



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

PETITION NO. 6 OF 2018

P O (SUING AS THE NEXT FRIEND OF

AA, LA, BA, FA, GO, SN, IO, WT, & PS).....1ST – 9TH PETITIONER

LAW SOCIETY OF KENYA.....10TH PETITIONER

VERSUS

BOARD OF MANAGEMENT

ST. A PRIMARY SCHOOL AHERO.....1ST RESPONDENT

CABINET SECRETARY

MINISTRY OF EDUCATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

ASSOCIATION OF

JEHOVAH'S WITNESSES IN EAST AFRICA.....INTERESTED PARTY

JUDGMENT

This Petition was brought by **PO** in his capacity as the Next Friend of nine children who were all students at the **ST. A CATHOLIC PRIMARY SCHOOL, AHERO**.

1. The Second Petitioner was the **LAW SOCIETY OF KENYA**.
2. The Petition was triggered by the decision which the Board of Management of school made, in response to a request by the students; who had asked the school to exempt them from all interfaith activities.
3. The nine students were all adherents to **JEHOVAH WITNESSES**.
4. One of the nine students had refused to attend a compulsory Catholic Church Mass which used to be held every Friday morning at the school.
5. Following her said refusal, the student was expelled from the school.
6. Following intervention by the Board of Management, it was resolved that the student would be re-admitted to the school if she and her father agreed to abide by the school routine, which included the attendance of Mass every Friday morning at 7a.m.

7. The Petitioners moved the court seeking;

“... to enforce the rights of Jehova Witness children at school, not to be indirectly discriminated through a forced ‘one-rule-fits-all’ Friday Mass attendance.”

8. The Petitioners sought;

“... reasonable accommodation through appropriate exemptions, which takes into account the rights of children and the right to education alongside freedom of religion and freedom from discrimination.”

9. At the time the petition was filed, in April 2018, the students were due to be registered as candidates for the Kenya Certificate of Primary Education Examinations.

10. Simultaneously with the Petition, the Petitioners filed an application seeking conservatory orders.

11. As the Petitioners were due to be candidates in the national examinations, it was obviously important to resolve some issues as quickly as possible.

12. The parties worked out an agreeable arrangement, so that the Petitioners were able to continue learning and the Petitioners eventually wrote their **KCPE** Examinations.

13. Meanwhile, the **ASSOCIATION OF JEHOVAH’S WITNESSES IN EAST AFRICA** sought and were granted leave to be enjoined to the Petition, as an Interested Party.

14. According to the Interested Party, there were about 30,000 members of the Jehovah’s Witnesses who live in Kenya.

15. It was the intention of the Interested Party to assist the court to achieve a result that protects the rights of the parties, as well as the rights of its other members throughout Kenya.

16. By the time when the Petition came up for hearing, the Petitioners had already sat for their **KCPE** Examinations.

17. In their submissions, the Petitioners said that they had brought the claim in public interest and on behalf of the students who were directly affected by the matters complained about.

18. It is in the light of that fact that, notwithstanding the contention that the Petition had been overtaken by events, the court was obliged to make a determination on the matter. Even though the students had already sat for their exams, that did not mean that the issues of the alleged discrimination should be swept away under the carpet.

19. The Petition sought the following reliefs;

“(a) A declaration that the 1st Petitioner’s expulsion from school on the basis of her religious views amount to an indirect discrimination; and constitute a violation of the 1st Petitioner’s right to education, right to dignity and was therefore null and void.

(b) Damages for violation of the 1st Petitioner’s fundamental rights and freedoms.

(c) A declaration that the school rules and regulations that provide for a mandatory 30-minutes Mass every Friday morning for all children is indirectly discriminatory, unconstitutional and invalid.

(d) That the 2nd and 3rd Respondents be compelled to provide a directive and or regulations for schools in Kenya on the exercise of freedom of conscience, religion, belief and opinion.”

20. It was the Petitioner’s case that their faith, as Jehovah’s Witness believers, forbids inter-faith activities.

21. Therefore, the Petitioners submitted that;

“... by imposing attendance of non-classroom inter-faith activities, the school interfered with the Petitioners’ rights under Article 32 (2), to manifest their religion as Jehovah Witnesses including through worship, practice, teaching or observance.”

22. Quoting from the Court of Appeal’s decision in **SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED Vs MINISTER FOR EDUCATION & 3 OTHERS, CIVIL APPEAL NO. 172 OF 2014**, the Petitioner submitted that the constitutional freedom of religion includes both the right to have a religious belief and the right to express such a belief in practice.

23. The Petitioners acknowledged that the freedom of religion was not absolute, but submitted that it only be limited by legislation.

24. Furthermore, if any such legislation were to limit the freedom of religion, the said limitation had to be reasonable and justifiable in an open democratic society.
25. In this case, the Petitioners pointed out that the limitation in issue had not been provided for by any legislation.
26. In any event, the Petitioners believe that the limitation in issue does not serve any legitimate aim.
27. The limitation being referred to here is the mandatory attendance, by all students, of the Friday Catholic Mass, for a duration of 30 minutes.
28. Although the Petitioners concede that that is a uniform rule that is applicable to all the students, they insist that the rule is indirectly discriminatory against non-Catholic students at the school.
29. But the Respondents reason that the uniform application of the school rule provides an orderly and predictable way of running schools.
30. It was pointed out that in any learning institution, it is important that students should be at a particular place at a particular time.
31. When that happens, the Respondents believe that it becomes easier for the institutions to monitor the students, for the sake of their own safety.
32. The Respondents also pointed out that whilst the Board of Management had been ready to explore the possibility of finding a workable compromise, the Petitioners had taken the position that on the issue at hand there could not be any compromise.
33. It was the Respondents' case that when the Petitioners moved to court, they were inviting the court to perform the duties of the Board of Management, which is the organ lawfully tasked to find solutions to grievances raised by the students.
34. The Respondents invited the court to adopt the reasoning in the case of **FRANCIS MAJIMBO & ANOTHER Vs THE PRINCIPAL, KIANDA SCHOOL (SECONDARY SECTION), HIGH COURT PETITION NO. 281 OF 2012.**
35. In that case the High Court expressed the considered view that the courts ought not to be quick to interfere with decisions of educational institutions.
36. In principle, I would agree that as much as possible, courts should be slow to interfere with decisions made by educational institutions, just as much as with the running of say Companies or Private Members Clubs.
37. However, if any person is able to demonstrate to the court that he has justiciable issues, and that he had either exhausted the internal mechanisms for dispute resolutions, or that the decision made was unjust, the person must be allowed to bring the issue to court.
38. The 1st Respondent submitted that there is trouble when parents agitate against prayers in school.
39. In this case I do not understand the Petition to constitute an agitation against prayers in school, per se.
40. The Petitioners have expressed no objection to the Holy Catholic Mass.
41. What they are saying is that they should not be compelled to attend the said Mass, as it was against the teachings of their faith.
42. The Board of Management of St. A Primary School, Ahero, has invited the court to find that it respects religious diversity, and that it consistently grants opportunities to children of different faiths to manifest their respective religions.
43. By virtue of the fact that the school admits students who profess faiths other than those of the Church which sponsors the said school, it can be said to respect religious diversity.
44. It may also be true, (although no evidence of that was necessary in this case), that the school consistently grants opportunities to children of different faiths to manifest their respective religions.
45. Nonetheless, the one issue which the Board stands accused of is the insistence that each student, regardless of his or her religion, must attend Mass on Friday morning.
46. In determining this Petition, I first take note of the fact that the Petitioners have not asserted that the rule in issue was introduced by the school just before the time when the Petitioners first wrote to the school, requesting exemption from inter-faith activities.
47. Indeed the school made it clear that;

“..... before admission of any pupil, including those of the 1st to 9th Petitioners, at the school, the Parents and the pupils are made aware of the rules and regulations of the school including the Friday mass at 7.00am.”

48. Considering that the Petitioners **AND** their parents all signed the school rules and regulations at the time when the students were getting admission into the school, that implies that when they later sought an exemption from inter-faith activities, that constituted an afterthought on the part of the Petitioners.

49. They have not explained why they initially accepted the rules and regulations, but were now complaining that the said same rules and regulations constituted a violation of;

“... the tenets of our faith of pure worship as Jehovah’s Christian Witnesses”

50. By their letter dated 26th September 2017, the Petitioners gave

“Notice of Prohibition of Interfaith Activities for Jehovah’s Witness Pupils.”

51. By the said letter they stated as follows;

“We, the parents of the pupils listed below, hereby direct that they be perpetually exempted from all interfaith activities: worship of any kind, prayers, hymning, church attendance, religious instructions or discourses (those extraneous of the academic curriculum).”

52. Although the letter was addressed to the Board of Management of the St. A Primary School, it was a Notice informing the Board that the parents had directed the said Board to be notified that their children had been directed to keep off all the listed activities.

53. In other words, the parents of the students had laid down the terms upon which their children would continue to attend school.

54. In the case of **SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED Vs THE MINISTER FOR EDUCATION & 3 OTHERS** (Supra), the Court of Appeal noted that the following are several inter-related constitutional principles which help in the determination of cases of this nature;

“..... non-discrimination, neutrality and impartiality of the State in contests between religions and as between religious and non-religious forms of belief, respect for others’ beliefs and the duty of the State to create a level playing field between different religions or beliefs or those without religion or belief, tolerance of other religions and beliefs, proportionality in determining whether an interference with the right to believe or manifest one’s religion is justified.”

55. All the parties before me acknowledge that in Kenya there is no state religion, as the Constitution recognizes the pluralistic nature of the Kenyan society.

56. Therefore, there is need to appreciate the existence and presence of contrary beliefs, and a need to tolerate the same.

57. In the case of **SEVENTH DAY ADVENTIST** (Supra) the Court of Appeal emphasized that the right to freedom of conscience, religion, thought, beliefs and opinion is manifested;

“..... through observance (which) includes observance of a day of worship, and a believer will not be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

58. In this case, the Petitioners have not asserted that there was any attempt to coerce them to adopt a religion or belief which was not of their choice.

59. They have also not asserted that they had been coerced to do something which would impair their freedom to manifest their religion or belief.

Is the right to freedom of religion absolute?

60. In the case of **SEVENTH DAY ADVENTIST** (Supra), the Court had occasion to state as follows;

“The fundamental character of these freedoms is reflected in the opening words of Article 24, that;

‘A right or fundamental freedom in the Bill of rights shall not be limited except’

In a practical sense, however, it is granted that no legal order can guarantee absolute religious liberty without any qualification, hence the legitimate restriction and strictures in Article 24.”

61. Where any restriction was provided, the aim was to ensure that one religion did not interfere with the exercise of other religions.

62. As the Court of Appeal observed;

“Ultimately, the purpose of limitation of human rights is still for the sake of protecting those very human rights.”

63. In other words, where a limitation exists, it ought to be justifiable.

64. The school, in this case, says that the rule requiring all students to attend Mass on Friday mornings is reasonable.

65. The school says that the rule has absolutely no intention of compelling any student who was not a Catholic to convert to that religion.

66. Effectively, therefore, the school and the other Respondents contend that requiring the students to take part in the same exercise, at the same time, renders the students equal.

67. A look at the decision in the case of **SEVENTH DAY ADVENTIST** reveals the following pronouncement which was rendered after the Court had examined several other decisions;

“..... equality before the law must never be confused with uniformity. Equality does not presuppose the elimination of differences. It does not imply leveling or homogenization of behavior, but an acknowledgment and acceptance of differences. And differences cannot and should not be the basis for exclusion, marginalization, stigma or punishment.”

68. In the final analysis therefore, the school and the Ministry of Education should appreciate there is no need for any person to eliminate differences between people, in an endeavor to make them equal.

69. Differences between people, religions, beliefs and opinions are an accepted fact of life.

70. But notwithstanding the said differences, the Constitution of Kenya states categorically, at **Article 27 (1)** that;

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

71. In the result, the court appreciates that the Holy Mass is a very integral part of life of a Catholic.

72. Therefore, it is not at all surprising that Mass takes a central place at a Catholic sponsored school.

73. But the said school does not discriminate against students who are non-Catholics. To that extent, the school can be applauded for showing respect and tolerance to other religions.

74. In order to ensure that any potential student and his or her parents appreciate the rules and regulations governing the school, it is a requirement that every student and his or her parents sign the said Rules and Regulations.

75. One of the rules makes it clear that it was mandatory for all students to attend Mass at the school on Friday mornings.

76. Therefore, every student who accepts the said rules ought to comply with them.

77. Yet, the court cannot ignore the provisions of **Article 32 (4)** of the **Constitution** which stipulates that;

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

78. If attending the Holy Catholic Mass is contrary to the beliefs or the religion of the Petitioners, it would be unconstitutional to compel them to attend Mass.

79. But it cannot be overlooked that from the outset, the Petitioners indicated their readiness to comply with the school rules. It is almost as if the Petitioners and their parents were deliberately misleading the school in order to gain admission to the said school.

80. Boards of Management can only formulate and enforce rules within schools.

81. As the school said herein, parents are represented in the said Board of Management. Therefore, the parents of the Petitioners are deemed to have been represented at the Board of Management of St. A Primary School, Ahero.

82. They or their predecessors ought to have made their representations to the Board.

83. Instead, the parents gave to the Board, a Notice of a decision which they had taken.

84. It must be emphasized that;

“..... the right to education does not entail education on the terms set by the students”;

and I would add that the parents cannot simply declare to schools or other institutions, the terms under which their children are to be given education.

85. On the other hand, as was submitted by the Interested Party;

“..... no religious faith has primacy of rights over others and any attempt by any institution to forcibly indoctrinate any person with the theological predisposition of its sponsor would run afoul of this constitutional injunction as well as the provisions of Article 32 of the Constitution.”

86. In this case, however, none of the Petitioners complained about any attempt to indoctrinate them, forcibly, or at all, with the theological predisposition of the sponsor of the school.

87. The Petitioners simply do not want to participate in interfaith activities.

88. The Petitioners submitted thus;

“As a result, the school rule on compulsory mass attendance is indirectly discriminatory against the Petitioners, because even though on the face of it, it is neutral, the rule nevertheless disadvantages them.”

89. However, the Petitioners did not give any explanation about how the rule which appears neutral, had disadvantaged them.

90. In the final analysis I find as follows;

(a) As the 1st Petitioner confirmed having sat for the KCPE Examinations in 2018, her right to education had not been violated.

(b) Not only did the 1st Petitioner sit for her exams, she and her parents had originally accepted the school rules and regulations, which included the requirement that all students must attend Mass on Friday mornings.

I find that the 1st Petitioner was not entitled to any award of damages for the alleged violation of her fundamental rights and freedoms.

(c) Pursuant to Article 32 (4) of the Constitution of Kenya, no person should be compelled to act or engage in any act that is contrary to the person’s belief or religion.

If there is any such compulsion, it would be unconstitutional.

(d) In this case, the Petitioners had accepted the rules by appending their signatures and by their parents also appending their signatures to the same; thus signifying acceptance of the said rules.

(e) As this is a public interest litigation, I order that each party will pay his or her own costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER 2019

FRED A. OCHIENG

JUDGE