



**Were & another v Cabinet Secretary, Ministry of Education & 2 others;
Abuto (Interested Party) (Petition 236 of 2019) [2023] KEHC 21854 (KLR)
(Constitutional and Human Rights) (15 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21854 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 236 OF 2019
HI ONG'UDI, J
AUGUST 15, 2023**

BETWEEN

SILAS SHIKWEKWE WERE 1ST PETITIONER

ONESMUS MBOYA ORINDA 2ND PETITIONER

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

EDGAR ABUTO INTERESTED PARTY

Homeschooling system's potential for adoption was dependent on its foundations being anchored on minimum educational standards set by the National Government

The petition sought among other orders; a declaration that homeschooling did not contravene or infringe the right to education and the right to free and compulsory basic education. The court held that for the homeschooling system's potential to be adopted in Kenya's domestic law, its foundations must be anchored on the set minimum educational standards as set by the National Government. The court further held that the parents' right to select a child's education was not absolute. It was capable of limitation as provided under the article 24 of the Constitution.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – right to education – use of homeschooling as a system of education - what was required for the homeschooling system's potential to be adopted in Kenya's domestic law - of Kenya, 2010, articles 2(5) and (6), 53 and Fourth Schedule, paragraph 15.



Jurisdiction – jurisdiction of the High Court – geographical jurisdiction - whether the High Court at Nairobi had the geographical jurisdiction to determine a petition whose cause of action arose in a different county but which widely challenged the provisions of an Act of Parliament - of Kenya, 2010, article 165.

Constitutional Law – constitutionality of statutes - principles in determining the constitutionality of statutes - what were the principles that guided courts in determining the constitutionality Acts of Parliament.

Constitutional Law – fundamental rights and freedoms – limitation of fundamental rights and freedoms – limitation of parents’ right to select a child’s education - whether parents’ right to select a child’s education was absolute - of Kenya, 2010, article 24.

Words and Phrases - homeschooling – definition of homeschooling – to teach school subjects to one’s children at home - .

Words and Phrases - homeschooling – definition of homeschooling – the practice of educating your child at home rather than in a school - Collins Dictionary.

Brief facts

The petition sought among other orders; a declaration that homeschooling did not contravene or infringe the right to education and the right to free and compulsory basic education; a declaration that section 43(2) of the was unconstitutional to the extent that it did not recognize or include “home” as a basic educational institution; and a declaration that section 30(2) and 31(2) of the were unconstitutional to the extent that it criminalized the act of parents who failed to take and/or admit their children to “school” as defined under the . The premise of the petitioners’ case revolved around the homeschooling system. The crux of the petition challenged the provisions of the which were stated to be in violation of the petitioners’ fundamental rights and freedoms to subscribe to the homeschooling system as a means of education for their children. The petitioner claimed that he was arrested and charged for the offense of infringing on a child’s right to education. The petitioner further claimed that every parent had a right to choose the kind of education that shall be given to their children. The petitioner deposed that the requirement that a parent must admit a child at a school and the classification of a school as either being a private or public education institution as registered under the , discriminated against parents and children who opted to pursue homeschooling education.

Issues

- i. What was required for the homeschooling system’s potential to be adopted in Kenya’s domestic law?
- ii. Whether the High Court at Nairobi had the geographical jurisdiction to determine a petition whose cause of action arose in a different county but which widely challenged the provisions of an Act of Parliament.
- iii. What were the principles that guided courts when determining the constitutionality of Acts of Parliament?
- iv. Whether the parents’ right to select a child’s education was absolute.

Relevant provisions of the Law

, No 14 of 2013

Section 30 - Compulsory primary and secondary education

(2) *A parent who fails to take his or her child to school as required under sub-section (1) commits an offence.*

Section 31 - Duty of parents and guardian

1. *It shall be the responsibility of every parent or guardian to present for admission or cause to be admitted his or her child, as the case may be, to a basic education institution.*
2. *Where a parent or guardian defaults in the discharge of his or her responsibility under sub-section (1), such a parent or guardian shall be deemed to have committed an offence and is liable to fine not exceeding one hundred thousand or to a period not exceeding two years or to both.*
3. *A parent or guardian shall have the right to participate in the character development of his or her child.*



Held

1. The jurisdiction of the High Court flowed from article 165 of the , which did not categorize it geographically. The argument that the instant court lacked geographical jurisdiction as the cause of action occurred in Butali in Western Kenya, and ought to have been filed at the High Court at Kakamega would only have been sustained if the issue was in relation to the petitioners claim against the 2nd respondent only.
2. The petitioners' grievances against the 1st and 3rd respondents arose from the 2nd respondent's action and were widely against provisions in the which they claimed were in violation of the and other universal declarations. The issue of geographical jurisdiction did not therefore apply.
3. The 2nd respondent, the Director of Public Prosecutions (DPP) derived his powers from article 157 of the which was operationalized by the , 2013(ODPP Act). For the Office of the Director of Public Prosecutions to be able to perform its functions enjoyed independence as provided under section 6 of the . Once the police established that a crime had been committed by any person through their investigations the DPP was required to make the decision whether or not to institute criminal proceedings based on the material before him as guided by the law and principles set out under article 157(11) of the .
4. The courts would not be quick to interfere with the mandate of the DPP which had been carried out within the confines of the law. The DPP's action was stated to be in line with the dictates of the law that was section 31 of the . As provided under section 6(c) of the , the DPP was subject to the law. Section 31(2) of the having not been declared unconstitutional was lawful and the DPP was bound to act as directed by the law, upon receiving sufficient evidence of disobedience. The 1st petitioner other than stating that they were arrested under section 31(2) did not demonstrate other factors that were present to indicate neglect of the respondents to uphold their duty or violation of their constitutional rights during the process.
5. The 1st petitioner did not discharge the burden to prove that the DPP's exercise of power as prescribed by law was unlawful and unconstitutional and as a result violated their constitutional rights. The arrest, detention, investigations and institution of criminal proceedings in the matter could not be condemned as it was both procedural and lawful.
6. It was imperative that the spirit of the presided and permeated the process of judicial interpretation and judicial discretion. The court was alive to the dictates under article 259 of , which charged it with the duty to interpret the in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the bill of rights in a manner that contributed to good governance.
7. In the interpretation of an Act of Parliament a number of principles had been established that guided courts in making the declaration of constitutionality or lack of a statute as follows:
 1. The general presumption that Acts of Parliament were enacted in conformity with the .
 2. A statute should be construed according to the intention expressed in the statute itself.
 3. The should be given a purposive and liberal interpretation as provided in on article 259(1) of .
 4. In order to examine constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration was the object and reasons as well as legislative history of the statute. That would help the court in arriving at a more objective and justifiable approach. There was no evidence of what system and standard they subscribed to teach their children, the academic curriculum and grading system for each stage was not made known, documentation of the various stages of the children's grades and progress were not shared. Further the petitioners did not disclose how such parents and guardians were qualified to teach their children in those systems and whether they held such necessary qualifications to do so. The guidelines and regulation procedures they complied with were also not stated.
8. The recognized the right to education under article 43(1)(f). One of the children's rights under article 53(1)(b) of the made known that a child had a right to free and compulsory basic education. Under article 53(1)(e) the responsibility of a parent was to care, protect and provide for the child. Parents under the were not recognized as education providers in the setting of basic education and neither were they mandated to do so.



The made known that that was a function and responsibility of the National Government as provided under paragraph 15 of the Fourth Schedule to .

9. In essence the making of education guidelines was a preserve of the National Government being one of its mandates. The court by virtue of the doctrine of separation of powers could not make a determination on the appropriate education policies as that was within the Government's arm.

10. The court's duty in the framework under article 20(3) of the was that in applying a provision of the Bill of Rights, a court shall develop the law to the extent that it did not give effect to a right or fundamental freedom; and adopt the interpretation that most favoured the enforcement of a right or fundamental freedom.

11. An overview of the showed that it did not provide for education of a child through their parents or prescribe its alternative forms such as homeschooling. Even in the enactment of the that tenet was not considered as a form of education. The under article 2(5) and (6) provided that as the general rules of international law shall form part of the law of Kenya and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the .

12. The provisions of international law with reference to education of a child and its various aspects were applicable in Kenya as part of its law. Article 21(1) of placed an obligation on the Government to ensure persons enjoyed the full extent of their rights as envisaged under the Constitution and international law.

13. Under international law alternative forms of education other than what was prescribed in the were provided for such as the homeschooling system. By and of itself, homeschooling was a plausible education system. However, from reading the various international provisions, any system that purported to offer education to a child must conform to the minimum educational standards as may be laid down or approved by the State. That requirement was in harmony with paragraph 15 of the Fourth Schedule to the in relation to the National Government's obligation. An education system must be in line with the rules and guidelines set and approved by the State. That was the legal position both domestically and internationally.

14. For the homeschooling system's potential to be adopted in Kenya's domestic law, its foundations must be anchored on the set minimum educational standards as set by the National Government. To prove that the impugned provisions were unconstitutional the petitioners bore the onus to show that the homeschooling system met that threshold.

15. The parents' right to select a child's education was not absolute. It was capable of limitation as provided under the article 24 of the . The limitation in that instance was that a parent under international law which applied also in Kenya could provide homeschooling as long as the same was in line with the Government's educational standards for that system. Manifestly the homeschooling system just like the other formal systems must be regulated by the Government.

16. A perusal of the material placed before the court revealed that while the petitioners put up a spirited fight for the homeschooling system a number of things were a miss; the petitioners despite having used the system for a while did not show their attempt to engage the various Government agencies such as the Ministry of Education to get approval and guidance of a standard they could apply or proposal to the National Government to amend the laws in favour of the homeschooling system. That was not a matter that the court would come up with to issue the orders and declarations the petitioners sought as it would result in an overhaul of the education system without public participation.

17. The petitioners did not bother to present or lay any factual basis of how they educated their children. It was a fundamental principle of law that a litigant bore the burden (or onus) of proof in respect of the propositions he asserted to prove his claim. Court decisions could not be made in a factual vacuum. To attempt to do so would trivialize the and inevitably result in the improper use of judicial authority and discretion.

18. As per the principles of interpretation, every Act of Parliament and law must pass through the test of constitutionality which was a formal test of rationality and harmony with the principles. The impugned provisions of the were in line with the principle that the State must prescribe minimum educational standards



for Kenya. That mandate was not a preserve of parents. The impugned provisions were constitutional and consistent with , unless amended through a legal process.

Petition dismissed with costs.

Citations

Cases

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) 1272 — Mentioned
2. *Council of County Governors v Attorney General & another* Constitutional Petition 56 of 2017; [2017] KEHC 6395 (KLR) — Explained
3. *Gesame, James Ondicho v Attorney General & others* Petition 376 of 2011; [2012] KEHC 3308 (KLR) — Mentioned
4. *Kabu, John & 3 others v Kenya National Examination Council & 2 others* Petition 15 of 2011; [2011] KEHC 1696 (KLR)— Mentioned
5. *Kathenge, Justus Mwenda v Director of Public Prosecutions & 2 others* Petition 372 of 2013; [2014] KEHC 7714 (KLR) — Explained
6. *Kenyatta, Uhuru Muigai v Nairobi Star Publications Ltd* Petition 187 of 2012; [2013] KEHC 6084 (KLR) — Mentioned
7. *Lalji, Diamond Hasbam & another v Attorney General & 4 others* Civil Appeal 274 of 2014; [2018] KECA 856 (KLR) — Explained
8. *Macharia & another v Kenya Commercial Bank Ltd & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 — Explained
9. *Matiba v Attorney General* Miscellaneous Application No 666 of 1990; [1990] KLR 666 — Mentioned
10. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) — Explained
11. *Murambi, Isaac Robert v Attorney General & 3 others* Constitutional Petition 3 of 2016; [2017] KEHC 3034 (KLR) — Explained
12. *Mwau, John Harun v Peter Gatrow & 3 others* Civil Appeal 112 of 2014 — Mentioned
13. *Ngayu, Cecilia Karuru v Barclays Bank of Kenya & another* Civil Case 17 of 2014; [2016] KEHC 7064 (KLR) — Mentioned
14. *Ngugi, Kiriro Wa & 19 others v Attorney General & 2 others* Petition 254 of 2019; [2020] KEHC 8819 (KLR) — Explained
15. *Otieno, Leonard v Airtel Kenya Ltd* Petition 218 of 2017 — Followed
16. *Oyugi, Edward Akong'o & 2 others v Attorney General* Constitutional Petition 441 of 2015; [2019] KEHC 10211 (KLR) — Explained

Regional Court

Ndyanabo v Attorney General [2001] EA 495— Explained

United Kingdom

William and others v Spautz (1993) 2 LRC 659 — Followed

United State

Meyer v State of Nebraska 262 US 390 (1923) — Followed

Statutes

1. Basic Education Act (cap 211) sections 2, 7(1); 30(2); 31(2); 43(2); — Interpreted
2. Children Act, 2022 (cap 141) section 20 — Interpreted
3. Constitution of Kenya articles 2(1); 3(1); 10(1)(2); 19(2); 20(2)(4); 21(2); 24, 27(1); 32,33(1); 43, 53, 55 — Interpreted
4. Office of the Director of Public Prosecutions (cap 6B) sectionS 5(1)(b); 6(c); — Interpreted



Texts

Merriam, MW., (Ed) (2004), *Merriam Webster Dictionary* (Massachusetts: Merriam-Webster Mass Market)

International Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1990
2. Convention on the Rights of the Child (CRC), 1989 article 29(2);
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1976 articles 13, 14
4. United Nations Convention on the Rights of the Child (UNCRC), 1989 section 18(2);
5. Universal Declaration of Human Rights (UNDHR), 1948 articles 11(4); 26(3);

Advocates

None mentioned

RULING

1. The petition dated June 17, 2019 was filed under articles 2(1), 3(1), 10(1) & (2), 19(2), 20(2) & (4), 21(2), 24, 27(1), 32, 33(1), 43, 53 and 55 of the Constitution for the alleged violation of articles 10, 27, 43, 53(1)(b) and 55 of Constitution. The petitioners seek the following orders:
 - a. A declaration that homeschooling does not contravene or infringe the right to education as enshrined under article 43(f) of Constitution.
 - b. A declaration that homeschooling does not contravene or infringe the right to free and compulsory basic education as enshrined under article 53(1)(b) of Constitution.
 - c. A declaration that the definition of “school” under section 2 of Basic Education Act should include “home” as an avenue for educating a child.
 - d. A declaration that the definition of “basic education” under section 2 of the Basic Education Act should include “home” as an avenue for offering basic education.
 - e. A declaration that section 43(2) of the Basic Education Act is unconstitutional to the extent that it does not recognize or include “home” as a basic educational institution.
 - f. A declaration that section 30(2) and 31(2) of the Basic Education Act are unconstitutional to the extent that it criminalizes the act of parents who fail to take and/or admit their children to “school” as defined under the Act.
 - g. An order of *mandamus* be issued directing the 1st and 3rd respondents to, within a period be specified by the court to come up with policies, rules and/or guidelines to harmonize the provisions of the Basic Education Act so as to include homeschooling as a form of education that meets the threshold of the right to education as enshrined in Constitution.
 - h. Costs of and incidental to this petition.

The Petitioners’ Case

2. The petitioners’ case is supported by the 1st petitioner’s supporting affidavit of even date. The premise of the petitioners’ case revolves around the homeschooling system. It is asserted that the and



international law grants a parent the right to choose and determine in the best interest of the child the forum on which his or her child receives education. The crux of the petition therefore challenges the provisions of the *Basic Education Act* which are stated to be in violation of the petitioners' fundamental rights and freedoms to subscribe to the homeschooling system as a means of education for their children.

3. The 1st petitioner commenced by informing that he is one of the parents in Kenya who utilize the homeschooling system to educate his children. He deposed that on February 18, 2019, he was arrested and charged under Butali Criminal Case No 133 of 2019 (*Republic v Silas Shikwekwe Were*). The offense was infringing on a child's right to education contrary to section 7 as read with section 20 of the *Children's Act*. The matter is still pending hearing and determination.
4. He deposed that his three children were also arrested, detained and arraigned in court under *Butali Children Case No 5 of 2019 (Republic v Ashleigh Silus) and Butali Children Case No 6 of 2019 (Republic v Cusp Were)*. He averred that the arrest was illegal and in violation of the children's rights. The children were released to the 1st petitioner on the condition that he would enroll them in a school, which he did.
5. The petitioner brings this petition on the basis of a number of legal principles. First the guarantees that every person has a right to education under article 43(1)(f) of *Constitution*. He noted while relying on international law, article 26(3) of the *Universal Declaration of Human Rights (UDHR)* that every parent has a right to choose the kind of education that shall be given to their children. As such article 11(4) of charter requires state parties to respect the duties of the parents to choose their children's schools other than those established by public authorities, which conform to such minimum standards as approved by the state.
6. He deposed consequently that the requirement that a parent must admit a child at a school and the classification of a school as either being a private or public education institution as registered under the *Basic Education Act*, discriminates against parents and children who opt to pursue homeschooling education. Further that the criminalization of non-enrollment of a child in a school unreasonably limits the scope of what constitutes education and a parent's right to determine the child's education forum.
7. He further deposed that the non-recognition of Homeschooling as a form of education contravenes the rights of children whose parents' opt for this forum. He pointed out that this also violated their right to freedom of conscience, religion, belief and opinion as guaranteed under article 32(1) of *Constitution*.
8. The 1st petitioner averred that there was no conclusive, empirical evidence and/or guarantee that the enrollment of a child in school inculcates quality education, morals, values and principles in the child or that Homeschooling compromises a child's right to education or undermines constitutional principles.
9. He averred that the homeschooling education system which is a child's right to education can be realized progressively. He noted that the State was obligated under article 55 of the to adopt laws that advance the progressive realization of the rights enshrined under article 43 of *Constitution*.
10. The petitioners are therefore challenging the provisions of section 2 of the *Basic Education Act* with reference to the definition of a school and basic education, and, section 30(1) which requires parents to enroll in a school as defined in the Act in violation of article 32(2) and 33(a) of *Constitution*. This is same to section 20 of the *Children's Act* as read with section 30(2) and 31(2) of the Act. It was noted that section 43 that requires a school to be either public or private violates a child's right to acquire



education at any forum. To this end, he deposed that unless his petition is allowed, their rights under articles 25, 47, 48 and 50 of the will be contravened.

The 1st and 3rd Respondents' Case

11. They filed thirty eight (38) grounds of opposition dated May 10, 2021 which are summarized as follows:
 - i. This court lacks the geographical jurisdiction to entertain this petition which should have been filed in Kakamega High Court.
 - ii. Homeschooling is not provided for in the laws of Kenya. Children are cared for under articles 21(3) & 53(2) of Constitution, the Children's Act and the Basic Education Act. If there is need for any amendment the proper procedure should be followed.
 - iii. The petitioners have misunderstood, misapplied, and misapprehended the right to freedom of expression under article 33 of Constitution. They have also misapprehended and misunderstood the rights of parents / guardians to participate in the development of children section 31(3) of the Basic Education Act. They have also failed to appreciate the role of government in the school education.
 - iv. The petitioners have misapprehended the provisions of the *vis-a-vis* those of the Universal Declaration of Human Rights (UDHR), the African Charter on the Rights and Welfare of the Child (ACRWC). They also have no expertise in the area of homeschooling to justify their allegations. No evidence was adduced to show any expertise on this. It is an offence under section 7(1) of the Basic Education Act and section 20 of the Children's Act to deprive a child of education as provided by the state.
 - v. The petitioners have failed to show that the setting of minimum standards for education in the country by the state is discriminatory. The petition has failed to take into account the history and purpose for which Constitution, and the laws were put in place to foster the right to education. They have not shown their involvement in their children's homeschooling.
 - vi. That the orders sought seek to have the court interfere with the mandate of the other arms of government in creating policy and law governing and in protection of the basic education of children.
 - vii. That the petitioners have failed to set out their case with specificity. It's full of glaring conjectures hence is an abuse of the court's due process. Not all rights and fundamental freedoms enjoyed under the Bill of rights are absolute in nature.

The 2nd Respondent's Case

12. He filed the grounds of opposition dated February 8, 2022 namely:
 - i. That the 2nd respondent's mandate is set out in article 157 of Constitution. Further that the decision to prefer criminal charges was based on the evidence available, and which was sufficient. There was no malice involved.



- ii. The children were recommended by the prosecution for release on condition that he would have them enrolled in school. The court at Butali issued the release order and terms on March 1, 2019.
- iii. All that the prosecution did was within the law and there was no violation of the same. That the petitioners have failed to show how the 2nd respondent acted *ultra vires* his mandate in this matter.

The Interested Party's Case

13. The interested party, filed his replying affidavit dated July 11, 2022 where he averred that article 18(2) of the *United Nations Convention on the Rights of the Child* (UNCRC) provides that state parties are required to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
14. Further that the *African Charter on the Rights and Welfare of the Child (ACRWC)* recognizes that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security. He averred that the home-schooling is a system of education where parents teach their children an academic curriculum at home. Further that home-schooling system engages parents, teachers or licensed instructors to impart academic knowledge and the set of desired beliefs.
15. In view of this he informed that he has homeschooled his children using the structured American curriculum. His first child has been homeschooled from grade one to grade nine and the second child is currently in grade two. He deposed that the system has enabled him to continue teaching his children in an uninterrupted manner. He informed that the homeschooling system is legalized in countries such as South Africa and Thailand.
16. He averred that the homeschooling system has offered numerous benefits. A few are that it allows him to cater for the best interests of his child, allows his children to be directly involved with their community since it allows generous time for service, and allows efficient and effective learning due to a low student-teacher ratio and reduction in wasted time. He stated that the family is the best foundation for social development, values impartation and spiritual development.
17. He deposed that these sentiments were also shared by other parents namely Jeff Oganga Katieno and Louis Shitandi who are also homeschooling their children. He in conclusion urged this court to grant the orders sought so as to stop violation of the petitioner's fundamental rights and freedoms.

The Parties Submissions

The Petitioner's submissions

18. The petitioner through the firm of Steve Justice Advocates LLP filed written submissions and a list of authorities both dated October 21, 2022. He identified six issues for determination. Counsel begun by giving a background of the homeschooling system and its elements. Counsel noting that article 43(1) (f) of the is the bedrock of the right to education submitted that the emphasizes the importance of realization of the right to education and provides under article 53(1)(b) of the that every child has the right to free and compulsory basic education.



19. Further that the best interests of the child should be upheld at every instance. In view of this he submitted that homeschooling is in line with the rights of the child to education as enshrined under articles 43, 45 and 53 of Constitution. In support he relied on articles 13 and 14 of the ICESCR and the case of John Kabu and 3 others v Kenya National Examination Council and 2 others (2011) eKLR which emphasized the application of international convention provisions on education in Kenya.
20. Counsel submitted that paragraph 29 of general comment 13 to article 13(3) of the ICESCR provides that it is the liberty of parents and guardians to choose education system other than public schools for the children provided the schools conform to such minimum educational standards and must be laid down or approved by the State. Additional reliance was placed on article 18(2) of the UNCRC, article 11(4) of ACRWC and the cases of Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017] eKLR; Meyer v State of Nebraska, 262 US 390(1923) and Pierce v Society of the Sisters of the Holy Names of Jesus, 268 US 510 (1925).
21. On the second issue, counsel submitted that section 2, 30(2), 31(2) and 43 of the Basic Education Act, 2013 are unconstitutional for their failure to recognize home as a place for offering education and homeschooling as a system of education enhancing the right to education and so limits the rights of the children. He argued that these sections define school, basic education and institution in a narrow manner. In effect section 30(2) of the Act makes it a criminal offense not to take a child to a school as defined by the Act.
22. He further submitted that the impugned sections limit the right of education of the 1st petitioner and other children by failing to recognize homeschooling system as an educational system. The sections further limit the rights of parents to choose the content and place of education for their children. This he contended is a violation of article 24 of Constitution.
23. On the fifth issue, counsel submitted that article 53 of the states that every child has a right not to be detained. The detention of his children was thus unreasonable and unnecessary since it was not a measure of last resort. Further that their arrest in view of homeschooling violated their right under article 50 of Constitution. Equally, that the institution of criminal proceedings pursuant to section 20 of Children Act and section 31(2) of the Basic Education Act is inconsistent with Constitution.
24. On whether the petitioners are entitled to the reliefs sought, he submitted that having proved their case they were entitled to the same. He closed by stating that it is trite law that costs follow the event as stated in Cecilia Karuru Ngayu v Barclays Bank of Kenya and another [2016] eKLR.

The 1st, 2nd and 3rd Respondents Submissions

25. Senior Principal Prosecution Counsel, Peris Gathu and State Counsel Eve Mbede on behalf of the respondents filed identical written submissions dated January 10, 2023 and March 10, 2023. They identified two issues for determination.
 - I. Whether the criminal case against the petitioners was founded on violation of rights
 - II. Whether the petitioners' constitutional rights were violated.
26. Counsel begun by submitting that, the petition had not disclosed any factual or legal basis for the orders sought. This is since constitutional mandate and scope of the 2nd respondent is stipulated under article 157 of the which allows him to make the decision to prosecute persons in respect of an offence committed. She relied on the case of Hon James Ondicho Gesame v Attorney General & others (Nairobi Petition No 376 of 2011) which reiterated and affirmed this position.



27. She pointed out that the only qualification to this was whether or not the material gathered met the evidential and public interest threshold as provided in the and the National Prosecution Policy. In that regard, counsel submitted that the 1st petitioner's failure to take his children to school necessitated his arrest and charging. Moreover that he failed to adduce evidence to support his allegation that he was Homeschooling the children.
28. On the second issue, counsel submitted that the petitioners had failed to prove with the requisite degree of precision, the specific rights which were violated, the manner in which they were violated and the persons against whom such a complaint of violation has been made as required under the principle set under in the cases of: (i) *Anarita Karimi Njeru v the Republic* (1976 -1980) KLR 1272. (ii) *Matiba v Ag* (1990) KLR 666 (iii) *Leonard Otieno v Airtel Kenya Limited* (2018) eKLR Counsel further relied on the Australian case of *William and others v Spautz* (1993) 2 LRC 659 where it was held that courts should refrain from exercise of their jurisdiction to try persons charged with criminal offences unless the interests of justice demand it.
29. Counsel added that a fundamental right can be limited under article 24(1) of the as long as it is reasonable and justifiable in an open and democratic society. She further argued that the jurisdiction of this court ought to only be invoked when there is no other recourse for disposing of the matter as held in the cases of *John Harun Mwau v Peter Gatrow & 3 others* (2014) eKLR; *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* (2013) eKLR, among many others.
30. On the right to basic education counsel submitted that the *International Covenant on Economic, Social and Cultural Rights* recognizes the right to education as a fundamental right and its importance captured in general comment number 11 on plans of action for primary education (1999). She confirmed that this right is also protected under various international conventions and articles 43(1) (f) and 53(1)(b) of *Constitution*. She submitted that the 1st petitioner had failed to take his children to school which is a criminal offence. It's her submission that the respondents had not violated the petitioners' constitutional rights.

The Interested Party's Submissions

31. The interested party filed written submissions dated January 10, 2023 through the firm of Begis Law Offices and Chambers Advocates. Counsel commenced by submitting that article 43 of the provides that every person has the right to education. Further that the Committee on Economic, Social and Cultural Rights adopted General Comment 13 outlines the features of basic education as availability, accessibility, acceptability, and adaptability. He stated that these features make clear the offensive nature of the *Basic Education Act* in relation to what is defined as school. He added that certain essential needs which were not available in the recognized institutions for basic learning were offered in the homeschooling system.
32. Counsel while relying on the Special Rapporteur Report on the right to education noted that all persons, including those within the realm of education, are entitled to the right to privacy (International Covenant on Civil and Political Rights, article 17) and, in accordance with article 16 of the Convention on the Rights of the Child, no child is to be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, or to unlawful attacks on his or her honour and reputation. Thus the legal strictures making it an offence to educate children outside the formal school systems which lead to arrests of both parents and children are a concern to the homeschooling community in Kenya and a violation of human rights principles.
33. In support counsel cited the case of US Supreme Court *Meyer v State of Nebraska*, 262 US 390 (1923) where it was held that rights guaranteed by the may not be abridged by legislation which has no



reasonable relation to some purpose within the competency of the state. The child should therefore not be regarded as a creature of the state.

34. Counsel making a comparison of the cons of the traditional system of learning versus the benefits of Homeschooling went on to state that formal institutions of learning are no longer the only reservoirs of knowledge and learning materials. Bearing this in mind, parents must exercise extra vigilance in ensuring that their children have access to the right kind of information and what are their best interests. He relied on article 29(2) of the [Convention on the Rights of the Child](#) (CRR) and article 4 and 7 of the *World Declaration on Education for All (WDEA)*, in support.
35. He urged the court to be guided by article 259 of the which requires that the be interpreted in a manner that promotes its purposes, values and principles. He argued that this court has a unique opportunity to be part of global and regional judicial leadership in protecting the rights of parents and children from unreasonable strictures which curtail other aspects of human and global development.

Analysis and Determination

36. Having gone through the parties' pleadings, submissions, cited authorities and the law, I find the issues falling for determination to be:
 - i. Whether this court has jurisdiction to entertain this petition;
 - ii. Whether the 2nd respondent in instituting criminal proceedings against the 1st petitioner and his children acted *ultra vires* and as well violated their constitutional rights;
 - iii. Whether sections 2, 30(2), 31(2) and 43 of the [Basic Education Act](#), 2013 are unconstitutional in light of the Homeschooling system; and
 - iv. Whether the petitioners are entitled to the reliefs sought.

Whether this court has jurisdiction to entertain this petition

37. This court's jurisdiction was challenged by the 1st and 3rd respondents on the ground that the instant suit lacks geographical jurisdiction as the cause of action occurred in Butali in Western Kenya, and ought to have been filed at Kakamega High Court.
38. The Supreme Court in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR held as follows:

“(68) A court's jurisdiction flows from either the or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the or other written law...”
39. The jurisdiction of the High Court flows from the under article 165, which does not categorize it geographically. This argument would only have been sustained if the issue was in relation to the petitioners claim against the 2nd respondent only. The petitioners' grievances against the 1st & 3rd respondents arise from the 2nd respondent's action and are widely against provisions in the [Basic Education Act](#) which they claim are in violation of the Constitution and other Universal declarations. The issue of geographical jurisdiction does not therefore apply here.



Issue No (ii). Whether the 2nd respondent in instituting criminal proceedings against the 1st petitioner and his children acted *ultra vires* and as well violated their constitutional rights

40. The 1st petitioner averred that his and his children's arrest and prosecution was inconsistent with the dictates of the in view of a child and parents' rights. The respondents opposed this argument stating that the arrest and institution of the criminal proceedings were brought under section 31(2) of the [Basic Education Act](#) which states that it is an offense to fail to enroll a child in school. Further the 2nd respondent made known that the decision to charge as mandated by the and guided by the National Prosecution Policy was informed by the material placed before him on the case.

41. The 2nd respondent derives his powers from article 157 of [Constitution](#). article 157(4), (6), (10) & (11) of the provides as follows:

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

This article is operationalized by The [Office of the Director of Public Prosecutions Act](#), 2013(ODPP Act). Section 5(1)(b) of the Act.

42. For the Office of the Director of Public Prosecutions to be able to perform its functions enjoys independence as provided under section 6 as follows:

Pursuant to article 157(10) of [Constitution](#), the Director shall—

a. not require the consent of any person or authority for the commencement of criminal proceedings;

b. not be under the direction or control of any person or authority in the exercise of his or her powers or functions under [Constitution](#), this Act or any other written law; and

c. be subject only to the and the law.

43. From the foregoing, it is clear that once the police establish that a crime has been committed by any person through their investigations the 2nd respondent is required to make the decision whether or not to institute criminal proceedings based on the material before him as guided by the law and principles set out under article 157(11) of [Constitution](#).



44. In view of this, the court in the case of *Justus Mwendu Kabenge v Director of Public Prosecutions & 2 others* [2014] eKLR resounding the mutual sentiments of the courts' with regard to constitutional mandate of the 2nd respondent held as follows:

“It is now trite that courts cannot interfere with the exercise of the above mandate unless it can be shown that under article 157(11):

- i. he has acted without due regard to public interest,
- ii. he has acted against the interests of the administration of justice,
- iii. he has not taken account of the need to prevent and avoid abuse of court process.

These considerations are not new and have over time been taken as the only bar to the exercise of discretion on the part of the 1st respondent. I say so taking into account the following decisions where the issue has been addressed;”

45. It is reasonable to infer therefore that the courts will not be quick to interfere with the mandate of the 2nd respondent which has been carried out within the confines of the law. As deduced from this matter, the contention is that the arrest of the 1st petitioner and his children based on laws that deprive the petitioner and his children a right to select their preferred choice of education system was unconstitutional and in contravention of the rights granted to a child and parent under *Constitution*, and several universal declarations.

46. As stated above the 2nd respondent's action was stated to be in line with the dictates of the law that is section 31 of the *Basic Education Act* which provides as follows:

Duty of parents and guardian

1. It shall be the responsibility of every parent or guardian to present for admission or cause to be admitted his or her child, as the case may be, to a basic education institution.
2. Where a parent or guardian defaults in the discharge of his or her responsibility under sub-section (1), such a parent or guardian shall be deemed to have committed an offence and is liable to fine not exceeding one hundred thousand or to a period not exceeding two years or to both.
3. A parent or guardian shall have the right to participate in the character development of his or her child.

47. As provided under section 6(c) of the ODPP Act, the 2nd respondent is subject to the law. Section 31(2) of the *Basic Education Act* having not been declared unconstitutional is lawful and the 2nd respondent was bound to act as directed by the law, upon receiving sufficient evidence of disobedience. It is noted further that the 1st petitioner other than stating that they were arrested under section 31(2) of the Act did not demonstrate other factors that were present to indicate neglect of the respondents to uphold their duty or violation of their constitutional rights during the process.



48. The Court of Appeal in the case of *Diamond Hasham Lalji & another v Attorney General & 4 others* [2018] eKLR was clear when it stated:

“(42) The burden of proof rests with the person alleging unconstitutional exercise of prosecutorial power. However, if sufficient evidence is adduced to establish a breach, the evidential burden shifts to the DPP to justify the prosecutorial decision.”

49. In light of these circumstances, I am satisfied that the 1st petitioner did not discharge the burden to prove that the 2nd respondent’s exercise of power as prescribed by law was unlawful and unconstitutional and as a result violated their constitutional rights. I further find that the arrest, detention, investigations and institution of criminal proceedings in this matter cannot be condemned as it was both procedural and lawful.

Whether sections 2, 30(2), 31(2) and 43 of the *Basic Education Act*, 2013 are unconstitutional in light of the Homeschooling system

50. The heart of this petition as stated by the petitioners revolves around the homeschooling system. The petitioner asserted that the *Basic Education Act* does not recognize this system of education yet the child and parent have the right to education and to choose what’s best for the child according to the and international conventions. It was noted that this system has been legalized in other jurisdictions such as South Africa, among others.

51. The respondents opposed this assertion stating that other than the Act enjoying presumption of constitutionality, the petitioners failed to appreciate the National Government’s role in the setting of education policy, standards, curricula and examinations as provided for under section 15 of the 4th schedule of *Constitution*. Further that the petitioners had misapprehended the provisions of the as against the international provisions, and so failed to prove their case for the homeschooling system.

52. Answering this question will involve interpreting the disputed sections alleged to be unconstitutional. It is accordingly vital to bear in mind the relevant guiding principles in interpretation of both the Constitution and an Act of Parliament. It is imperative that the spirit of the Constitution presides and permeates the process of judicial interpretation and judicial discretion. This court is alive to the dictates under article 259 of *Constitution*, which charge it with the duty to interpret the in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights in a manner that contributes to good governance.

53. In the interpretation of an Act of Parliament a number of principles have been established that guide courts in making the declaration of constitutionality or lack thereof of a statute. The first principle in determining constitutionality of a statute or a provision is the general presumption that Acts of Parliament are enacted in conformity with the Constitution as also highlighted in the parties pleadings. This position was affirmed by the Court of Appeal of Tanzania in the case of *Ndyanabo v Attorney General* [2001] EA 495 where the court held:

“Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”



54. Further, in the case of *Isaac Robert Murambi v Attorney General & 3 others* [2017]eKLR the court highlighted a number of principles that are considered in interpretation as follows:

b) A statute should be construed according to the intention expressed in the statute itself as confirmed the Court of Appeal case *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR when it stated that:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

c) the should be given a purposive and liberal interpretation as provided in on article 259(1) of *Constitution*.

55. Further in the case of *Council of County Governors v Attorney General & another* [2017] eKLR the court underscored another critical principle in the interpretation of statute as follows:

“...Further, in order to examine constitutionality or otherwise of statute or any of its provisions, one of the most relevant consideration is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach...”

56. The impugned provisions in the *Basic Education Act* are accentuated below:

Section 2:

"school" means an institution registered under this Act that meets the basic prescribed standards and includes institutions offering alternative approaches of multi-grade, double-shift, mobile schooling, out of school programmes, adult and continuing education, distance or correspondence instruction, or accelerated learning and talent based institutions.

"basic education" means the educational programmes offered and imparted to a person in an institution of basic education and includes Adult basic education and education offered in early childhood education centres;

Section 30 (2):

A parent who fails to take his or her child to school as required under sub-section (1) commits an offence.

Section 31(1) and (2):

(1) It shall be the responsibility of every parent or guardian to present for admission or cause to be admitted his or her child, as the case may be, to a basic education institution.

(2) Where a parent or guardian defaults in the discharge of his or her responsibility under sub-section (1), such a parent or guardian shall be deemed to have committed an offence and is liable to fine not exceeding one hundred thousand or to a period not exceeding two years or to both.



Section 43:

Basic educational institutions shall be categorised as—

- (a) public schools which are schools established, owned or operated by the Government and includes sponsored schools;
- (b) private schools as those established, owned or operated by private individuals, entrepreneurs and institutions.

57. Essentially the petitioner's grievance is that the impugned sections do not recognize an alternative form of education such as homeschooling other than those prescribed in the Act. That as a result parents and guardians who do not comply with these provisions in terms of education of the child commit an offence.

58. To put this matter into context it is necessary to understand what homeschooling is. *The Merriam – Webster Dictionary* defines homeschooling as:

to teach school subjects to one's children at home.

While the Collins Dictionary defines it as:

Homeschooling is the practice of educating your child at home rather than in a school.

59. The Constitution of Kenya undoubtedly recognizes the right to education under article 43(1)(f). One of the children's rights under article 53(1)(b) makes known that a child has a right to free and compulsory basic education. Under article 53(1)(e) the responsibility of a parent is to care, protect and provide for the child. Parents under our Constitution are not recognized as education providers in the setting of basic education and neither are they mandated to do so. The Constitution makes known that this is a function and responsibility of the national government as provided under the fourth schedule paragraph 15. This paragraph reads as follows:

Education policy, standards, curricula, examinations and the granting of university charters

60. In essence the making of education guidelines is a preserve of the national government being one of its mandates. This court by virtue of the doctrine of separation of powers cannot make a determination on the appropriate education policies as this is within the government's arm. This limit has been respected by the courts' severally. A case in point is that of *Kiro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR where the court opined as follows:

“99. The political question doctrine focuses on the limitations upon adjudication by courts of matters generally within the area of responsibility of other arms of Government...

100. According to the political question doctrine, certain sets of issues categorized as political questions, even though they may include legal issues, are considered to be external to the Judiciary as an arm of Government. Such issues are handed over to other branches of Government for adjudication. The political question doctrine therefore focuses on limiting of adjudication of disputes by courts in favour of the legislative and the executive interventions. It is underpinned by the concept of separation of powers. All that the courts are



doing in such situations is assigning discretion on the issue to another branch of Government.”

61. This court’s duty in this framework under article 20(3) of the is as follows:

In applying a provision of the bill of rights, a court shall--

- a. develop the law to the extent that it does not give effect to a right or fundamental freedom; and
- b. adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

62. An overview of the of Kenya shows that it does not provide for education of a child through their parents or prescribe its alternative forms such as homeschooling. It is discernible therefore that even in the enactment of the *Basic Education Act* this tenet was not considered as a form of education. the of Kenya under article 2(5) and (6) provides as follows:

- (5) The general rules of international law shall form part of the law of Kenya.
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

63. This means that the provisions of international law with reference to education of a child and its various aspects are applicable in Kenya as part of its law. In view of this, article 21(1) of the places an obligation on the government to ensure persons enjoy the full extent of their rights as envisaged under the and international law as follows:

It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.

64. Kenyan courts and emerging jurisprudence has turned to the international customary laws on various legal issues and questions where there was no adequate provision in our law. In particular the Supreme Court in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) held as follows:

“130. ...the expression “part of our law” means that domestic courts of law, in determining a dispute before them, have to take cognizance of rules of international law, to the extent that the same are relevant, and not in conflict with *Constitution*, statutes, or a final judicial pronouncement. The phrase rules of international law, viewed restrictively, and at any rate, in the context in which it was used in the American and English cases quoted above, refers to customary international law.

131. It is already clear that in our context, article 2(5) and (6) of the embraces both international custom and treaty law. This provision can be said to be both outward, and inward looking. The article is outward looking in that, it commits Kenya-the State, to conduct its international relations in accordance with its obligations under international law. In this sense, the article can be considered to be stating the obvious, in view of the fact that, as a member of the international community, Kenya is bound by its obligations under customary



international law and its undertakings under the treaties and conventions, to which it is a party. Yet, reference to international law by a domestic Constitution is evidence of its progressive nature.”

65. It is appreciated that the parties herein submitted extensively on the right of education and parental responsibility towards their children under international law which this court is in agreement with and sees no need to reiterate save for emphasis of the key issues in view of this case. It is apparent that under international law alternative forms of education other than what is prescribed in the *Basic Education Act* are provided for such as the homeschooling system.
66. article 13(3) of *International Covenant on Economic, Social and Cultural Rights* provides as follows:
- The states parties to the present covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions.
67. In line with this, General Comment No 13: The Right to Education to this article expounds as follows:
29. The second element of article 13(3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to “such minimum educational standards as may be laid down or approved by the State”. This has to be read with the complementary provision, article 13(4), which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in article 13(1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13(1).
68. By and of itself, homeschooling is a plausible education system as discussed. What is apparent however from reading the various international provisions is that, any system that purports to offer education to a child must conform to the minimum educational standards as may be laid down or approved by the State. This requirement is in harmony with the fourth schedule paragraph 15 of the in relation to the national government’s obligation. An education system must be in line with the rules and guidelines set and approved by the State. This is the legal position both domestically and internationally.
69. My understanding therefore is that for the homeschooling system’s potential to be adopted in our nation’s domestic law, its foundations must be anchored on the set minimum educational standards as set by the national government. To prove that the impugned provisions are unconstitutional the petitioners bear the onus to show that the homeschooling system meets this threshold.
70. Evidently the parents’ right to select a child’s education is not absolute as argued by the petitioners and interested party. It is capable of limitation as provided under the article 24 of *Constitution*. The limitation in this instance is that a parent under international law which applies also in Kenya can provide homeschooling as long as the same is in line with the government’s educational standards for that system. Manifestly the homeschooling system just like the other formal systems must be regulated by the government.
71. A perusal of the material placed before this court reveals that while the petitioners put up a spirited fight for the homeschooling system a number of things were a miss. First there is no evidence of



what system and standard they subscribe to teach their children, the academic curriculum and grading system for each stage is not made known, documentation of the various stages of the children's grades and progress are not shared. Further the petitioners did not disclose how such parents and guardians are qualified to teach their children in these systems and whether they hold such necessary qualifications to do so. The guidelines and regulation procedures they comply with are also not stated.

72. Furthermore, the petitioners despite having used the system for a while do not show their attempt to engage the various government agencies such as the Ministry of Education to get approval and guidance of a standard they can apply or proposal to the national government to amend the laws in favour of the homeschooling system. This is not a matter that the court would come up with to issue the orders and declarations the petitioners seek as it would result in an overhaul of the education system without public participation. There is a taskforce which has been collecting views on our education system. I hope the petitioners, interested party and others did present their views there for consideration. They could also seek for the amendment of the Act through parliament.
73. Unfortunately, in a nutshell the petitioners did not bother to present or lay any factual basis of how they educate their children. At this juncture this court finds that the opine in the case of *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR is relevant in this matter. The court observed as follows:

“74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

74. In view of the analysis above I find that the petitioners have failed to prove their case on this issue. Moreover, as per the principles of interpretation, every Act of Parliament and law must pass through the test of constitutionality which is a formal test of rationality and harmony with the principles. The impugned provisions of the *Basic Education Act* as analyzed above are in line with the principle that the state must prescribe minimum educational standards for the country. This mandate as discussed is not a preserve of parents as submitted. The inevitable inference that I come to is that the impugned provisions are constitutional and consistent with *Constitution*, unless amended through a legal process.
75. The above being my findings I come to the conclusion that the petition dated June 17, 2019 lacks merit and is dismissed with costs.
76. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15TH DAY OF AUGUST 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE

