JEA v Cabinet Secretary, Ministry of Education, Science & Technology & 3 others; Teachers Service Commission & 6 others (Interested Parties) (Constitutional Petition 2189 of 2020) [2020] KEHC 1578 (KLR) (Constitutional and Human Rights) (19 November 2020) (Judgment)

Joseph Enock Aura v Cabinet Secretary, Ministry of Education, Science & Technology & 3 others; Teachers Service Commission & 6 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 1578 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 2189 OF 2020

JA MAKAU, J

NOVEMBER 19, 2020

BETWEEN

JEA ..... PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY ..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH ..... 2ND RESPONDENT

THE NATIONAL COUNCIL FOR CHILDREN'S SERVICES . 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

TEACHERS SERVICE COMMISSION ..... INTERESTED PARTY

KENYA PRIVATE SCHOOLS ASSOCIATION ..... INTERESTED PARTY

KENYA PARENTS ASSOCIATION ..... INTERESTED PARTY

KENYA SECONDARY SCHOOL HEADS ASSOCIATION INTERESTED PARTY

KENYA PRIMARY SCHOOL HEADS ASSOCIATION ..... INTERESTED PARTY

KENYA PUBLIC SECONDARY SCHOOLS NON-TEACHING STAFF ASSOCIATION ..... INTERESTED PARTY

KENYA UNION OF POST PRIMARY EDUCATION TEACHERS ASSOCIATION (KUPPET) ..... INTERESTED PARTY

High Court declares the open-ended closure of schools for reasons related to the Covid 19 pandemic illegal in light of sections 4(1) and 70 of the Basic Education Act.

The petition was brought in response to the "State of the Nation Address" by the President that directed the indefinite closure of schools on the basis of the novel covid-19 pandemic among other measures. The court found that the decision directing the indefinite closure of schools, violated the rights to education of school-going students in Kenya. The court went further to state that measures to mitigate the spread of Covid 19 were implemented better when learners were in learning institutions where there were health and safety measures in place as opposed to when such learners were roaming in villages or shanties or towns.

Reported by Beryl Ikamari & George Kariuki

Constitutional Law *- fundamental rights and freedoms - right to education - whether closure of schools for purposes of combating the Covid - 19 pandemic was constitutional and whether it exposed children to psychological harm - articles 10(2)(a), 10(2)(b), 22, 23, 53, 131 (2) (e), and 135; Children Act, No 8 of 2001, sections 4 32(2) and 22; Basic Education Act, No 14 of 2013, sections 4(l), 42, 55 and 70; Public Health Act, (cap 242) section 32.*

Constitutional Law *- constitutionality of subsidiary legislation - subsidiary legislation relating to closure of schools in order to combat the Covid - 19 pandemic - role of the Cabinet Secretary for Health and the role of the Cabinet Secretary for Education, Science and Technology - whether the subsidiary legislation met constitutional and statutory thresholds including provisions on the best interests of the child as a paramount consideration - Constitution of Kenya 2010, article 53(2) and Children Act, No 8 of 2001, sections 4 32(2) and 22; Basic Education Act, No 14 of 2013, sections 4(l), 42, 55 and 70; Public Health Act, (cap 242) section 32.*

Constitutional Law *- office of the Attorney General - the Attorney General as an advisor to the Executive - whether the Attorney General failed to advise the Executive on how to comply with the law when undertaking closure of schools due to the Covid - 19 pandemic.*

Constitutional Law *– constitutional litigation – drafting of petitions - precision in drafting petitions - whether the petition had been drafted in a manner that sufficiently and precisely set out the claim so as to enable parties to respond to it and the court to make a determination.*

Constitutional Law *- national values and principles of governance - public participation - whether the process of the enactment of the community based learning program failed to meet public participation requirements and was therefore unconstitutional - Constitution of Kenya 2010, article 10.*

Brief facts

The petition was brought in response to the "State of the Nation Address" by the President on March 15, 2020 that directed the indefinite closure of schools on the basis of the novel Covid-19 pandemic among other measures. The petitioner brought the petition on behalf of his children: JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) for compensation for the psychological suffering inflicted on them by the Government of Kenya's closure of in-person learning since March 16, 2020, in breach of their rights against such freedom from psychological torture and right to human dignity. The petition was also brought on behalf of millions of such other school going children.

The petitioner also contended that the Executive through the Ministry of Education and the Ministry of Health failed to provide the basis for the unilateral closure of schools without consultation with National and County Education Boards even after being probed by the petitioner. Those administrative actions were contended to be *ultra vires* the best interests of the child as constitutionally founded.

Lastly, the petitioned opposed the community based learning prescribed by the Ministry of Education as a remedial measure for arresting the effects of Covid-19 on education. The petitioners contended that the policy had no underpinning under the law.

Issues

i. Whether the closure of schools following a directive issued by the President of the Republic of Kenya in a "State of the Nation Address" as part of the measures put in place to combat the Covid – 19 pandemic was unconstitutional.

ii. Whether the closure of schools as part of the measures put in place to combat the Covid – 19 pandemic caused psychological harm to school-enrolled children.

iii. What was the role of the Cabinet Secretary for Health in the enactments of legislative measures about Covid-19 pandemic?

iv. Whether enactments related to the Covid- 19 pandemic met legal and constitutional thresholds with respect to the right to education of school enrolled-children.

v. Whether the Cabinet Secretary for Education, Science and Technology discharged its mandate under article 53(2) of the Constitution as read together with section 32(2) of the Children's Act, in the face of the open-ended closure of schools over the Covid – 19 Pandemic and whether it was in 'the best interest of the child' to re-open schools.

vi. Whether the Attorney-General was liable for his failure to advise the Executive to adhere to the relevant statutory requirements when closing schools due to the Covid – 19 Pandemic.

vii. Whether the amended petition was sufficiently and precisely pleaded or it was based on conjecture.

viii. Whether the community based learning program as prescribed was legal.

Held

1. In exercise of executive authority, the President was bound to promote service to the people for their well-being and benefit. In doing so, the President was required to consult with the County and National Executive Boards.
2. According to rules of practice, petitioners approaching the constitutional court were required to disclose in their petition a brief statement of facts with reference to exhibits, attached to the petition, issues arising for determination and a concise statement of argument on each issue incorporating the relevant authorities referred to.
3. The petitioner failed to specifically plead the breach allegedly committed in the President's address and facts about that were not provided in any part of the petition. In that regard, the court had inherent jurisdiction to prevent an abuse of its process and it therefore had a duty to intervene and stop such proceedings to prevent abuse of the court process.
4. In issuance of the "State of the Nation Address" pursuant to article 10 of the Constitution, the President was entitled to address the nation on any issue of national concern, as it arose anywhere. The closure of schools following a directive issued by the President of Republic of Kenya in a *"State of the Nation Address"* was therefore constitutional and did not violate the Constitution of Kenya in any way.
5. Injuries suffered as a result of discrimination, harassment or inhuman and degrading treatments were no less real because they did not possess tangible physical or financial consequences. The difficulty in assessing the amount of compensation for that type of injury ought not to deter the court from recognizing its potential.
6. There was genuine prospect that the effects of the indefinite closure of schools would permanently alter the lives of children caught in the apex of the Covid-19 pandemic.
7. Evidence was adequately adduced to the effect that children who faced acute deprivation in nutrition, protection or stimulation, or periods of prolonged exposure to toxic stress, during the critical window of early childhood development were likely to develop lifelong challenges as their neurological development would be impaired.
8. Children who dropped out of school would not only face a higher risk of child marriage, child labour, and teenage pregnancies, they would also see their lifetime earning potential precipitously fall. Children who experienced family breakdowns during the period of heightened stress risk would lose the sense of support and security on which children's wellbeing depended.

9. The petitioner pleaded, particularized, and proved that the closure of schools would cause psychological harm to school-enrolled children.
10. Constitutionally, information required by any person ought to have at first been requested for the enforcement or protection of another right and been denied before a violation of the right to information could be alleged. The petitioner failed to prove the allegation against provision of information to the required standard of proof.
11. The benefit of the petitioner's school going children and other school children attending school in-person out-weighed the risks of Covid – 19 as urged by the respondent as long as the respondents ensured that Covid – 19 measures and safety protocols were put in place and fully complied with in each and every school by both the learners and the teachers.
12. The best interest of any child was to be in school in-person as there was more control, guidance and provision of health safety measures in the school than leaving the children roaming in the villages or shanties or towns without observing any Covid-19 Health Protocols.
13. It was important for school-gong children to have the social interaction and academic development that could be reaped only from in-person learning. Therefore, the school going children would reasonably be safe in school given that health conditions that would place children at health risk were given priority and mitigated.
14. The acts of default alleged against the Attorney General were not particularized or specifically pleaded and there was no demonstration from the petitioner that any such impugned acts were done. There was no demonstration on part of the petitioner that the impugned acts were done in bad faith for executing the functions, power's or duties of the commission so as to render the Attorney General liable to any action, claim or demand whatsoever. There was therefore no basis in the petitioners' allegation that the Attorney General failed to advise the Executive.
15. The petition was drawn in accordance with guidelines statutorily set out for drawing constitutional petitions. The petition was therefore not an abuse of the court process as the relevant articles were clearly stated as were the particulars.
16. Evidence was sufficiently adduced to the effect that the interests of justice as regards the welfare of children would be better served when the children were at school as compared to when they were out of school without any control as regard person-to-person contact. The respondents could have given directions when most of the children were at school.
17. The Executive stepped beyond what the law and the Constitution permitted. They could therefore not seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny.
18. The respondents did not rebut the petitioner's contention that the Community Based Learning Program was unilaterally commenced, that there were no consultations with the stakeholders and that they were not on relevant provisions of the Basic Education Act.
19. There was a sixteen-member committee appointed by the Minster but there was no evidence that the committee made any report on Community Based Learning Program and even if they did so, it was not supported by any provisions of the Basic Education Act. The project was *ultra vires* the Act and was therefore null and void for all purposes and intentions.

Petition partly allowed.

Orders

i. *A declaratory order was issued declaring that each of the petitioner's school-going children subject of this petition, JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) and all equally implicated Kenyan school-going children and learner's fundamental rights and freedoms in relation to their education as enumerated in the petition were contravened and grossly violated by the respondents as enumerated in the petition.*

ii. *An order was issued declaring that pursuant to article 10 (2) (a) and 10 (2) (b) of the Constitution of Kenya, the 1st respondent was bound by the principles of patriotism, public participation, transparency, fairness, human rights, and good governance in the execution of the terms of his portfolio and duties appurtenant to the education sector in Kenya as spelt out in the applicable statutory regimes, and any recommendations by any person or entity to the 1st respondent on the closure and reopening program of schools in Kenya at any time conducted without involving the National Education Board, the respective County Education Boards, the County Parent's Associations from school through a delegate system as mandated in the Third Schedule to the Basic Education Act was null and void.*

iii. *A declaratory order was issued declaring that, in prolonging the open-ended closure of schools and learning institutions in Kenya from March 16, 2020 to date without any consultations with the parents, guardian of school-enrolled children, affected learners in diverse learning institutions, in conjunct with the National Education Board and respective County Education Boards, the 1st respondent's (Cabinet Secretary, in charge of Education's) action was ultra vires Section 4 (I) and Section 70 of the Basic Education Act.*

iv. *A declaratory order issued declaring that the "community-based" learning project announced by the 1st respondent on July 30, 2020 in conjunct with the 1st Interested Party, (Teachers Service Commission) was null and void for want of public participation and consultation with the National Education Board, respective County boards across Kenya, and the petitioner via his cited children's school, and like parents of school-enrolled children across Kenya.*

v. *An order of injunction was issued to restrain the 1st respondent by himself, his assistants and partners, agents, servants, or otherwise howsoever, together with the 1st interested party, Teacher Service Commission from undertaking, or further executing the "community-based learning" project in schools and learning institutions across Kenya as announced by the 1st respondent on July 30, 2020.*

vi. *An order of mandamus was issued to compel the 1st respondent to immediately direct the re-opening of in-person learning institutions and schools in Kenya, observing the health and safety guidelines and considering a safe environment, commencing forthwith and not later than 60 days of the order for learning institutions and schools across the Republic of Kenya so as to have all the learners in learning institutions and schools enjoying in-person learning.*

vii. *An order of certiorari by way of judicial review was issued to bring into the court for purposes of quashing, the 1st respondent's decision made on July 30, 2020 purporting to declare and execute "community-based learning" program in schools, learning institutions, churches and places of worship across Kenya, for lacking of public participation and being ultra vires Section 42 (1) of the Basic Education Act, Act No. 14 of 2013.*

viii. *Each party was directed to bear their own costs in the petition.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR);(1976-1980) KLR 1272 - (Followed)
2. *Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management* Misc Appli 1131 of 2007; [2008] eKLR - (Explained)
3. *Bor, Jonathan Kiplangat & 524 others v Sub County Police Commander Narok & another* Petition 19 of 2019; [2020] KEELC 2221 (KLR) - (Explained)
4. *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* Civil Appeal 112 of 2016; [2017] KECA 763 (KLR) - (Explained)
5. *George, Bala v Attorney General* Petition 238 of 2016; [2017] eKLR - (Explained)
6. *Githua, Mungai & another v Law Society of Kenya & another* Petition 286 of 2014; [2015] eKLR - (Explained)

7. *Kamami , Michael Maina & another v Attorney General* Civil Appeal 189 of 2017; [2019] KECA 437 (KLR) - (Explained)
8. *Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited and another* Constitutional Petition 7 of 2015; [2016] KEHC 5580 (KLR) - (Explained)
9. *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties)* Petition 132 of 2020; [2020] eKLR - (Explained)
10. *Law Society of Kenya v Hilary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties)* Petition 120 of 2020; [2020] KEHC 6881 (KLR) - (Mentioned)
11. *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others ; Kenya National Commission on Human Rights & 3 others (Interested Parties)* Petition 120 of 2020; [2020] KEHC 6881 (KLR) - (Explained)
12. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] eKLR - (Explained)
13. *Mutua, Alfred N & another v Speaker of The Senate & another, Inspector General of Police (Interested Party)* Petition 398 of 2019; [2020] eKLR - (Explained)
14. *Mwau, John Harun v Linus Gitahi & 13 others* Petition 520 of 2014; [2016] eKLR - (Explained)
15. *Okoiti, Okiya Omtatah v Joseph Kinyua, Public Service Commission & Attorney General* Petition 51 of 2018; [2018] KEELRC 1750 (KLR) - (Explained)
16. *Republic v Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua* Miscellaneous Civil Application 1298 of 2004; [2010] eKLR - (Followed)
17. *Republic v Ministry of Health, Cabinet Secretary Ministry of Health & Attorney General Ex-parte Kennedy Amdany Langat & 14 others & Amit Kwatra & 12 others* Judicial Review 2 of 2017; [2018] KEHC 5221 (KLR) - (Explained)
18. *Trishcon Construction Company v Landmark Holdings Ltd* Civil Appeal 225 of 2014; [2016] KECA 155 (KLR) - (Explained)
19. *Waigwe, Antony Murimi v Attorney General & 4 others* Constitutional Petition 336 of 2019; [2020] eKLR - (Explained)

South Africa

Section 27 & others v Minister of Education & another (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) - (Explained)

Malawi

State v President of the Republic of Malawi ex parte Steven Mponda (Malawi Zomba District Registry Judicial Review No. 13 of 2020 - (Explained)

Canada

1. *Glynn v Paulmert* 2020 ONSC 5432 - (Explained)
2. *Zinat v Spence* 2020 ONSC 5231 - (Explained)

Texts

1. Centres for Disease Control and Prevention (2020), *Centres for Disease Control and Prevention: Operating Schools During COVID-19* National Center for Immunization and Respiratory Diseases (US) Division of Viral Diseases
2. Committee on the Rights of Child (2020), *Committee on the Rights of Child Covid-19 Statement* Office of the High Commissioner on Human Rights (OHCHR)
3. Iwata, k., et al (Eds) (2019), *Was School Closure Effective in Mitigating Coronavirus Disease 2019 (COVID-19)?* International Journal of Infectious Diseases 99 (2020) 57-61
4. UNICEF (2020), *UNICEF Supplement to Framework for Reopening Schools: Emerging Lessons from Country Experiences in Managing the Process of Reopening Schools* United Nations

Statutes

Kenya

1. Basic Education Act (cap 211) Schedule 3; sections 4(t); 41; 42(1); 55; 71 - (Interpreted)
2. Children Act (cap 141) sections 4-9, 22(2); 31; 32(2); 38(2) - (Interpreted)
3. Children Act (Repealed) (cap 141) In general – (Cited)
4. Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general (Cited)
5. Constitution of Kenya articles 10, 10(2)(a)(b); 23(3); 24(1); 27(4); 28; 29(d); 41(f); 45(1); 47; 53(1)(b); 53(2); 129; 131(2)(e); 132(2)(e); 135; 259(3); 260 - (Interpreted)
6. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, Sub Leg) rules 10, 21(3); 22(2)(b) - (Interpreted)
7. Evidence Act (cap 80) sections 59, 60, 107(1) - (Interpreted)
8. Office of the Attorney-General Act (cap 6A) section 8 - (Interpreted)
9. Prevention of Torture Act (cap 88) In general –(Cited)
10. Public Health Act (cap 242) sections 32, 35 - (Interpreted)
11. Statutory Instruments Act (cap 2A) section 11 - (Interpreted)

Instruments

1. Committee on Economic, Social and Cultural Rights, General Comment No 13: The Right to Education

2. Committee on the Right of the Child, General Comment No 5: The General Measure of Implementation of the Convention on the Rights of the Child articles 4, 42, 44; paragraph 6
3. Committee on the Rights of the Children, General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration

4. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 article 13

Advocates

None mentioned

JUDGMENT

1. The petitioner through an amended petition dated September 9, 2020 seek the following orders:-

    a. A declaration do issue that each of the petitioner's school-going children subject of this petition, JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) and all equally implicated Kenyan school-going children and learner's fundamental rights and freedoms in relation to their education as enumerated in the petition herein were contravened and grossly violated by the respondents as enumerated in the Petition herein.

    b. A declaration do issue that pursuant to article 10(2)(a) and (b) of the *Constitution of Kenya*, the 1st respondent is bound by the principles of patriotism, public participation, transparency, fairness, human rights, and good governance in the execution of the terms of his portfolio and duties appurtenant to the Education sector in Kenya as spelt out in the applicable statutory regimes, and any recommendations by any person or entity to the 1st respondent on the closure and reopening program of schools in Kenya at any time conducted without involving the National Education Board, the respective County Education Boards, the County Parent's Associations from school through a delegate system as mandated in the Third Schedule of the *Basic Education Act*, is null and void.

c. A declaration do issue that the open-ended closure of Kenya's schools and learning institutions by means of an Address To The Nation made on march 15th 2020 by the President of the Republic of Kenya, Uhuru Muigai Kenyatta was *ultra vires* the provisions of article 131(2)(e) of the *Constitution of Kenya*, and is to the said extent null and void.

d. A declaration do issue that the address to the nation made on March 15th 2020 by the President of the Republic of Kenya, Uhuru Muigai Kenyatta implicating the Constitutional and statutory right to education of JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) all school-enrolled children and learners in Kenya was a violation of, and is ultra vires the provisions of article 135 of the *Constitution of Kenya*, having never been Gazetted as a record to the People of Kenya, and is therefore null and void to the extent it negatively implicates the enjoyment of the said children's right to education.

e. A declaration do issue that, in prolonging the open-ended closure of schools and learning institutions in Kenya from March 16th 2020 to date without any consultations with the parents, guardian of school-enrolled children, affected learners in diverse learning institutions, in conjunct with the National Education Board and respective County Education Boards, the 1st Respondent Cabinet Secretary in charge of Education in Kenya said continuing action was *ultra vires* section 4(i) and section 70 of the *Basic Education Act*.

f. A declaration do issue that the "community-based" learning project announced by the 1st respondent on July 30, 2020 in conjunct with the 1st interested party, Teachers Service Commission is null and void for want of public participation and consultation with the National Education Board, respective County boards across Kenya, and the petitioner *via* his cited children's school, and like parents of school-enrolled children across Kenya.

g. A declaration do issue that the conversion of schools and learning institutions in "Covid-19" "Quarantine facilities" across Kenya by the 1st and 2nd respondent, jointly and/or severally constitutes a violation of section 32 of the *Public Health Act*, and is null and void *ab initio*.

h. A declaration do issue that the 1st and 2nd respondent personally bear responsibility from the violations of the rights of the petitioner's children JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years), and Kenyan school-enrolled children now kept out of learning in-person in their respectively schools on account of the mental and psychological torture and suffering occasioned on them by the 1st and 2nd respondent's joint and several acts and omissions in breach of section 5 to 9 of the *Children's Act* as envisaged under section 22(2) of the *Children's Act*.

i. An order of injunction do forthwith issue restraining the 1st respondent by himself, his, assistants and partners, agents, servants, or otherwise howsoever, together with the 1st interested party, Teacher Service Commission from undertaking, or further executing the "community-based learning" project in schools and learning institutions across Kenya as announced by the 1st respondent on July 30, 2020.

j. An order of *mandamus* do issue, to compel the 1st respondent to forthwith direct the reopening of in-person learning institutions and schools in Kenya, commencing forthwith, and not later than 14 days of the making of this order, for schools across Kenya.

k. An order of prohibition by way of Judicial Review do issue, prohibiting the 1st respondent from taking any further action adverse to the best interests and welfare of Kenya's school-enrolled children and learners.

l. An order of *Mandamus* by way of judicial review do issue, to compel the 2nd Respondent to forthwith (an not later than within 3 days of the making of this Order) direct the reopening of all play areas and recreational centres for all children across Kenya, and in particular school enrolled children.

m. An *certiorari* by way of judicial review do issue, to bring to this honourable court for purposes of quashing, and to be quashed, the 1st respondent's decision made on July 30th 2020 purporting to declare and execute "community-based learning" program in schools, learning institutions, Churches and places of worship across Kenya, for lacking of public participation and being *ultra vires* section 42(1) of the *Basic Education Act*, Act No 14 of 2013.

n. An Injunction do issue, restraining the 3rd interested party from submitting to the 1st respondent or any entity connected with the administration of Education in the Republic of Kenya, any memoranda, resolution, or decision purporting it to be representative of the nationwide membership of the Parents and guardians of school-enrolled children and learners in Kenya, absent such consultative participation of parents and guardians of school-enrolled children and learners across Kenya duly signified vide the respective Parent's Associations envisaged under the third schedule of the *Basic Education Act*, as read with section 55 of the said *Act*.

o. An order of judicial review by way of prohibition do issue, prohibiting the 1st and 2nd respondents from closing any schools in the Republic of Kenya on the basis of public health concerns stated as "Covid-19", absent a strict adherence with the applicable statutory procedures, compliance with relevant and applicable statutory regimes, and constitutional imperatives set out in the *Constitution of Kenya*.

p. An injunction do issue, restraining the 1st and 2nd respondents, their servants, agents, or any person acting under their direction and behest from demanding, directing, or administering a mandatory mass or individual "Covid-19" vaccine on school-enrolled children across Kenya's public and private schools as a precondition to any further or continued enrolment on such public or private schools.

q. An order of *mandamus* by way of Judicial Review do issue, compelling the 3rd respondent here to forthwith articulate and execute programs in co-ordination of child rights activities across Kenya, especially the right to Education and its implementation pursuant to the Judgment herein rendered, and within 180 (One eighty days of delivery of the judgement herein) to file with the court and furnish on the petitioner and affected parties its report compiled on the measures and effectuation of the right to education of Kenya's school-enrolled children and learners below 18 years in Kenya's schools and learning institutions from March 16th 2020 to the date of the delivery of the Judgement herein.

r. An award of damages do issue, directing that the Government of the Republic of Kenya compensates all Private Primary and Secondary Schools in Kenya as shall submit to the 1st respondent their losses and quantifiable damages within 30 days of the making of this order for the losses incurred by them from March 20th 2020 to be the date of the reopening of such schools.

s. The petitioner's children subject of these proceedings JLA (aged 21 years), JMA (aged 18), and DTA (aged 16 years) be compensated by way of damages for the psychological suffering inflicted on them, on account of the Government of Kenya's closure of in-person learning since March 16th 2020, in breach of their rights against such psychological torture as enshrined in

the *Constitution of Kenya* and the international legal instruments that Kenya has ratified in furtherance of the right to education of the said children, and Kenya's school-enrolled children in general.

t. The costs of this petition be awarded to the petitioner.

Petitioner's Case

2. The petition is brought before this court in response to the "Address to the Nation" by His Excellency President Uhuru Muigai Kenyatta, on 15th March 2020, suspending schooling in Kenya indefinitely on the basis of the Covid-19 Pandemic, and the subsequent measures of the respondents including the open-ended closure of schools from March 16th 2020 by the 1st respondent.

3. The petitioner complains that while domestic and international air travel was re-opened on June 8, 2020 to mitigate losses, schools which have run losses amounting billions of Kenya shillings remain closed in violation of article 27 (4) of the *Constitution of Kenya*.

4. The petitioner alleges that article 28 of the *Constitution of Kenya* has been infringed by the actions and omissions of the respondents. It is complained that the right to human dignity of school-enrolled children is infringed by the 1st respondent permitting such children to roam freely anywhere across Kenya apart from school premises. Additionally, the closure.

5. It is further asserted that article 29(d) of the *Constitution* has been violated by the open-ended closure of schools which amounts to psychological torture on the petitioner's children and all school-going Kenyan children, who are now in a state of endless learning free-fall.

6. Additionally, it is argued that the respondents have violated article 45(1) of the *Constitution* as it has not taken any steps at either of the two levels of Government to stem the tide of pregnancies among school going children during the current involuntary and forced closure of schools across Kenya.

7. The petitioner aver that the actions of the respondents in failing to respond to the petitioner's inquiry and demand to address the basis of the petitioner's objections to the decision to unilaterally close school constitutes a violation of article 47 of the *Constitution* on the right to fair, expeditious, efficient, lawful, reasonable, and procedurally fair administrative action.

8. Furthermore, it is alleged that article 53(1)(b) of the *Constitution* on the right of every child to free and compulsory basic education was violated by the closure of schools yet children are free to roam wherever they are. It is contended that the prolonged open-ended closure of schools across Kenya ultimately have a direct and negative impact on the quality of education enjoyed ultimately by pupils in these school hence infringing on the right of these pupils to access free and quality education.

9. The petitioner asserts that the closure of children's playgrounds has meant that children are kept indoors with no form of physical activity, which is not in the best interest of the children. Moreover, it is claimed that in order to give effect to the right to education schools must be opened, and the Ministry of Health be compelled to collaborate all efforts to ensure that the highest standards of hygiene are observed across Kenyan schools.

10. The petitioner highlights the adverse effects of school closures as identified by UNESCO which include increased exposure to violence, rise in dropout rates and interrupted learning. It is further contended that "community based learning" has no legal underpinnings and therefore is a deliberate violation of the relevant law.

11. The petition is supported by the verifying affidavit of Joseph Enock Aura dated August 21, 2020; and his subsequent supplementary affidavit dated October 13, 2020 and October 21, 2020 in response to the 1st respondents replying affidavit.

1st Respondent's Case

12. The 1st respondent filed a replying affidavit sworn by Prof. George A.O. Magoha, CBS on October 12, 2020. The deponent adopts the affidavits of the CS- Ministry of Health as filed in *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties)* [2020] eKLR and *Law Society of Kenya v Hilary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested)* [2020] eKLR.

13. In line with the decisions in the above cases, it is deponed that the Ministry of Education has initiated a phased re-opening of schools which is predicated on the protocols from the Ministry of Health. The phased re-opening of school is also pursuant to the Guidelines on Health and Safety Protocols for Reopening of Basic Education Institutions amid the Covid-19 Pandemic formulated by the Covid-19 Education Response Team. The 1st respondent contends that the phased-reopening of schools is being done in the best interest of the child, in protection of the [larger] public interest and in execution of the Government's positive obligation to protect the right to life/health, which take precedence over the right to education

14. It is further deponed that pursuant to articles 10 and 259(3) of the *Constitution* and the interpretation of the same by the court in *Okiya Omtatah Okoiti v Joseph Kinyua, Public Service Commission & Attorney General* [2018] eKLR the President can address the nation about any such matters at any other time or occasion as need and opportunity arises.

15. The deponent asserts the petition contains 'huge statements' of generalities, conjecture and speculation, which are not supported by any empirical reports or researched data and therefore cannot form the basis of a constitutional claim.

16. It is further averred that as far as the petitioner seeks to interdict the Covid-19 Regulations on account of violating the Statutory Instruments Act, the same is *re judicata* and unavailable as it was litigated over in *Law Society of Kenya v Attorney General & another* (supra) and *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others* (supra).

17. The deponent asserts that the Ministry is aware of the adverse effects of the closure of schools including the risks of child marriage, pregnancies and exposure to pornographic material. Being alive to the same, the Ministry has instituted several remote learning interventions and 'community based learning' all in the best interest of the [learning] child.

18. On the matter of financial losses raised by the petitioner, the 1st respondent relies on the finding in *Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management* [2008] eKLR that there are circumstances in which the public interest must be dominant over the interest of a private individual.

The 1st Interested Party's Response

19. The 1st interested party filed a replying affidavit to petitioner's application sworn by Reuben Nthamburi Mugwuku on September 4, 2020, the Director, Quality Assurance & Standards of the Teachers Service Commission, the 1st interested party in this matter. The 1st interested party did not however file any response to the petition herein.

The 2nd to 6th Interested Party's Responses

20. The 2nd, 3rd, 4th, 5th and 6th respondents through duly served with the petition did not file any response to the Petition.

7th Interested Party's Response

21. The 7th interested party filed a replying affidavit sworn by Akelo Misori on October 26, 2020 in support of the measures taken by the government including the 'Community Based-Learning.

Analysis and Determination

22. I have very carefully considered the petitioner's pleadings as set out in the amended petition; all supporting affidavits and the responses by the respondents and 7th interested party as well as the contents in the replying affidavits; counsel rival submissions and authorities relied upon in support and in opposition of the petition herein and from the above several issues arise which can be summed up as hereunder:-

    a. Whether the closure of schools following a directive issued by the President of the Republic of Kenya in a "state of the National Address" was unconstitutional?

    b. Whether the closure of schools has caused psychological harm to school-enrolled children?

    c. What is the role of the 2nd respondent Cabinet Secretary for Health in the enactments of legislative measures implicating "Covid-19" and whether such measures meet legal and constitutional threshold and how such legislative restrictions affect the right to education of the petitioner's School enrolled-children?

    d. Whether the 3rd respondent has discharged its mandate under article 53(2) of the *Constitution* as read together with section 32(2) of the *Children's Act*, in the face of the open-ended closure of schools over the COVID – 19 Pandemic and whether it is in the best interest of the child to re-open school?

    e. Whether the Hon Attorney-General is liable for his failure to advice the Executive to adhere to the relevant statutory instruments when closing schools, due to COVID – 19 Pandemic?

    f. Whether the amended petition is sufficiently and precisely pleaded or it is based on conjecture?

    g. Whether the court can Review Policy-Deference and Separation of power?

    h. Whether community based learning program is legal?

A. Whether the closure of schools following a directive issued by the president of the republic of kenya in a "state of the national address" was unconstitutional?

23. The petitioner as regards the "President's Address to the Nation" of March 15, 2020 at paragraph 35, 37, 57, 58, and 129 G of the amended petition contend that pursuant to article 135 of the *Constitution* the President in performance of any function under the *Constitution* shall be in writing and shall bear his seal and signature.

24. Article 135 of the *Constitution* states that a decision of the President in the performance of any function of the president under this *Constitution* shall be in writing and shall bear the seal and signature of the President.

25. The petitioner under paragraph 57 and 58 of the amended petition, state that the President of the Republic of Kenya truncated the school term by indefinitely closing schools through his Address. It is under paragraph 129 G where the petitioner has set out issues for determination and ultimately prayers (c) and (d) of the amended petition where he seeks the nullification of the President's Address on account that it is ultra vires article 132(2)(e) and article 135 of the *Constitution*.

26. Article 132(2)(e) of the *Constitution* relied upon by the petitioner provides that the president shall nominate and with the approval of the National Assembly, appoint and may dismiss the high commissioners, ambassadors and diplomatic and consular representatives.

27. The petitioner refer to the "Address to the Nation" delivered on March 15, 2020, a copy of which is produced as exhibit "EA 2" to the petitioner's supporting affidavit at page 160 to 163, Vol. 1 of the bundle. It is petitioner's position that the President's proposed to close all schools and learning institutions due to COVID – 19. The petitioner contend that this exercise of Executive Authority is unlawful.

28. Article 129 of the *Constitution of Kenya* sets out the principles of Executive Authority as follows:

> " 129. Principles of executive authority
>
> 1. Executive authority derives from the people of Kenya and shall be exercised in accordance with this *Constitution*.
>
> 2. Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit." (Emphasis mine)

29. The petitioner under paragraphs 44, 45 and 46 of the amended petition, states that section 71 of the *Basic Education Act* enjoins the 1st respondent in mandatory terms to act

> "in consultation with the National Education Board, and the various County Education Boards and institutions and all persons engaged in the promotion, provision and conduct of education shall –
>
> a. Ensure compliance with quality and relevance in the provision and delivery of education;
>
> b. Adapt effective and efficient systems to achieve the desired outcomes and objectives and avoid duplication and waste" (Emphasis added)

30. In view of the provisions of section 71 of the *Basic Education Act* the petitioner assert that the power thereto is not vested in the President of the Republic of Kenya and that the decision implicating the delivery of education in Kenya cannot be made by the President of the Republic of Kenya without there being an amendment to section 71 of the *Basic Education Act*. It is further averred that section 41 of the *Basic Education Act*, 2013 mandates the 1st respondent to ensure that there is "enhancement of co-operation, consultation and collaboration among the Cabinet Secretary, Teachers Service Commission, the National Education Board, the County Education Boards, the education and training institutions and other related stakeholders on matters related to education."

31. The petitioner further contend that by operation of the statutory mandate on the National Education Board spelt out in the *Basic Education Act*, neither the 1st respondent nor the President of the Republic

of Kenya had any power to unilaterally decree that schools in Kenya were to be closed effective March 16, 2020 or even by way of the instrumentality of a "State of the Nation Address".

32. In view of the foregoing the petitioner argues that any act by the President of the Republic of Kenya purporting to close schools outside the statutory provisions of the Basic Education Act constitutes an unlawful usurpation of the statutory powers of the National Education Board.

33. The petitioner further contend that at any rate, an "Address to the Nation" does not constitute legislation within the meaning of article 24(1) of the *Constitution* so as to lawfully limit the right to education located in both article 41(f) or article 53(1)(b) of the *Constitution of Kenya*. Article 24 of the *Constitution of Kenya* provides for limitation of rights and fundamental freedoms in the following terms:

> " 24.
>
> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including - ..."

34. The petitioner further state that the "Address to the Nation" purporting to cut down the petitioner's school-enrolled children's right to education is amenable to judicial scrutiny and censure as sought in the declaratory relief and positive orders sought.

35. Where the President's actions exceeded the constitutional remit of his office, this honourable court has in the fast called the President to account. In the Court of Appeal case *Republic v Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua* [2010] eKLR. Where the President purported to limit the terms of an investigative Tribunal formed to investigate complaints regarding the Hon. Deceased Judge Ole Keiwua, it was held:-

> " The President had no power to direct the tribunal to investigate the conduct of the applicant by using the words 'including but not limited to'. We find the inclusion of the said words in the gazette notice No. 8828 of 2003 was in contravention of Constitutional powers of the President as enshrined under section 62 of our *Constitution*. That was a manifest and patent contravention of our *Constitution*" (Emphasis Added).

36. Further, the exercise of judicial scrutiny has been anchored on the constitutional power under article 165 of the *Constitution* to inquire into the constitutionality of act complained of which being cognizant of the doctrine of separation of powers. In the case of, *George Bala v Attorney General* [2017] eKLR the Hon Justice Odunga held:

> " I therefore hold and affirm that this court has the power to enquire into the constitutionality of the actions of the executive notwithstanding the doctrine of separation of powers. This finding is fortified under the principle that the *Constitution* is the Supreme Law of this County and the Executive must function within the limits prescribed by the *Constitution*. In case where it has stepped beyond what the law and the *Constitution* permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny." (Emphasis Added)

37. The respondent on the other hand argue the amended petition as drafted violates the salient provisions of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (Otherwise referred to as "*Mutunga Rules*, 2013) specifically rule 10, 21(3) and 22(2)(b) hence the same is alleged to be incompetent and sought to be struck out.

38. Rule 10(2) of the *Mutunga Rules*, 2013 provides:

> " The petition shall disclose the following-
>
> a. The petitioner's name and address;
>
> b. The facts relied upon;
>
> c. The constitutional provision violated;
>
> d. The nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;
>
> e. Details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition.
>
> f. The petition shall be signed by the petitioner or the advocate of the petitioner, and
>
> g. The relief sought by the petitioner."

39. Under rule 10 of the *Mutunga Rules*, 2013 it is clearly provided what a competent petition should include rule 21(3) of the *Mutunga Rules*, 2013 provides that court may frame the issue for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case and lastly rule 22(2)(b) provides that submission shall contain a brief statement of facts with reference to exhibits, if any, attached to the petition, issues arising for determination ; and a concise statement of argument on each issue incorporating the relevant authorities referred to together with the full citation of each authority.

40. A clear perusal of the petitioner's amended petition reveal that the breach allegedly committed by the President's Address is not part of the pleadings. It is not pleaded and its facts are not provided in any part of the amended petition under either Part C, D, E and F. This is clear from paragraph 54 – 129 of the amended petition. It is further noted strangely and contrary to rule 21 (3) of the *Mutunga Rules*, 2013 the said Address is dealt with as an issue for determination under paragraph 129 G and prayers (c) and (d).

41. Rule 22(2) of the *Mutunga Rules*, 2013 provides for issues arising for determination. I find that the issues arising from the averments in the petitioner's amended petition cannot form part of the facts of the petition or the constitutional provisions violated or the harm or injury caused as contemplated by *Mutunga Rules*, 2013. I find that issues of determination ought not to be part of the substantive petition to rule 10 of the *Mutunga Rules* and that the issues can only be brought forth and dealt with at the submission stage.

42. I find that to the extent of any finding that paragraph 129(G)(i)(ii)(iii)iv) (v)(vi)(vii) are identified as issues for determination, they do not conform to rules 10, 21(3) and 22(2)(b) of the *Mutunga Rules*,

the same should be struck out. In the case of *Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers Limited and another* [2016] eKLR Hon Justice Olao held as follows:-

> " Rule 3(8) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* 2013 (*Mutunga Rules*) provides as follows:-
>
> > "Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary of the ends of justice or to prevent abuse of the process of the court". Such orders as are mentioned above include striking out a constitutional petition that amounts to an abuse of the court process. As to what constitutes an abuse of the court process is a matter to be determined by the circumstances of each case as there is no all en-composing definition of the concept "abuse of process" – *Benosi v Wiyley* 1973 CA 721...As was held in The *King v The General Commissioner for the Purpose of Income Tax Acts for the District of Kensington Ex-parte Princes Edmond De Polignal* (1917) KB 486 At Page 495, there is inherent jurisdiction of every Court to prevent an abuse of its process and it is therefore its duty to intervene and stop such proceedings that amount to the abuse of the court process."

43. The petitioner further alleges and questions whether the President's Address having not been gazetted and tabled before Parliament constituted a lawful order under article 132 of the *Constitution* and whether it is available to an order of mandamus. It should be appreciated that the President is the head of the Executive and government and is entitled to address any issue of National concern, as it arises and anywhere pursuant to article 10 of the *Constitution*.

44. Article 131 of the *Constitution* on authority of the President provides:-

> " 131. Authority of the President
>
> (1) The President—
>
> (a) is the Head of State and Government;
>
> (b) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;
>
> (c) is the Commander-in-Chief of the Kenya Defence Forces;
>
> (d) is the chairperson of the National Security Council; and
>
> (e) is a symbol of national unity.
>
> (2) The President shall—
>
> (a) respect, uphold and safeguard this *Constitution*;
>
> (b) safeguard the sovereignty of the Republic;
>
> (c) promote and enhance the unity of the nation;
>
> (d) promote respect for the diversity of the people and communities of Kenya; and

(e) ensure the protection of human rights and fundamental freedoms and the rule of law.

(3) The President shall not hold any other State or public office."

45. Further under article 132(4) of the *Constitution* it is provided:-

" 132. Functions of the President

(4) The President may—

(a) perform any other executive function provided for in this *Constitution* or in national legislation and, except as otherwise provided for in this *Constitution*, may establish an office in the public service in accordance with the recommendation of the Public Service Commission;

(b) receive foreign diplomatic and consular representatives;

(c) confer honours in the name of the people and the Republic;

(d) subject to Article 58, declare a state of emergency; and

(e) with the approval of Parliament, declare war."

46. In view of the exercise of the authority of the President as provided under article 131 of the *Constitution* and the President of the Republic of Kenya being the Head of State and Government and in exercise of the executive Authority with assistance of the Deputy President and Cabinet Secretary, I find that he is entitled to address any issue of national concern, as it arises and anywhere as per article 10 of the *Constitution*. The petitioner has failed to demonstrate what article the Address to the Nation by the President it violated and in what manner. The closure of schools following a directive issued by the President of Republic of Kenya in a "State of the Nation Address" was constitutional and did not violate the *Constitution of Kenya* in any way. So I find.

B. Whether the closure of schools has caused psychological harm to school-enrolled Children?

47. The petitioner under paragraphs 77, 78, 79, 94, 95 and 96 of the amended petition aver that the open-ended closure of Schools has caused his school-enrolled children (and millions) of other school-enrolled children in Kenya) psychological harm and this has violated their right to protection against both physical and psychological torture as enshrined under article 29(d) of the *Constitution* as read together with the *Prevention of Torture Act*. Further the petitioner presents at paragraph 129(G) (viii) as an issue for determination, contrary to the provisions of *Mutunga Rules*, the question whether the petitioner and all school going children have been physically and psychologically tortured by the act of closing schools. Lastly on this issue the Petitioner seeks under prayer (h) and (s) for damages and compensation for physical and psychological torture.

48. The petitioner in support of his case sought reliance on the UNESCO Report on the impact of "Covid – 19" on school enrolled children produced as exhibit "EA 20" at page 448 – 450 of Volume 2. The said Report has outlined the actual harm visited on school-enrolled children by open-ended closure of schools.

49. The petitioner also provided other professionally produced reports, marked as exhibit "EA6" and "EA 7", running from page 188 to page 252 of his Volume 1. Specifically, the UN document marked exhibit

"EA6" at pages 188 to 237 in Volume 1 provides extensive explications of the harm visited on school-enrolled children by virtue of the open-ended school closures.

50. The petitioner herein has outlined and particularized the specifics of the harm in paragraph 78 of his supporting affidavit at pages 117 to 119 of Volume 1 of his bundle.

51. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya provides "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts actually exists; sub-section (2) thereof provides that – 'when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." It is therefore incumbent upon the petitioner to prove that indeed the three petitioners who are his children and all the other school going children in the country, have suffered from physical torture, trauma and psychological torture as it is not enough to just allege.

52. The respondent in support of the above proposition sought to rely in the decision in the case of *Michael Maina Kamami & another v Attorney General* [2019] eKLR where the question of physical and psychological torture were in question, the court not only sought the most extensive definitions of torture but it proceeded to hold that:-

> " It was not enough to present the allegations, and expect a court to conclude that violations were proved. We are not prepared to find that the allegations were proved merely by reason of their having been uncontroverted. Like the learned judge, we are unable to find on a balance of probabilities that he allegations were founded on fact, and in our view, they remained just that mere allegations."

53. In the instant petition the petitioner has outlined and particularized the specific harm in paragraph 78 of the supporting affidavit. The respondents have not controverted matters raised in the petitioner's supporting affidavit at pages 117 to 119 of volume 1 of the bundle. The respondents have not tabled any material that was in context superior to the petitioner's material or that was more recent in its findings than was tabled by the petitioner. I therefore find that this aspect of the petitioner's case remains unchallenged and the plea to re-open in person schooling is not challenged in terms of the available evidence.

54. I find that the uncontroverted evidence on arising harm and loss being largely psychological is no less damage warranting the government not to grant the relief sought as envisaged under article 23(3) of the *Constitution of Kenya*. This court in awarding "appropriate relief" held in paragraph 60 in the case of *Antony Murimi Waigwe v Attorney General & 4 others* [2020] eKLR stated that;

> " Furthermore, it is clear that under article 23(3)(e) of the *Constitution* that in any proceedings brought under article 22 a court may grant appropriate relief including an order for compensation which in my view can take a form of an award of damages." (emphasis added)

55. It is noted in paragraph 27 – 45 of the petitioners supporting affidavit sworn on August 21, 2020 from page 68 – 73 of Volume 1 of the bundle, the petitioner has stated the harm visited on his children and similarly school-enrolled children in Kenya. None of the averments have been controverted by the respondents or any of the interested parties herein.

56. The petitioner sought to rely on the case of *GNB & others v Attorney General* [2018] eKLR where the Hon. Justice Mativo stated that the fact that injury inflicted on a victim is intangible is no reason not to grant relief, in the following terms at paragraph 35 of his Judgment;

> " 35. An injury suffered as a result of discrimination, harassment or inhuman and degrading treatment is no less real because it does not posses tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its potential."

57. The petitioner more specifically relies on the findings of the *UN Policy Brief Report titled "Longer – terms effects*" where it is stated:-

> " For children caught in the apex of the crisis, there is a genuine prospect that its effects will permanently alter their lives. Children facing acute deprivation in nutrition, protection or stimulation, or periods of prolonged exposure to toxic stress, during the critical window of early childhood development are likely to develop lifelong challenges as their neurological development is impaired. Children who drop out of school will face not only a higher risk of child marriage, child labour, and teenage pregnancies, but will see their lifetime earning potential precipitously fall. Children who experience family breakdowns during this period of heightened stress risk losing the sense of support and security on which children's wellbeing depends." (Emphasis mine)

58. It is further noted under paragraphs 163 – 165 of the petitioner's supporting affidavit, the petitioner pointed out the abdication by the 3rd respondent of its statutory mandate to his school-enrolled children and similarly enrolled children across Kenya. I note that the 3rd respondent did not file any response nor submissions. Therefore no rejoinder. The petitioner prays prayer (q) in this petition be granted. I therefore find that the petitioner has pleaded, particularized, and proved that the closure of schools has caused psychological harm to school-enrolled children.

C. What is the role of the 2nd respondent cabinet secretary for health in the enactments of legislative measures implicating "covid-19" and whether such measures meet legal and constitutional threshold and how such legislative restrictions affect the right to education of the petitioner's school enrolled-children?

59. The petitioner contend that the 2nd respondent is mandated by statute to deal with health matters under the Public health Act, and in this case encompassing "Covid – 19" and its impact on school-enrolled children. It is further submitted that he failed to demonstrate any definable danger school enrolled children would be exposed to in the event of a resumption of in-person learning. It is also urged that he failed to provide any data before the court, even preliminary data, of and about school closures and the impact of "Covid-19" on in-person learning.

60. It is further asserted that the 2nd respondent failed to offer any evidence before this honourable court demonstrating that since March 16, 2020, when the impugned decision was made, there have been specified irrefutably reported and documented cases of fatal "Covid-19" cases of school-enrolled children across Kenya. Not even a single case was cited by the 2nd respondent, so submits the Petitioner.

61. In refusal to respond to request for information in writing on issue implicating a constitutional right this court in the case of *Alfred N Mutua & another v Speaker of The Senate & another, Inspector General of Police (interested party)* [2020] eKLR where the refusal to respond to a request for information in

writing on issues implicating a constitutional right it was held to be a naked violation of article 47(1) of the *Constitution of Kenya*. It was held"

> " 28. The respondents did not respond to letters dated September 12, 2019 and September 26, 2019 seeking adjournment of meeting envisaged by both invitations dated September 26, 2019 and summons served on September 25, 2019. This was a clear violation of article 47 of the *Constitution* requiring that if a right of fundamental freedom of a person has been or is likely ot be adversely affected by administrative action, the person has the right to be given written reasons for the actions. The respondents having failed to respond to the 1st petitioners request for adjournment; they therefore violated the 1st petitioner's constitutional right to be given reasons in writing for the rejection of the pela for adjournment, by failure to give the 1st petitioner written notice." (emphasis added).

62. The petitioner further urge that at the time the petition herein was lodged, there was no parliamentary approval of any of the "Covid-19" purported legislation incepted in the public domain by the 2nd respondent.

63. The respondent on issue whether the 2nd respondents has at any one time declared COVID – 19 a pandemic under section 35 of the *Public Health Act*, the respondent aver that such matters of fact ought to be taken Judicial notice of pursuant to section 59 and 60 of *Evidence Act*, cap 80 Laws of Kenya. This question it is urged was dealt with in the case of *Hilary Mutyambai Inspector General National Police Service & 4 others; Kenya national Commission on Human Rights & 3 others* (2020) eKLR where it was held;

> 'It has already been established that the Curfew Order is baked by law. The Curfew Order applies to each and every person in the Republic of Kenya except those who offer essential services. There is no dispute that the measures imposed are aimed at the containment of a novel infectious disease with no known cure or vaccine. Evidence from other countries show that some of those who have been infected by the disease have died as a result of the infection. WHO has declared the disease a pandemic. The disease is therefore a threat to life which is a fundamental right protected by article 26(1) of the *Constitution*.'

64. I therefore find this question has been determined in the above-case and it is *res-judicata*.

65. On whether any lawful COVID-19 Regulation exists in Kenya that meet the threshold of legality in terms of section11 of the *Statutory Instruments Act* – It is urged by the respondents that apart from the failure by the petitioner to give the details of violations stemming from this issue, the same is *res judicata*. It is contended that this court pronounced itself on this issue in *Law Society of Kenya v Attorney general & another; National Commission for Human Rights & another (Interested Parties)* [2020] eKLR. [See paras 13, 17, 21, 22, 23(1), 24(d), 26(b), 31, 34, 43, 44, 49 and 50 among others, of the decision].

66. On issue whether the 2nd respondent has any data on the prevalence of Covid 19 among students, spanning from pre-primary to adult learners; and whether such data has been availed to the 1st respondents and all stakeholders as a basis of discussion on the verdict of the continued closure of school.

67. The respondent submissions in response in this regard is two-fold. First it is stated the petitioner in paragraphs 69, 74, 75, 76, 77, 83 and 84 makes extremely generalized statements concerning the

afflictions of the Pandemic among school going children. He urges that in-learning persons are not affected by the disease across the world. He again avers that infections are rare amongst learners. At paragraph 76 of the petition he posits that there is no documented proof of any risk of spread of the virus amongst school going children. This court is asked to note that the petitioner in his statements does not provide any evidence in the form of scientific data to prove his allegations, and to that extent it is urged these averments are omnibus, and speculative.

68. Secondly it is respondents case that the petitioner is seeking information without invoking article 35 of the *Constitution*. The respondent objects to the Petitioners action; and points out that the right to information is not in issue and the same cannot be introduced in the pleadings as an issue, amongst other issues. It must be pleaded independently. The procedure for enforcing that right was given by this court in *John Harun Mwau v Linus Gitahi & 13 others* [2016] eKLR where this court at paragraph 20 held that:-

> 'Article 35 requires that the information required by any person should be first requested and be denied for the enforcement or protection of another right. The logical set-up of the article therefore contemplates a situation wherein a party request information, in full-blown judicial proceedings, which would be used for the enforcement or protection of another fundamental right in separate proceedings. From this, logic tells me that the request for information should precede the protection and the enforcement of another right. That is why this court observed as follows in *Federation of Women Lawyers-Kenya & 28 others v Attorney General & 8 others* [2015] eKLR:-
>
> > "Although parties did not address me on the issue, it seems to me that article 35 rights are substantive rights that must be proved, not in interlocutory proceeding's, but in a substantive hearing on the merits. To do otherwise would mean that article 35 processes are merely facilitative of a hearing to prove the alleged violation of other rights in the Bill of Rights by invocation of article 35(2) of the *Constitution*. At face value, I see no merit in such a proposition."

69. Section 107(1) of the *Evidence Act*, cap 80 Laws of Kenya clearly provides that he who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts actively exist thus the petitioner has alleged herein and the burden of proof lies with him. I find the petitioner was bound to prove the allegation under this issue to the required standard of proof.

D. Whether the 3rd respondent has discharged its mandate under article 53(2) of the *Constitution* as read together with section 32(2) of the children's act, in the face of the open-ended closure of schools over the covid – 19 pandemic and whether it is in the best interest of the child to re-open school?

70. The issue herein is whether the 3rd respondent has discharged its mandate under article 53(2) of the *Constitution* as read together with section 38(2) of the *Children Act* in the face of the open-ended closure of schools over COVID-19 pandemic. Under section 31 of the *Children's Act*, the Composition of the National Council, the 3rd respondent herein, includes the Principal Secretary for health, the Principal Secretary for Education and the Honourable Attorney General, who are all parties herein. The actions of the 1st, 2nd and 4th respondents must be seen through the lenses of the 3rd respondent and vice versa.

71. Section 32(2) of the *Children's Act* (cap 141) Laws of Kenya sets out the function of the council and in applying the same there is need of reading the whole Act, the *Constitution* and every statute dealing

with children so as to have the broad interest of the children. It is further clear that article 53(2) of the *Constitution* provides that the interest of the child shall be of paramount importance in any matter concerning a child. Further Section 4 of the *Children Act* reiterates this cannon and specifies that:-

a. Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child;

b. In all actins concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration;

c. All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to – safeguard and promote the rights and welfare of the child; conserve and promote the welfare of the child; secure for the child such guidance and correction as is necessary of the welfare of the child and in the public interest. (Emphasis Added)

72. The petitioner herein concern is whether the respondents have executed their mandate clearly provided for under article 53(2) of the *Constitution* and section 32 of the *Children Act* deligently or at all. Section 4 of the Children Act clearly provides that every child has an inherent right to life and that it shall be responsibility of Government and the family to ensure the survival and development of the child; and that all decisions made by the respondents in concerning the child shall be in the child's best of interest and they shall all be in the public interest. it is urged on behalf of the respondents that the respondents diligently exercised the mandate and that they continue to do so by engaging a phased re-opening of schools.

73. The respondents contend that the right to education is clearly provided for in the *Constitution* and relevant statutes. Section 4 of the *Children Act* provides that it is positive duty of the respondents herein to ensure that the right to life, which is inherent in every child, is upheld. That it is the duty of the government to guarantee the survival and development of every child. This was restated by this court in *Law Society of Kenya v Attorney General & another; national Commission for Human Rights & another (interested parties* [2020] eKLR at para 115, that:-

> 'It is of general notoriety that people aged 60 years and above and those with underlying health conditions are at the highest risk of death if they contract Covid – 19. The government has a constitutional obligation to protect such persons and all Kenyans. As was appreciated in *Zeitun Juma Hassan Petitioning on Behalf of the Estate of Abdul Ramadhan Biringe (Deceased) v Attorney General & 4 others* [2014] eKLR it was stated:-
>
> "23. Apart from ensuring that every person enjoys the right to life to the fullest extent, the right to life imposes a positive duty on the State to protect the right to life by enacting laws that protect life which are backed by effective law enforcement machinery for the prevention, suppression and sanctioning of breaches of such laws."

74. Further, on this issue, this court also relied on the Malawi case *President of the Republic of Malawi ex parte Steven Mponda (Malawi Zomba District Registry* Judicial Review No. 13 of 2020) the high Court stated as follows:-

> " The court having reviewed the state of disaster declaration noted that it was prescribed by law, that is, the DRPA. Furthermore, this court does not find it unreasonable that where the world has declared a pandemic and cases continue to rise, a school shall consider closure so as to safeguard the lives of the students it caters for. Furthermore, this court on examining the city of Zomba wishes to point out that apart from Chancellor College, Zomba has the highest number of institutions hosting large numbers of people, all within 10 to 20 km from Chancellor College like the two army barracks, police training school, Zomba Central Hospital, Zomba Mazimum Prison, Zomba Mental Hospital, Zomba Market, Secondary Schools like Mulenguzi, St Mary's, Masongola, Police and Zomba Catholic to name a few as well as numerous primary schools. The potential risk of spread if not considered would be catastrophic. Thirdly, the court noted that the declaration was recognized by international human rights standards as neighbouring countries like Zambia, Mozambique and Tanzania have similarly done the same. Lastly, the limitation was necessary in a democratic and open society which was balancing the right to life versus the right to education.'

75. As regards the precautionary principle it is urged the principle demanded the closure of schools in a contained measure against the spread of pandemic. In the case of the *Law Society of Kenya v Attorney General & another, National Commission for Human Rights & another (Interested Parties)* [2020] eKLR petition at para. 120 it is urged that – the restriction on movement was informed by the serious threat posed to the health and lives of Kenyans by the spread of COVID – 19, protection of the old and vulnerable in society and prevention of potential resultant deaths. The 2nd respondent (CS – Ministry of Health, the 2nd respondent herein) in his affidavit deponed that its decision has been reached based on expert determination that COVID – 19 spread primarily via respiratory droplets, thus little blobs of liquid as someone cough, sneezes, or talks and that virus contained in these droplets can infect other people via the eyes, nose, or mouth; either when they land directly on somebody's face or when they are transferred there by people toughing their face with contaminated hands.

76. The respondents urge that the interaction between students, teachers, non-teaching staff and the schools' immediate communities, schools form a fertile ground for the incubation and spread of the pandemic. The likelihood of the pandemic spreading through respiratory droplets, little blobs of liquid [coughing, sneezing, or talking] and infections through contacts cannot be gainsaid. The precautionary principle demanded, then, that schools be closed however a phased reopening has now been recommended.

77. The respondent seek reliance in both *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties)* [2020] eKLR and *Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested)* [2020] eKLR this court pronounced itself clearly and cited with approval Lady Justice Aburili's decision in *Republic v Ministry & 3 others ex-pare Kennedy Amdany Langat & 27 others* [2018] eKLR. The courts have made the following salient holding, in respect to this principle:-

    a. That the principle focuses primarily on prevention of unforeseen and unwanted consequences to human beings, during a pandemic. The principle is designed to prevent potential risks and it is the duty of the state to take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated or manifested. This approach takes into account the actual risk to public health, especially where there is uncertainty as to the existence

or extent of risks to the health or consumers. The state may take protective measures without having to wait until the reality and the seriousness of those risks are apparent;

b. Where, in matters of public health, it proves impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted ... but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective and

c. Governments cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle. The use of a curfew order [in this case the closure of schools and their phased re-opening] to restrict the contact between persons, as informed by the trends of the pandemic."

78. The petitioner urges that he is entitle to declaration he seeks against the closure of schools for in-person schooling in Kenya by means of the impugned "Address to Nation". It is contended the divine injunction on parents to diligently teach their children is found in the Bible in Deuteronomy 6:4-9 which it states:-

> " Hear , O Israel: The Lord our God is one Lord: 5 And thou shalt love the Lord thy God with all thine heart, and with all they soul, and with all they might. 6 And these words, which I command thee this day, shall be in thine heart: 7 And though shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when tough liest down, and when thou risest up. 8 And thou shalt bind them for a sign upon thine hand, and they shall be as frontlets between thine eyes. 9 And thou shalt write them upon the posts of they house, and on they gates."

79. The petitioner further refers to 2nd Timothy 2:15 where the Bible states the command to study in order to secure God's approval, and for knowledge and understanding to navigate the discourse of Life:-

> " Study to show thyself approved unto God, a workman that needs not to be ashamed, rightly dividing the word of truth." (Emphasis Added)

80. Article 13 of the *International Covenant on Economic, Social and Cultural Rights* expenses the primacy of the Right to Education in the following terms:-

> " Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially, marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from hazardous labour and social exploitation, promoting human rights and democracy and protecting the environment and controlling the population growth." (Emphasis mine)

81. The petitioner in seeking the intervention of the court herein, over the respondents acts in leaving his school enrolled children exposed to harm and injury sought reliance from *Section 27 and others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012) where when the South African Constitutional Court was faced with a challenge of a similar nature to issue appropriate relief

implicating the realization of education rights did not hesitate to order remedial measures. It held *inter alia* that the Limpopo Department of Education was to:-

> " b. Identify the extent to which the quality of teaching in the areas where it occurred was prejudiced or compromised as a result of the non-availability of text books.
>
> c. Identify remedial' measures that are contemplated in addressing both the matters identified in a and b above, the role of the various role players in this regard, including the respondents, schools, educators, learners and parents and any other party.
>
> d. Provide a timeframe in respect to which the plan is to be implemented as well as the monitoring mechanisms which will be put in place to monitor the implementation of the plan.
>
> e. Ensure that the plan is comprehensive to the extent that it covers all affected Grade 10 learners, recognising of course, that the nature of the interventions may differ from school to school.
>
> f. To the extent that the plan will invariably involve extra classes and lessons, indicate when these will happen..." (emphasis added)

82. The Committee on the Rights of the Children *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* stated:-

> " The "best interest" of the child is described by the Committee as a "dynamic concept that encompasses various issues which are continuously evolving."[1] Due to the complex nature of the best interests of the child, its content must be determined on a case by case basis. It is flexible and adaptable and should be assessed and determined according to the specific situation and circumstances of the children concerned.[2]
>
> The best interest of the child is to be applied in order to "resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties." Therefore, where States seeks to implement measures they have an obligation to clarify the best interest of all children.[3]
>
> The Committee is aware that the flexible nature of the concept of the child's best interests means that it can be manipulated and abused by Governments and other State authorities, parents, or by professionals.[4] States must therefore ensure that when developing legislation and policies, a continuous process of child rights impact assessment (CRIA) is performed to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights.[5]
>
> In giving full effect to the child's best interests, the following parameters should be borne in mind:
>
> (a) The universal, indivisible, interdependent and interrelated nature of children's rights;
>
> (b) Recognition of children as right holders;
>
> (c) The global nature and reach of the Convention;

(d) The obligation of States parties to respect, protect and fulfill all the rights in the Convention;

(e) Short-, medium- and long-term effects of actions related to the development of the child over time.[6] (emphasis mine)

83. Committee on the Right of the Child *General Comment No 5: The General Measure of Implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6)

> "The Committee postulates that the principle of the 'best interests of the child' requires "active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children."[7] (Emphasis mine)

84. Committee on Economic, Social and Cultural Rights *General Comment No 13: The Right to Education (art 13)*

> "The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.[8]" (Emphasis Added)

85. The *Committee on the Rights of Child Covid-19 Statement*

The Committee calls upon States to:

1. Consider the health, social, educational, economic and recreational impacts of the pandemic on the rights of the child. Although initially declared for short terms, it becomes clear that declarations of States of emergencies and/or disaster may be maintained for longer periods, leading to longer periods of restrictions on the enjoyment of human rights. The Committee recognizes that in crisis situations, international human rights law exceptionally permits measures that may restrict the enjoyment of certain human rights in order to protect public health. However, such restrictions must be imposed only when necessary, be proportionate and kept to an absolute minimum. Additionally, while acknowledging that the COVID-19 pandemic may have a significant and adverse impact on the availability of financial resources, these difficulties should not be regarded as an impediment to the implementation of the Convention. Nevertheless, States should ensure that responses to the pandemic, including restrictions and decisions on allocation of resources, reflect the principle of the best interests of the child. (emphasis added)

3. Ensure that online learning does not exacerbate existing inequalities or replace student-teacher interaction. Online learning is a creative alternative to classroom learning but poses challenges

for children who have limited or no access to technology or the Internet or do not have adequate parental support. Alternative solutions should be available for such children to benefit from the guidance and support provided by teachers.

86. Ministry of Health Covid -19 Outbreak in Kenya: Daily Situation Report (27 July 2020)

> "According to the last situation report released by the Ministry of Health, of the 17,975 confirmed cases 706 were between 10-19 years of age, and 730 were between 0-9 years of age. Additionally, of the 285 fatalities, 2 persons were between the 10-19 years of age and 7 were between 0-9 years of age. As of October, there are no statistics to confirm whether these numbers have increased or decreased since this last report". (Emphasis mine)
>
> According to the latest news, 52 students and 6 teachers have tested positive for Covid-19 at school in Busia County. https://citizentv.co.ke/news/52-students-6-teachers-test-positive-for-covid-19-at-school-in-busia-county-349940/ (Emphasis Added)

87. From the above it turns out that there is a potential risk of the spread of COVID-19 in schools and particularly with the students and teachers as has recently been noted in the schools opened with students in grade 4, standard 8 and Form IV as from September 2020.

88. Kentaro Iwata, Asako Doi and Chisato Miyakshi titled "*Was School Closure Effective in Mitigating Coronavirus Disease 2019 (COVID-19)?* Time Series Analysis using Bayesian Inference (International Journal of Infectious Diseases 99 (2020) 57-61)

> "The authors studied the closure of schools in Japan and its effectiveness in controlling the spread of COVID-19. The authors found that their "analysis did not demonstrate the effectiveness of school closures that occurred in Japan, in mitigating the risk of coronavirus infection in the nation. Although the effectiveness could have occurred in some scenarios of sensitivity analyses, most scenarios in [their] sensitivity analyses also did not demonstrate its effectiveness."[9]
>
> They assert that they do not claim that "school closures overall are ineffective in mitigating the COVID-19 epidemic in a nation", as the closure of schools coupled with other measures such as city lockdowns might be useful.[10] It must be noted that the closure of schools in Japan was only for those aged 6-18 years, and therefore the study did not take into account those who are vulnerable to the disease and those who are likely to spread it.[11] (Emphasis mine)

89. *Centres for Disease Control and Prevention: Operating Schools During COVID-19:-*

> "To be sure, the best available evidence from countries that have reopened schools indicates that COVID-19 poses low risks to school-aged children – at least in areas with low community transmission. That said, the body of evidence is growing that children of all ages are susceptible to SARS-CoV-2 infection and, contrary to early reports, might play a role in transmission.
>
> The many benefits of in-person schooling should be weighed against the risks posed by COVID-19 spread. Of key significance, in-person learning is in the best interest of students, when compared to virtual learning. Application and adherence to mitigation measures provided in this document and similar to those implemented at essential workplaces can help schools reopen and stay open safely for in-person learning."
>
> https:www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html

(Emphasis Added)

90. *UNICEF Supplement to Framework for Reopening Schools: Emerging Lessons from Country Experiences in Managing the Process of Reopening Schools*

> "Overall, the global evidence suggests that young children have lower susceptibility to infection compared to adults, with susceptibility generally increasing with age, and that children are less likely to be main transmitters of infection. Emerging evidence drawn from Eastern and Southern Africa also suggests that schools have not been associated with significant increases in community transmission. However, where the virus local transmission rate is more prevalent or where safety measures cannot be universally implemented - because of crowded classrooms, lack of WASH facilities, crowded school transportation services, or insufficient and therefore shared teaching and learning materials – decision-making becomes more complex."
>
> Some states have opted to prioritise opening up early grades and exam-preparatory classes to help mitigate the impact on student educational trajectories and support physical distancing. Countries like Tunisia, Sierra Leone and Malawi have opted to keep schools closed but "returned students who are studying for their examinations, giving them weeks of remedial learning before administering the exams." In Singapore, graduating students have returned to school to focus on preparing for national examinations.
>
> https:www.unicef.org/media/83026/file/Emerging-lessons-from-countries-experiences-of-reopening-schools-2020.pdf
>
> (Emphasis Added)

91. The court has in some instances ordered for resumption of in-person learning in schools after considering some parameters. In the *Zinat v. Spence*, 2020 ONSC 5231 (CanLII) it was stated that:-

> "(27) In my view, and having regard to available jurisprudence on this new and evolving issue, determinations about whether children should attend in-person learning or online learning should be guided by the following factors:
>
> a. It is not the role of a court tasked with making determinations of education plans for individual families or children to determine whether, writ large, the government return to school plans are safe or effective. The government has access to public health and educational expertise that is not available to the court. The court is not in a position, especially without expert evidence, to second-guess the government's decision-making. The situation and the science around the pandemic are constantly evolving. Government and public health authorities are responding as new information is discovered. The court should proceed on the basis that the government's plan is reasonable in the circumstances for most people, and that it will be modified as circumstances require, or as new information becomes known.
>
> b. When determining what educational plan is in a child's best interest, it is not realistic to expect or require a guarantee of safety for children who return to school during a pandemic. There is

no guarantee of safety for children who learn from home during a pandemic either. No one alive today is immune from at least some risk as a result of the pandemic. The pandemic is only over for those who did not survive it.

c. When deciding what educational plan is appropriate for a child, the court must ask the familiar question – what is in the best interest of this child? Relevant factors to consider in determining the education plan in the best interests of the child include, but are not limited to:

i. The risk of exposure to COVID-19 that the child will face if she or he is in school, or is not in school;

ii. Whether the child, or a member of the child's family, is at increased risk from COVID-19 as a result of health conditions or other risk factors;

iii. The risk the child faces to their mental health, social development, academic development or psychological well-being from learning online;

iv. Any proposed or planned measures to alleviate any of the risks noted above;

v. The child's wishes, if they can be reasonably ascertained; and

vi. The ability of the parent or parents with whom the child will be residing during school days to support online learning, including competing demands of the parent or parents' work, or caregiving responsibilities, or other demands."

(48) Having regard to all of these factors, I conclude that the benefits of N attending school in-person outweigh the risks. I find she will be reasonably safe at school, given the lack of any health conditions that place her at particular risk, and that it is particularly important for her to have the social interaction and consequent development that only in-person learning can offer. Mr Zinati's plan to ameliorate the risk to N's social development is not specific enough or likely to be effective. For these reasons, it is in N's best interests to begin school in person on Sept 15, 2020. (Emphasis Added)

92. Similarly in *Glynn v. Paulmert*, 2020 ONSC 5432:-

"[10] In Ontario, as of September 8, 2020, the total number of children aged 10-19 who have been hospitalized due to COVID-19 is 31. There are 1,617,937 children in this cohort. Therefore, the risk of children aged 10-19 of being hospitalized due to COVID-19 is 19 in one million. The total number of deaths in this cohort is nil.

(12) Any COVID-19 "case" that does not result in hospitalization is not a concern in this analysis since the child would either be asymptomatic or would recover in the same manner that children recover from other minor illnesses. These

"cases" do not represent an increased risk to the child compared to normal risks assumed by children attending school pre-COVID.

(13) Is it in the best interests of a child to be removed from school solely based on a 19 in one million chance of being hospitalized? No. As stated in Zinati, it is not realistic to expect or require a guarantee of safety for children in school. The level of risk to children from COVID-19 is well within the normal parameters of day to day risks associated with living in modern society. (Emphasis Added)

93. The court have also considered other factors in certain scenario and declined to resumption of in-person learning. In the case of the *President of the Republic of Malawi ex parte Steven Mpondo* (Judicial Review No 13 of 2020) it was stated:-

> " 3.22 The court having reviewed the state of disaster declaration noted that it was prescribed by law, that is, the DRPA. Furthermore, this court does not find it unreasonable that where the world has declared a pandemic and cases continue to rise, a school shall consider closure so as to safeguard the lives of the students it caters for. Furthermore, this court on examining the city of Zomba wishes to point out that apart from Chancellor College, Zomba has the highest number of institutions hosting large numbers of people, all within 10 to 20 km from Chancellor College like the two army barracks, police training school, Zomba Central Hospital, Zomba Maximum Prison, Zomba Mental Hospital, Zomba Market, Secondary schools like Mulunguzi, St Mary's, Masongola, Police and Zomba Catholic to name a few as well as numerous primary schools. The potential risk of spread if not considered would be catastrophic. Thirdly, the court noted that the declaration was recognized by international human rights standards as neighbouring countries like Zambia, Mozambique and Tanzania had similarly done the same. Lastly, the limitation was necessary in a democratic and open society which was balancing the right to life versus the right to education." (Emphasis Added)

94. I am alive to the fact that it is not the role of a court to make determination of education plans for individual families or children to determine whether the government return to school plan are safe or effective. This is simply because the government has access to public health and educational expertise which is not available to the court. The courts are not in a position without the expert evidence, to second guess the government's decision making. It is however clear that the situation and the Science around the pandemic are constantly evolving from today to today. Government and public health authorities are responding as new information is discovered. I find that the court should proceed on the basis that the government plan is reasonable in the circumstances and that it will be modified as circumstances require or new information is available. I however find that in determining what educational plan is in a child's best interest, it is wrong to require a guarantee or assurance of safety for children who return to school during the pandemic periods, as there is similarly no guarantee of safety for those who do not go to school but choose to roam freely about and for those who roam in the villages during the pandemic period. No one can claim to be safe today nor tomorrow until the disease is completely wiped out. Anyone moving in crowded areas attending political gathering or during open business in open market or traveling in a crowded matatu or in a private car is not safe either and hence the need to observe the COVID-19 safety protocols. The pandemic is only over for those who have not survived it thus the dead. The living are under an obligation to comply with Covid-19 safety protocols, whether young or old.

95. I nevertheless find that deciding what educational plan is appropriate for a child, the court of law, must consider what is the best interest of a child. The court in seeking guidance in determining the education plan in the best interest of child should consider amongst many others the following:-

> " (i) The high risk of exposure to COVID-19 that a child will face if he/she is in school or is not in school.
>
> ii) whether the child or a family member is at increased risk from COVID – 19 as a result of health conditions or any other risk factors.
>
> iii) The risk the child faces to their mental health, social development, academic development or psychological well-being from learning online;
>
> iv) Any proposed or planned measures to alleviate any of the risks noted above;
>
> v) The ability of the parent or parents with whom the child will be residing during school days to support online learning, including competing demands of the parent or parents' work, or caregiving responsibilities, or other demands.
>
> vi) The Health environment under which the child is exposed when out of the school."

96. The respondent urge the petitioner is in pursuant of extremely narrow and private interest as opposed to child interest. The respondent contend that the courts have pronounced themselves on the issue of public interest and private interest in the pandemic epoch. The respondents to buttress that point rely in the case of *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (Interested Parties)* [2020] eKLR and *Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (interested)* [2020] eKLR where it is urged that this court pronounced itself clearly and cited with approval Lady Justice Aburili's decision in *Republic v Ministry& 3 others ex-parte Kennedy Amdany Langat & 27 others* [2018] eKLR.

97. In *Law Society of Kenya v Attorney General & another; National Commission for Human Rights & another (interested parties)* [2020] eKLR the court made the following findings:-

a. At paragraph 124 – ' I have considered the parties rival submission and authorities relied upon, and from the various international authorities; I have no doubt in stating that the restrictions imposed through the restriction of movement rules are reasonable, proportionate and Constitutional and are reflective of the steps taken world over in the fight against COVID – 19. COVID - 19, now a pandemic covering the whole world with the resultant deaths in Kenya and other several whole world with the resultant deaths in Kenya and other several countries (including Italy, Spain, USA, South Africa, China and World Over) speak to magnitude of the danger which Kenya is facing and this is therefore an issue of grave public interest and for which should be taken seriously.'

b. At paragraph 125 – 'I find that in view of the seriousness of COVID – 19 disease and in light of the principles laid down by the Supreme Court in the case of *Gatirau Peter Munya case* (*Supra*) and *Jennifer Shangalla case* (*supra*), the public interest lies in saving lives of Kenyans and protecting their well being against COVID – 19, and in effect, the priority level attributable to the relevant government cause in doing so should take precedents over the unsubstantiated allegations by the petitioner.'

c. At paragraph 127 – ' I find that it is not in public interest to allow the prayers sought in this petition because if the petition is allowed and rules suspended and/or quashed, what will be witnessed or ensure is rapid spread and exposure of Kenyans to COVID – 19. What should continue to happen is to continue to take preventive measures to counter the spread of COVID – 19, including government supporting the vulnerable groups. I find that suspending the rules will harm the majority of Kenyans and that would not be proportionate to any mischief, if at all, to which the petitioner alleges it proposes to cure. I further find that the petitioner has not placed material facts before this court, of any identifiable person whose rights have been violated or evidence of violation of any provisions of the *Constitution*.'

98. The decision in *Law Society of Kenya v Attorney General & another* (*Supra*) is distinguishable in that the said case was challenging. One restrictions imposed through Restriction of Movement rules whereas the present petition is seeking that the open-ended closure of Kenya's Schools and learning institutions by means of an Address to the Nation made on March 15, 2020 is null and void. The issue in the present suit was not considered in the *Law Society of Kenya v Attorney General & another*. It is a new issue which this court is obligated to determine. The public interest and private interest referred to in the *Law Society of Kenya v Attorney General* (supra) was referred in a different context and the decision on the same is not applicable in this Petition as the issue raised is totally different.

99. The children rights are specifically entrenched in the *Constitution of Kenya* and the *Children Act* 2001. The petitioner has specifically pleaded the children rights under paragraphs 48, 50 – 53 of the amended petition. The respondents on their part have not fully addressed the petitioner's concerns, interest or learning needs of Kenya's children during the impugned period from March 16, 2020 todate save for Grade 4, Standard VIII and Form IV and no justification has been given for re-opening of Grade 4 together with the other 2 classes which are awaiting examinations. The petitioner's school-going children and other learners in the age bracket defined as "Youth" in article 260 of the *Constitution* which means the collectivity of all individuals in the Republic who; have attained the age of eighteen years and have not attained the age of thirty five years, have effectively been shunned by the Government without effectively addressing their educational needs. The selection of Grade 4, Standard VIII and Form IV as part of the phase learning and leaving the majority of other students without known education plan by the Government greatly affects such other students and risks the children facing serious mental health, social development, academic development or psychological well-being from failure to be learning at all or from learning online, bearing in mind there is no known cure for COID – 10 and no known period for how long the COVID – 19 has to remain torturing human beings. Life has to continue and the children best interest is attending school in-person.

100. Upon considering all the relevant factors, as well as authorities relied upon, I find that the benefit of the petitioner's school going children and other school children attending school in-person out-weighs the risks of COVID – 19 as urged by the respondents provided the respondents ensures that COVID – 19 measures and safety protocols are put in place and fully complied with in each and every school by both the learners and the teachers. This being complied with, I find that the school going children will reasonably be safe in school given that health conditions that may place children at health risk are given priority. Further this court notes that it is important for school-gong children to have the social interaction and academic development that can be ripped only from in-person learning. The best interest of any child is to be in school in-person as there is more control, guidance and provision of health safe measures in the school than leaving the children roaming in the villages or shanties or towns as the case may be without observing any Covid-19 Health Protocols.

E. Whether the Hon Attorney-General is liable for his failure to advice the executive to adhere to the relevant statutory instruments when closing schools, due to COVID – 19 pandemic.

101. The place of the Attorney General in this suit is threefold. One, pursuant to article 156(4)(a) of the *Constitution* he is the Principal legal advisor of the government. Two, pursuant to article 156(6) of the *Constitution* he is the first defender of the public interest and lastly under the Children's Act, section 30 and 31 he is a member of the National Council for Children Services, the 3rd respondent herein, his participation in the decision sought to be impugned herein cannot be gainsaid.

102. In pursuant to the *Office of the Attorney General Act*, Act No 49 of 2012, section 8 thereof the person of the Attorney general is protected from any civil and criminal proceedings in respect to any proceedings in a court of law or in any proceedings based on issues arising from the execution of his Constitutional and Statutory mandate. Specifically the Act provides:-

a. Section 8(1)(a) – No criminal proceedings or civil suit shall be brought against the Attorney-General, the solicitor General or a subordinate officer in respect of any proceedings in a court of law or in the course of discharging of the functions of the Attorney-General under the *Constitution* and this Act.

b. Section 8(1)(b) – No matter or thing done by the Attorney General, the Solicitor-General or a subordinate office shall, if the matter or thing is done in good faith for executing the functions, power's or duties of the Commission, render the Attorney-General, Solicitor General or other subordinate officer personally liable to any action, claim or demand whatsoever.

103. In *Githua Mungai & another v Law Society of Kenya & Another* (2015) eKLR a bench comprising of Odunga, Mumbi and Korir JJ. made the following instructive finding in respect to section 8 of the *Office of the Attorney General Act* and the immunity of the office holder. Which finding we fully rely on:-

> 'At paragraph 77 – 'We observe also that the acts which the respondents seek to censure through the "certificate of dishonour" resulted from acts performed by the petitioner in his capacity as the Attorney General of Kenya. The respondents are therefore seeking to hold the petitioner personally liable for acts performed in his official capacity as the Attorney General. In our view, even had such an attempt been made by a party with the statutory mandate to call the Attorney General to account, they would have been unsustainable unless it had been shown that the acts were not done in good faith. This is because the provisions of Section 8 set out elsewhere in this judgment insulate the Attorney General and other officers from personal liability when acting in good faith in the discharge of their official functions.' (Emphasis Added)

104. It is herein noted the acts of default alleged against the 4th respondent have not been particularized or specifically pleaded; and that there has been no demonstration from the petitioner that any such impugned acts were done mala fides. There is no demonstration on part of the petitioner that the impugned acts were not done in good faith for executing the functions, power's or duties of the commission so as to render the Attorney General liable to any action, claim or demand whatsoever. I find no basis in the petitioners' allegation and the same is accordingly dismissed.

F. Whether the amended petition is sufficiently and precisely pleaded or it is based on conjecture?

105. The respondent contend that the petition herein is omnibus petition; incapable of attracting precise answers from the respondents – At paragraphs 41, 42 and 43 of the *Mumo Matemu Case* (supra) the Court of Appeal states thus:-

> '...However, our analysis cannot end at the level of generality. It was the High Court's observation that the petition before it was not the 'epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.'

106. The respondent filed response to the petitioner's petition through a replying affidavit contending that the long statements in the amended petition are not supported by any empirical reports or researched data and therefore they cannot form the basis of a constitutional claim and prayed the same be struck out or be expunged from the record.

107. It is further urged that the petitioner cites several articles of the *Constitution* and several sections of the Basic Education Act but says nothing about them. The respondents contend that this is a clear abuse of the court process that was referred to by the Court of Appeal in the *Mumo Matemu Case* (supra) at para 3 of its judgment. These articles and Sections as cited without giving their connection with the cause of action or the facts are an abuse of this court process.

108. It is contended by the respondents that the emerging jurisprudence in litigating on matters touching on Covid-19 call for a more thorough approach to the facts relied upon by the petitioners. In declining to grant the orders sought in *Law Society of Kenya* (supra) the court held as follows, in paragraphs 135 and 138, of your Judgment:-

> 'On requirement of the lone driver to wear masks the petitioner urge that is irrational, effectively inviting the court to make policy and merit review of the rules. I find the petitioner's in seeking such a policy and merit review has not placed before this court any scientific evidence to this effect. I find no evidence has been availed in inviting this court to substitute the petitioner's merit view for those of the 2nd respondent.'
>
> > 'From the aforesaid I decline the petitioners' invite to review policy and expert decisions on their merits since the petitioner has not provided any scientific evidence or any evidence to justify the invite and basis for their invite on unsupported personal preference. Further I find that if orders sought by the petitioner, are granted, they would have the effect of allowing the unprecedented spread of COVID – 19 rendering the health professionals' job impossible to carryout.' (Emphasis Added)

109. It is therefore submitted by the respondents that the petition is a collection of long general statements that are not supported by any [scientific] evidence and therefore they cannot form a basis for a constitutional claim touching on alleged violation of rights touching on the Covid – 19 pandemic.

They urge further that they cannot form the basis for granting the orders and declarations sought. The respondents therefore pray that the Petition herein be dismissed.

110. The petitioner contend the respondents submissions contain untenable technical objections and states he has complied with provisions of rule 10(2) of *Mutunga Rules*, 2013.

111. The petitioner further urge he was bound in mandatory term to enumerate the particulars of these aspects of the petition and merely complied with the law, for clarity of pleadings, and in compliance with the guidelines of this honourable court's decision of *Anarita Karimi Njeru v Republic* [1979] eKLR.

112. The petitioner contend that the respondents rely on the Court of Appeal case of *Trishcon Construction Company vs. Landmark Holdings Ltd* 2016 eKLR. With respect, the said decision dealt with the deficiencies of a civil suit, as opposed to a constitutional petition such as now under consideration and the rules of procedure are entirely different.

113. In the case of *Jonathan Kiplangat Bor & 524 others v Sub County Police Commander Narok & another* [2020] eKLR Hon. Justice Kuloba held thus:-

> "I find that the *Civil Procedure Rules* are strictly inapplicable [in a constitutional petition] when a suit/or petition touches on rights, furthermore the failure of the petitioner to attach the list of persons in my mind is not fatal to the petitioners as this is a mere form and not of substance and the same can be cured under the provision of article 159(2)(d) of the *Constitution of Kenya* 2010." (Emphasis Added)

114. I have very carefully perused the petitioner's petition and I find the same is drawn in accordance with guidelines set in the *Anarita Karimi Njeru v Republic* (1979) eKLR. The relevant articles are clearly stated and so are the particulars. The petition is not an abuse of the court process.

G. Whether the court can review policy-reference and separation of power.

115. The respondents contend the decision to close the schools in March 2020 was taken by the respondents following the out break of COVID – 19 pandemic; which was only emphasized by the President in his speech of March 15, 2020. Further it is averred the decision of phased reopening of schools is being done by the 1st respondent, with the advice of the 2nd respondent and the Covid-19 Education Response Team. The opening of Schools, in the face of the pandemic, is a policy issue within the exclusive domain of the Executive Arm of Government.

116. The respondents seek reliance on the deposition of Prof Maghoha in his replying affidavit to the amended Petition particularly to paragraphs 5, 6 to 9 where he re-emphasises that containment measures which he urges include the closure of schools in March 2020 taken by the government are reasonable and justifiable. He contends the phase re-opening of schools is informed by the safety of the school going children and the school community. Further that, the phased reopening is also informed by the government duty not to take away the gains made by the containment measures earlier taken.

117. The respondents further urge that granting orders sought will be akin to doing a merit review of the decision taken by the respondents, who by the large represent the executive arm of government in the making of critical policy decisions. In view whereof the respondent urge this court to exercise restraining and deference on the said decisions by declining to grant the orders sought.

118. The petitioner contend that the open-ended closure of in-person learning in schools and learning institutions across Kenya by way of a Presidential "State of the National Address" outside the scope of the *Basic Education Act* was unconstitutional, a breach of the statutory mandate of the National

Education Board and the 1st respondent's powers as Cabinet Secretary in charge of Education. The petitioner therefore contend that the exercise of Executive Authority is unlawful. Article 129 of the *Constitution of Kenya* sets out the principles of Executive Authority as follows:-

> " (i) Executive authority derives from the people of Kenya and shall be exercised in accordance with this *Constitution*.
>
> ii) (2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit."

119. It is clearly pleaded under paragraphs 44 – 46 of the amended petition that section 71 of the *Basic Education Act* enjoins the 1st respondent in mandatory terms to act "in consultation with the National Education Board, and the various County education Boards and Institutions and all persons engaged in the promotion, provision and conduct of education shall –

    a. Ensure compliance with quality and relevance in the provision and delivery of education;

    b. Adapt effective and efficient systems to achieve the desired outcomes and objectives and avoid duplication and waste. (Emphasis Added)

120. Clear reading of the said section reveal that this power is not vested in the President of the Republic of Kenya.

121. Further under section 4(t) of *Basic Education Act*, 2013 mandates the 1st respondent to ensure that there is "enhancement of co-operation, consultation and collaboration among the Cabinet Secretary, Teachers Service Commission, the National Education Board, the County Education Boards, the education and training institutions and other related stakeholders on matters related to education."

122. It is clear by operation of this Statutory mandate on the National Education Board spelt out in Basic Education Act, the 1st respondent had no power to unilaterally decree the Schools in Kenya were to be closed effective March 16, 2020. There was need to comply with the statutory provision. It has however not been demonstrated by the petitioner in reaching the decision to close the schools, the respondents herein acted contrary to the Act and unilaterally.

123. It should be noted that an "Address to the Nation" does not constitute legislation within the meaning of article 24 of the *Constitution* so as to lawfully limit the right to education as found in both article 41(f) and article 53(1) of the *Constitution of Kenya*. Article 24 of the *Constitution of Kenya* which provides:-

> " 24. Limitation of rights and fundamental freedoms
>
> 1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> a. the nature of the right or fundamental freedom;
>
> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation

d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

3. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.

4. The provisions of this chapter on equality shall be qualified to the extent strictly necessary for 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.

5. Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

124. Article 24(2) of the *Constitution of Kenya* clearly and consistently emphasizes that the recognized limiting instrument is legislation, which has ostensibly passed through the set sieves of valid legislation pursuant to the Statutory Instrument Act No. 23 of 2013.

125. The "Address to the Nation" in article 24 of the *Constitution* envisages a law, passed by a legislative Assembly article 260 of the *Constitution* defines "Legislation" to include, "An Act of Parliament or a law made under authority conferred by an Act of Parliament. In view of the above it is clear the "Address to the Nation" purporting to cut down the petitioner's school of which being cognized of the doctrine of separation of powers. In the case of *George Bala v Attorney General* (2017) eKLR Hon Justice Odunga, held:

> "I therefore hold and affirm that this court has the power to enquire into the constitutionality of the actions of the executive notwithstanding the doctrine of separation of powers. This finding is fortified under the principle that the *Constitution* is the Supreme Law of this Country and the Executive must function within the limits prescribed by the *Constitution*. In cases where it has stepped beyond what the law and the *Constitution* permit it to do, it cannot seek refuge in illegality and hide under the twin doctrines of parliamentary privilege and separation of powers to escape judicial scrutiny." (Emphasis Added)

126. Considering the provisions of the *Constitution* as well as by way of analogy and in considering the pleas sought by the petitioner, I find the same to be consistent with the Judicial Interventions in similar cases. The Court of Appeal in *Republic v Chief Justice of Kenya & 6 others ex-parte Moijo Mataiya Ole Keiwa* (*Supra*) held thus:-

> "We think the Chief Justice, the President and the Tribunal failed to observe the basis requirement of the law. Fundamental guarantees of fair trial empower judges to resolve disputes between parties, interpret and apply the law of the land. In performance of that privilege or honour the judges define peoples' rights, duties, powers responsibilities, obligations and liabilities. They also define and determine the definition of vast amount of public and private resources and correct erroneous actions of public officers." (Emphasis Added)

127. In the instant petition the petitioner is seeking the intervention of this court of the overbearing actions of the respondents which has made his school-enrolled children out of school and leading to their being exposed to harm and injury. The petitioner seeks several orders including an order to open schools following close down of the school and forbidding in-person learning on the grounds of containment of COVID – 19.

128. It is noted that the respondents invocation of "policy" as a defence is raised in the submissions as no evidence is raised on policy or legislative waiver of the respondents mandate to act with the National Education Board in exercise of the powers of the Education Cabinet Secretary under Basic education Act. The allegations from the respondents' submissions in paragraphs 57, 58, 59, 60, 61 and 62 on alleged "Policy" have no backing either in fact or in law. The respondent s failure to comply with provisions of section 107 of the *Evidence Act* goes against their submissions.

129. The respondent urge that the granting of the orders sought will be tantamount to this court substituting the decision of the respondents with the view of the petitioner and that the court will be sitting to make a merit review on the policy decision of the respondents and further increase person to person contact between the students and school community with possible consequence the pandemic will astronomically spread. It is noted that the respondents contention is not supported by

any pleadings or evidence herein. The respondents have not disclosed in this petition what are their so called policy decisions. It is wrong on part of the Respondents to urge by granting orders sought this court will be sitting to make a merit review. On the issue of increasing person-to-person contact between students and the school community, it is noted the respondents have opened school for grade 4; Standard 8 and Form IV. It is assumed that they have put in place measures to contain the spread of Covid – 19. Secondly there is no policy in place controlling person-to-person contact in respect of the pupils who are not attending schools but are let loose and allowed to roam anywhere anytime. The children attending school at least have some measure of containment of Covid – 19. I find in the interest of justice as regards the welfare of children is better served when at school than when out of school without any control as regards person-to-person contact to which the respondents can give directions to when most of the children at school.

H. Whether community based lerning program is legal?

130. The petitioner herein in the amended petition raises issue as to legitimacy and constitutionality of community Based Learning Programme. The petitioner contends that the Program thwarted the legitimate expectations of the 2020 candidates, it was unilaterally commenced – there were no consultations with the stakeholder, it was ill-thought and is based on the Nyumba Kumi socialist / communist concept, that through the Program school going children were learning in community shacks / abandoned sheds, that the Program will water down the quality of education given in Kenya, that the Program will not have meaningful and /or quality education, that the Program removes choice from parents / guardians. It is dictatorial and that it is bereft of quality checks.

131. The petitioner seeks to have the Program declared null and void for lack of public participation; further he seeks an order of injunction stopping the respondents from further undertaking the Program.

132. The respondents in response assert that despairingly reference made against the Program is unsubstantiated. They are general statements, incapable of attracting precise answers. The respondent urge that the bottom line is that school going children were somehow to have continuity in their studies during the pandemic period.

133. In the instant petition, the respondents have failed to demonstrate that the "Community Based Learning" program was within the law. The petitioner on the other had has been able to cite specific provisions of the *Basic Education Act* contravened in the process of inception of the "Community Based Learning" program. The respondent did demonstrate compliance with the several provisions stated to have been violated by the 1st respondent in the petitioner's petition.

134. The respondents on issue of Public participation contend that Prof Magogha, the Minister herein appointed a sixteen member committee which was christened the Covid-19 Education Response Team [hereinafter referred to as the Committee], which drew its membership from relevant trade unions, government curriculum development institutions, county government curriculum development institutions, county government representatives, representatives of the Kenya national Examination Council, Directorate of Policy, Partnerships & East Africa Community, Directorate of Secondary Education, the Muslim Education Council, the National Council of Churches Kenya, the Kenya Association for Independent International Schools, the Kenya conference of Catholic Bishops, the Chairman – Kenya Parents Association, the Chief Executive Officer – Kenya Private Schools Association, the Chairperson – KEPSHA, the Chairperson – Kenya Secondary Schools Heads Association and representatives of the Teachers Service Commission. This is evidenced by exhibit "GAOM – 2' which is a bundle containing letters of appointment of various members to the team.

135. The respondents therefore contend that there was public participation, fully compliant with the Supreme Court decision in *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 Others* (2017) eKLR, My Lord in *Law Society of Kenya Case* (*Supra*) paragraphs 77, 88, 92, 93, 95, 97, 98 and 99 speak to the point that each case should be looked at on its own merits; that extreme necessity should be a determinant on the character of the public participation required; and that in the circumstances of Covid 19 Pandemic it can be successfully urged that going through the rigours of public participation could as well have undermined the containment measures taken and the precautionary principle; to extreme prejudice and peril of school going children and the school community.

136. The respondents contend the committee's mandate was wide but specifically it was to advice the 1st respondent on issues, policies and strategies that the education sector needed to address in response to the pandemic challenges; this included the re-opening of schools.

137. It is noted that the guidelines are modelled along the precautionary principle. Through the implementation of the Guidelines the respondents will be able to prevent the infections and just in case they occur the respondents will have an early detection mechanism and present timely medical interventions.

138. The Guidelines it is noted are not static. At page 3 of 'GAOM – 4' it is acknowledged that the Guidelines will be reviewed from time to time with the guidance of the 2nd respondent to ensure that they align with the new information on the pandemic and the global best practices. This goes to confirm that even experts are unable to give term dates with certainty.

139. On the phased Re-opening exhibit "G AOM-6" the respondents urge that the schools are being reopened. The modus of reopening of primary schools however is phased / progressive, as opposed to allowing everybody to be in school. This is informed by the Committee's Report that the learner's right to education must be enjoyed in a safe environment that requires thorough preparation aimed at preventing infections, to early infection detection and early treatment in the school ecosystem and community [paragraphs 15 – 18 of the Respondent's Replying Affidavit].

140. The respondents have not rebutted the petitioner's contention that the community Based Learning program was unilaterally commenced, that the were no consultation with the stakeholders and that it was not on relevant provisions of the *Basic Education Act*. There was a sixteen members Committee appointed by the Minster but there is no evidence that the committee made any report on Community Based Learning Program and even if they did so, as the same it is not supported by any provisions of the *Basic Education Act*, the project would be *ultra vires* the *Basic Education Act*. It is null and void for all purposes and intentions.

141. Having come to the conclusion that, I have, I find the petitioner's petition partially succeeds. I proceed to make the following orders:-

    a. A declaration be and is hereby issued that each of the petitioner's school-going children subject of this petition, JLA (aged 21 years), JMA(aged 18), and DTA (aged 16 years) and all equally implicated Kenyan school-going Children and Learner's Fundamental rights and freedoms in relation to their Education as enumerated in the petition herein were contravened and grossly violated by the respondents as enumerated in the petition herein.

    b. A declaration be and is hereby issued that pursuant to article 10(2)(a) and (b) of the *Constitution of Kenya*, the 1st respondent is bound by the principles of patriotism, public participation, transparency, fairness, human rights, and good governance in the execution of

the terms of his portfolio and duties appurtenant to the Education sector in Kenya as spelt out in the applicable statutory regimes, and any recommendations by any person or entity to the 1st respondent on the closure and reopening program of schools in Kenya at any time conducted without involving the National Education Board, the respective County Education Boards, the County Parent's Associations from school through a delegate system as mandated in the Third Schedule of the Basic Education Act, is null and void.

c. A declaration be and is hereby issued that, in prolonging the open-ended closure of schools and learning institutions in Kenya from March 16th 2020 to date without any consultations with the parents, guardian of school-enrolled children, affected learners in diverse learning institutions, in conjunct with the National Education Board and respective County Education Boards, the 1st respondent, Cabinet Secretary, in charge of Education in Kenya said continuing action was ultra vires section 4(I) and section 70 of the *Basic Education Act.*

d. A declaration be and is hereby issued that the "community-based" learning project announced by the 1st respondent on July 30, 2020 in conjunct with the 1st interested party, Teachers Service Commission is null and void for want of public participation and consultation with the National Education Board, respective County boards across Kenya, and the petitioner via his cited children's school, and like parents of school-enrolled children across Kenya.

e. An order of injunction be and is hereby issued restraining the 1st respondent by himself, his assistants and partners, agents, servants, or otherwise howsoever, together with the 1st interested party, Teacher Service Commission from undertaking, or further executing the "community-based learning" project in schools and learning institutions across Kenya as announced by the 1st respondent on July 30, 2020.

f. An order of *mandamus* be and is hereby issued, to compel the 1st respondent to forthwith direct the re-opening of in-person learning institutions and schools in Kenya, observing the health and safety Guidelines and considering safe environment commencing forthwith and not later than 60 days of this order for learning institutions and schools across the Republic of Kenya so as to have all the learners inn learning institutions and schools enjoy in-person learning.

g. An order of *certiorari* by way of judicial review be and is hereby issued bringing to this honourable court for purposes of quashing, and to be quashed, the 1st respondent's decision made on July 30, 2020 purporting to declare and execute "community-based learning" program in schools, learning institutions, Churches and places of worship across Kenya, for lacking of public participation and being ultra vires section 42(1) of the *Basic Education Act*, Act No 14 of 2013.

h. Prayers c, d, g, h. k. l. n. o. p. q, r, and s in the petition have not been proved and the same are not granted.

i. The petitioner has succeed in some of the prayers and failed equally in a number of prayers. The petitioner was partially successful and so were the respondents in their opposition to this petition. In the interest of justice I find each side has won and lost on some issues. I accordingly direct each party to bear its own costs.

j. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER, 2020.

.....

J. A. MAKAU

JUDGE

[1] p 2

[2] p 5