court), that the majority reversed and remanded the decision of the Tenth Circuit.

97. In the Canadian case of **Balvir Singh Multani and Balvir Singh Multani** in his capacity as tutor to his minor **Gurbaj Singh Multani (Applicants vs. Commission Scolaine Murgurite Bourges and Attorney-General of Quebec (respondents) and World Singh Organization** and Canadian Civil Liberties Association, Canadian Human Rights Commission and Ontario Human Rights Commission, (interveners), the superior court of Canada found that the limitation on wearing a "kirpan" a sword by a student professing Sikh religious beliefs was not justified on the grounds of public safety.

98. In **RALHON HUDOYBERGANILA vs. WEBEKISTAN, Communication No. 931/2000 (UN Document CCPR/C/82/D/931/2000 (2004)** cited the decision of the European Court of Human Rights which concluded that –

**“a secular university could restrict women students in the use of a traditional hijab consisting of a scarf covering the hair and neck, because of the “impact” on other women students. See Layla Sahir vs. Turkey No. 44774/93, decided 29 June, 2004. The court asserted that the rights and freedoms of others” and “the maintenance of public order” were implicated because a particular goal might cause persons of the same faith to feel pressure to conform. The European Court observed that it did not lose sight of the fact that extremist political movements in Turkey sought “to impose on society as a whole their religious symbols and conception of a society founded on religious precepts”**

99. In the **QUEEN** on the application of **SARIKA ANGEL WATKINS SINGH (a child acting by Sarita Kumari Singh, her mother and litigation friend) and THE GOVERNING BODY OF ABERDARE GIRLS HIGH SCHOOL, and PHONDDA CYNONTAF UNITARY AUTHORITY [2008] EW HC 1865 (Admin) in Case No. CO/1/435/2007**, the court found the decision to bar a Sikh girl (Sarika) from wearing the **Kara** was not a form of indirect discrimination on grounds of race and religion.

100. Similarly, in **R (on application of Begum by her litigation friend, Rahman), Respondent vs. Head Teacher and Governors of Denbigh High School (Applicants) [2007] UK HL15**, a claim by the Respondent, Shabrina Begum, that her right under Article 9 of the European Convention on Human Rights to manifest her religion or beliefs and had violated her right not to be denied education under Article 2 of the First Protocol to the Convention. The trial court rejected the claims. The Appeal Court reversed the Judge, and accepted the Respondents claims.

101. The Appellants with the support of the **Secretary of State for Education and Skills as Intervener (Interested Party)**, on appeal to the House of Lords, submitted that the trial court was right and the Court of Appeal wrong.

102. The House of Lords allowed the appeal, set aside the orders of Court of Appeal, and restored the orders of the Judge, that the school Head Teacher and Governors of the school had not limited her right under Article 9 of the European Convention on Human Rights to manifest her religion or beliefs, and had not violated her right not to be denied education under Article 2 of the First Protocol to the Convention.

103. However, in a wide ranging judgment in **MEC FOR EDUCATION: KWAZULU NATAL & 3 OTHERS VS. NAVANEETHUM PILLAY & 3 OTHERS (CCT51/06)**, the South African Constitution considered the question of the role of religious and cultural expression in public schools, the nature of discrimination under the **Prevention of Unfair Discrimination Act** (No. 4 of 2000) as well as the extent of protection afforded to cultural and religious rights in public school setting and possibly beyond. At the centre of the storms was a **tiny gold nose stud**. The Constitutional court allowed the appeal to set aside the order of the High Court, and replaced it with (i) a declaration that the decision of the Governing Body of Durban Girls' High School to refuse Sernali Pillay an exemption from its Code of Conduct to allow her to wear a nose stud, discriminated against her unfairly, (ii) an order that the Governing Body (Particulars Withheld) High School in consultation with the learners, parents and educators of the school and within a reasonable time, to effect amendments to the school's Code of Conduct to provide for the reasonable accommodation of deviations from the Code on religious or cultural grounds and a procedure according to which such exemptions from the Code can be sought and granted.

104. The case of the **SECRETARY STATE FOR DEFENCE vs. MRS. DIANA ELIAS** (case No. CI/2005/15489 & CI/2005/1554 concerned interpretation of the Britain's Race Relations Act where the Respondent Diana Elias accused the Secretary of State for Defence of alleged high handedness trivialism insulting and thoughtless behavior towards a venerable citizen, and granted orders quashing the decision of Secretary of State for Defence and dismissed the appeal with costs.

105. The US case of **WILLIE S. GRIGG et al (Petitioners) vs. DUKE POWER COMPANY, (401, US 424, 915, CE 849)** concerned the right to employment for Negroes under Civil Rights Act 1964 – Chief Justice BURGER delivered the opinion of the court, and said –

**“We granted the unit in this case to resolve the question whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment on or transfer for jobs when (a) neither standard is shown to be significantly related to successful performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a long standing practice of giving preference to whites.”**

106. The Race Relations Act of 1964 prohibited any form of limitations, segregations or classification of employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual race, color, religion, sex or national origin.

107. Lastly, both the cases of **Arap Ngok vs. Attorney-General & Another [2005]eKLR** and **Federation of Kenya Women Lawyers Kenya (FIDA K) & 5 others vs. Attorney-General & Another [2011]eKLR** concern the interpretation of the Constitution a subject I already touched upon at the beginning of this long Judgment.

## **DETERMINATION**

108. The Amended Petition is premised upon the provisions of Articles 2(1), 2(4), 3(1), 8, 10, 19, 20, 21, 24, 43(1), 47(1), 53(2) and 258 of the Constitution of Kenya 2010.

109. I will now consider in brief each of these provisions in relation to the Petitioner's claims of violation of the rights through discrimination and denial to her daughter of the right to manifest her Islamic faith. The opening sentence to the preamble to our constitution acknowledges the supremacy of the

**“almighty God”**, and ends with the supplication **“God Bless Kenya”**. The first stanza of our **National Anthem** invokes the name of **“God of all creation”**. The Oath of office of all state officers prescribed under Articles 74, 141(30, 148(5) and 152(4) (in respect respectively of the President, Deputy President, Cabinet Secretary) and with the words, **“So Help me God”**. The same procedure applies to oaths by members of Parliament (MPs and Senators), Judges and holders of independent offices. So the Republic of Kenya is a state rooted in the belief of God or Supreme Being – whatever individuals perceive HIM to be.

110. Article 2(1) declares that the Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government. Article 2(4) provides that any law, including customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. And Article 3(1) declares that every person has an obligation to respect, uphold and defend the Constitution.

111. I see no controversy in those Articles. Article 8 is relevant to the determination of the Petition. It declares that **“there shall be no state religion”**. This Article as already stated has to be read along with Article 32 (Freedom of conscience, religion, belief and opinion) and Article 32(4) says –

**“a person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion.”**

112. In **Bahir Singh Multani and Bahir Singh Multani vs. Commission Scolaire Marguerite Bourgeois and Attorney-General of Quebec** (supra), the Supreme Court of Canada *inter alia* said –

**“This court has on numerous occasions stressed the importance of freedom of religion. For the purpose of this case, it is sufficient to reproduce the following statement from Big M Drug Mart, at page 336 – 337 and 351 –**

**“The essence 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 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.**

**...The freedom of religion consists of the freedom to undertake practices and harbor beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or sincerely undertaking in order to connect with the divine or as an affirmation of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.”**

113. Drawing from the same font, the same court in **Syndicate North Crest vs. Anselem [2004] 2SCR 551, 2004 SCC.47** said that in order to establish that his or her freedom of religion has been infringed, the claimant must demonstrate –

1. he or she sincerely believes in a practice or belief he has a nexus with religion, and
2. that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial,

with his or her ability to act in accordance with that practice or belief.

114. The religious belief must be asserted in good faith and must not be fictitious, capricious or an artifice. In assessing the sincerity of the belief, a court must take into account inter alia the credibility of the testimony of the person asserting the partisan belief and the consistency of the belief with his or her other religious practices.

115. In the case at hand, the Petitioner's daughter, a student among the 38 students suspended for disobeying school rules, turned around, and pleads that her daughter's right to profess her mother's Islamic faith is being violated by being "**forced**" to attend the "Catholic Mass" which she pleads is not a public prayer but a "**ritual**". The facts from the Replying Affidavit on behalf of the First Respondent do not support this claim. On the contrary, the Petitioner's daughter and others who profess the Islamic faith are afforded a separate room from which they may exercise and profess and worship according to their faith. In addition students professing the Islamic faith are afforded special assistance and a school coach to travel to Voi Town to celebrate the end of the fasting period of Ramadhan. It seems to me that a claim of religious discrimination is a subterfuge for promoting an agenda alien to the morals and traditions of the school sponsor which is protected by Section 11 of the Basic Education Act, 2013.

116. Articles 22 and 23 are procedural provisions of **locus standi** relating to the enforcement of fundamental rights and freedoms, by every person who claims that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The Article also grants to the Chief Justice power to make rules providing for initiation of court proceedings. And Article 23 grants the High Court special jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.

117. Article 10 (national values and principles of governance) and Article 19 (which declares that the Bill of Rights is an integral part of Kenya's democratic state, and is a framework for social, economic and cultural policies, the national values and principles of governance which include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people). The School Rules and Regulations, attached to the Replying Affidavit of **Hassan Mohamed**, the Secretary to **National Cohesion and Integration Commission** deal with standard minimum conditions for the management of any public school. It comprises of the role of the sponsor, while the Rules declare that the school is under the patronage of the Catholic Archdiocese of Mombasa, and the ethos of the Catholic tradition, it declares –

**'While all other religious traditions are equally cherished, we do not tolerate any religious practices which cause a breach of the school rules, indiscipline or the practice of which cause fear in others. We do not allow our school as a centre for proselytization nor the platform for the denunciation of religion of others, by any group however well-meaning they may be.**

**High level of discipline, e.g. silence, should be maintained throughout the Mass celebration.**

### **On religion**

**All students have opportunity to participate (practice") their faith, Christian students meet for prayers daily. On Sunday, all Christians attend Mass in the Mission Church and Muslims attend prayers separately in one classroom. All Christian students attend Tuesday and Thursday Mass in the Mission Church. As a Catholic sponsored school ALL FEAST DAYS are mandatory.**

**Any religious person who wants to meet other faithfuls must seek permission from the Parish**

**Priest.”**

118. The other sections of the School Rules and Regulations deal with the mundane requirements of students and school management, uniform, make-up and jewellery, conduct of students in class rooms, dormitory, routine, wake-up time, morning preps, prohibited materials/equipment/substances, (including music apparatus, special rooms which are accessible under supervision of a teacher – science laboratories – compute laboratory, E-learning room, cookery and needle-room rooms, learning and reporting back to school). Telephone calls, payment of school fees, visitors, cleaning students canteen, Tea-shop allowed foods stuff in school and out of bounds quarters and consequences or sanction for breach of these rules.

119. The Secretary to the National Cohesion and Integration Commission strangely described these Rules and Regulations as being based on **archaic laws and practices which had no place in a modern Constitution**. I say “**strangely**” because the Rules and Regulations of Bura Girls' High School conform with national values and principles of governance under Article 10 of the Constitution, and the Basic Education Act 2013.

120. The Petitioner also complained about discrimination contrary to Article 27 of the Constitution. This Article provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. The Petitioner alleged that their right cannot be abridged or limited except as provided under Article 24, on the grounds –

1. the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom;
2. in the application of Muslim law before the Kadhis Courts to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.

121. I have already observed that there was and there is no discrimination in the Rules and Regulations of Bura Girls' High School.

122. Reliance was also placed upon the provisions of Article 56 regarding the minorities and marginalized groups. Article 56 provides that the state shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups, including provision of special opportunities in educational and economic fields. The fact that the Petitioner's child was admitted to a National School, sponsored by a Christian denomination, or in this case, the Catholic Church is testimony to the state's affirmative action to ensure that the Muslim children have access to the best available education opportunities in the country. A claim to the contrary is not supported by any facts.

**DISPOSITION**

123. Having explored the relevant provisions of the Constitution of Kenya 2010, and having examined decision from comparative jurisdictions including the UK, USA, Canada and South Africa, the picture revealed is that there is no uniform opinion on how to treat cases of alleged discrimination on religious and cultural grounds. The cases concerning individuals (a pupil Shalima Begum with the “**hijab**” in the UK), Pillay (in South Africa and the golden nose stud), discrimination in the work place (R vs. Big M. Mart Limited in Canada), Diana Elias (in the UK – discrimination on the grounds of race), Willie S. Griggs (in the US on discrimination in job hiring), the right not to attend meetings on Saturday by Seventh Day Adventist – (**Gekara v. AG et al**). All these cases involve individuals whether pupils, mothers, or retirees, and occur at a particular time, and a particular place. Each of them was resolved on their particular facts

and circumstances. In cases of dress the courts did not find it fit to rule whether an Islamic dress or any feature of Islamic dress should or should not be permitted in the schools concerned. The courts found that those would be inappropriate questions for the court to answer. I humbly agree with that approach.

124. In most schools in Kenya, the School Principals or Head Teachers and their respective Boards of Management believe that school uniform play an integral part in securing high and improving school standards, securing the needs of diverse communities, promote a positive sense of communal identity and avoid manifest disparities of wealth and style.

125. I agree entirely with the above approach, in particular in a county such as ours with diverse cultures, and great disparities of wealth, a standardized approach in schools with such mundane things as school uniforms would maintain a common identity among all students irrespective of the origin of a particular student or his or her religious affiliation or faith.

126. On the right to manifest one's faith or religion in a school Section 27 of the Basic Education Act 2013 prescribes the role of the sponsor and specifically Section 27(d) provides for one of the roles –

**“maintenance of spiritual development safeguarding the denomination of religious adherence of others.”**

127. In majestic and poetic speech in **GITHUNGURI vs. REPUBLIC [1986]1KLR 1**, Madan CJ said –

**“We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We believe we are speaking correctly and not for the sake of being self-laudatory when we say the Republic of Kenya is praised and admired by other people and other systems for the independent manner in which justice is dispensed by the courts of this country. We also speak knowing that it is our duty to ask ourselves what is the use of having a constitution if it is not honoured and respected by the people. The people will lose faith in the constitution, if it fails to give effective protection to the fundamental rights. The people know and believe that to destroy the rule of law you destroy justice and they are also destroying the society.”**

128. In this Petition, the Petitioner has not established any ground for the reliefs she seeks. It is sad to say, but is necessary to say so, that this is one of those Petitions that serve no useful purpose, and that it was supported by the National Cohesion and Integration Commission is a little strange. The only purpose it serves is to raise questions as to whether it had any ulterior motives. I however find no such ulterior motive, but it had no merit at all.

129. In the circumstances, it is dismissed with a direction that in light of its nature, being a public interest litigation, each party shall bear its own costs.

129. It is so ordered.

**Dated, Signed and Delivered at Mombasa this 29<sup>th</sup> day of November, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**



In the presence of:

No Appearance for Petitioner

Mr. Ngari holding brief Miss Lutta for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents

No Appearance for 1<sup>st</sup> Respondent

No Appearance for Interested Party



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