



**Kiarie v Attorney General & 2 others (Petition 19 of 2014)
[2016] KEHC 2274 (KLR) (29 September 2016) (Judgment)**

Erick Githua Kiarie v Attorney General & 2 Others [2016] eKLR

Neutral citation: [2016] KEHC 2274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION 19 OF 2014
CW GITHUA, J
SEPTEMBER 29, 2016**

BETWEEN

ERICK GITHUA KIARIE PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY FOR EDUCATION 2ND RESPONDENT

**CABINET SECRETARY FOR LABOUR, SOCIAL AND
SERVICES 3RD RESPONDENT**

Children held in detention facilities have the right to free and compulsory basic education

The petition alleged that the State had violated their constitutional rights of children held in detention facilities especially the right to free and compulsory basic education by failing to put in place mechanisms to facilitate access to education for children. The court held that children held in detention facilities had the right to free and compulsory basic education.

Reported by Teddy Musiga & Winnie Matiri

Constitutional Law - fundamental rights and freedoms - right to education - the right of every child to free and compulsory education - enforcement of the right to free and compulsory basic education- realization of the right to free and compulsory basic education for children held in detention facilities - Constitution of Kenya, article 53(1)(b) & 43(1)(f); Basic Education Regulations 2015, section 29; Children Act (Cap 141), section 7; The International Covenant on Economic, Social and Cultural Rights (ICESR) article 13(1) & Universal Declaration of Human Rights (UDHR) article 26.

Constitutional Law - fundamental rights and freedoms- enforcement of fundamental rights and freedoms- right of a child to free and compulsory basic education- limitation of the right of a child to free and compulsory basic education- constitutional threshold for limitation of rights- whether the limitation of the right of children to



basic and compulsory education for the reasons given met the constitutional threshold for the limitation of rights- Constitution of Kenya, 2010 articles 53(1)(b) and 24.

Constitutional Law - *fundamental rights and freedoms- Implementation of fundamental rights and freedoms- immediate and progressive realisation of rights- minorities and marginalised groups- detention facilities- jail for children under the age of 18- whether children in detention facilities fell in the category of minority and marginalized groups and therefore their right to basic education was not an immediate right but one that should be realized progressively- Constitution of Kenya, article 56.*

Brief facts

The petitioner filed the petition on behalf of minors remanded at the Kapsoya Juvenile remand home (KJRH) and children held in other detention facilities on grounds that the State had violated their constitutional rights especially the right to free and compulsory basic education guaranteed by the Constitution of Kenya, the Basic Education Act and the Children Act.

The petitioner contended that although the KJRH was established to act as a committal institution for children in conflict with the law, it also housed children in need of care and protection which included children with disabilities; that the 2nd and 3rd respondents had failed to put in place mechanisms to facilitate access to education for children in the remand home which contravened the right to free and compulsory basic education guaranteed to all children by the Constitution under article 53 and the law. The petitioner asserted that those children's right against discrimination under article 27 was also violated as other children who were not in custody were getting education.

The respondents argued that the right to basic education was not absolute and could be limited under article 24 of the Constitution; that the right flowed from the right to liberty; that under section 50 of the Children's Act and the Fifth Schedule thereto, the right to liberty for children in conflict with the law was curtailed through remand orders issued by the court; and that the right to basic education for such children was limited for the period of their detention. They further argued that children in detention centres fell under the category of minorities and marginalized groups and that therefore their right to basic education should be realized progressively.

Issues

- i. Whether the failure to offer or facilitate formal education to children held at detention facilities contravened their constitutional right to free and compulsory basic education.
- ii. What orders were appropriate to remedy a breach of contravention of the constitutional right to basic education to detained children.
- iii. Whether the limitation of the right of children to basic and compulsory education met the constitutional threshold for the limitation of rights as provided for under article 24 of the Constitution.
- iv. Whether children in detention facilities fell in the category of minority and marginalized groups and therefore their right to basic education was not an immediate right but one that should be realized progressively.

Relevant provisions of the Law

Constitution of Kenya

Article 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.

Article 25 - Fundamental Rights and freedoms that may not be limited

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.

Children Act, Cap 141

Section 7 - Right to education

(1) Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents.

(2) Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.

Held

1. Under article 43(1)(f) of the Constitution, the right of every person to education was enshrined as part of the economic and social rights enumerated therein but the Constitution did not stop there. It proceeded further to specifically provide for the right of children to basic education by declaring under article 53(1)(b) that every child had the right to free and compulsory basic education.
2. To give effect to the right to free and compulsory basic education, the Basic Education Act (the Act) was enacted with one of its purposes being to promote and regulate free and compulsory basic education. Section 28 of the Act required the Cabinet Secretary responsible for basic education and training to implement the right of every child to free and compulsory education. Section 29 of the Act proceeded to provide the different ways which the 2nd respondent should employ to ensure that all children were afforded free and compulsory education.
3. The Children Act Chapter 141 of the Laws of Kenya which according to its preamble was enacted to give effect to Kenya's treaty obligations in the Convention on the Rights of the Child and the African Charter on the Rights and welfare of the child and other connected purposes also secured the right of children to free and compulsory basic education. Article 28 of the United Nations Convention on the Rights of the Child was incorporated in section 7 (ii) of the Children Act.
4. Other key international instruments ratified by Kenya which obligated state parties to provide free and compulsory basic education were the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) which identified education as a means to ensure full development of the human personality and dignity. In this regard, article 13 (1) of the ICESCR provided that the state parties to the present covenant recognized the right to everyone to education. They agreed that education should be directed to the full development of the human personality and the sense of its dignity, and should strengthen the respect for human rights and fundamental freedoms.
5. The UDHR recognized the right to free and compulsory basic education. Article 26 of the UDHR stated that everyone had the right to education, that education should be free, at least in the elementary and fundamental stages and that elementary education should be compulsory. All international instruments form part of the laws of Kenya by virtue of article 2(5) and (6) of the Constitution.



6. The central role that education played in driving societal change and in empowering people to realize their full potential could not be gainsaid. The right to education had not only been recognized as a basic human right but also as one which was essential for the enjoyment of all other human rights. The importance of the right in shaping people's lives was captured by the committee on Social, Economic and Cultural rights in General comment No. 13 on the right to education guaranteed under article 13 of the ICESCR in the terms that education was both a human right in itself and an indispensable means of realizing other human rights.
7. As an empowerment right, education was the primary vehicle by which economically and socially marginalized adults and children could lift themselves out of poverty and obtain the means to participate fully in their communities. Education had a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education was recognized as one of the best financial investments states could make. But the importance of education was not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, was one of the joys and rewards of human existence.
8. Under article 21(1) of the Constitution, the state and all state organs had an obligation to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights which included the right of all children to free and compulsory basic education. And under article 3 thereof, every person had an obligation to respect, uphold and defend the Constitution.
9. The people of Kenya in promulgating the Constitution of Kenya decided that of all the rights and freedoms that were guaranteed in the Constitution, only four of those rights and freedoms should be absolute; that all the other rights would be subject to limitation but only to the extent and circumstances permitted by article 24 of the Constitution.
10. The right of children to free and compulsory basic education could be limited under article 24 of the Constitution. Under article 24(3) of the Constitution, the burden of demonstrating to the Court, tribunal or other authority that the requirements warranting the limitation of a right under article 24(1) of the Constitution had been satisfied, fell on the state or on the person seeking to justify a particular limitation.
11. The respondent's failure to offer basic education to the children at KJRH or any other remand facility constituted a limitation on their right to free and compulsory education. The question that arose was whether the said limitation for the reasons given met the constitutional threshold for the limitation of rights as provided for under article 24 of the Constitution.
12. The first test under article 24 of the Constitution was whether the limitation in question was prescribed by the law. That meant that the limitation had to be expressly contained in a statute. It was only after the limitation passed the first test that the Court would be called upon to consider if it was reasonable and justifiable in a free and democratic society taking into account all the relevant factors spelt out in the article, that was, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of the others, the relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.
13. Section 57 of the Children Act empowered the Court to issue committal orders remanding children to remand homes. Section 50 only established Children Remand Homes. There was no limitation express or otherwise in the provision limiting the right of children held in remand homes to basic education. The provision stated that the order committing a child to custody in a children's remand home or ordering him to be sent to a rehabilitation school should be sufficient authority for his confinement in that place in accordance with the tenor thereof, or in a health institution under section 56, and a child while confined and while being conveyed to or from a children's remand home or a rehabilitation school to or from a health institution, as the case might be, should be deemed to be in lawful custody.



14. There was no substance in the respondent's submission that the children's right to basic education was dependent on their liberty; that once their liberty was taken away by a committal order to a remand home that right was limited by article 51 of the Constitution for the period of their detention. Article 51 of the Constitution in so far as was relevant for purposes of the petition were in the terms that a person who was detained, held in custody or imprisoned under the law, retained all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom was clearly incompatible with the fact that the person was detained, held in custody or imprisoned.
15. Persons, who included children in legal custody, retained all their rights and fundamental freedoms in the Bill of Rights unless any particular right was incompatible with their detention. The respondents did not demonstrate how the right to basic education for children held in detention centres, were incompatible with the fact of their detention.
16. The expected period of stay of children in remand homes which the respondent described as short but which was long in terms of the school calendar (between one and three school terms considering that a child was to be discharged if after one year, the case was still pending) could not be said to be incompatible with the right to basic education for two main reasons: First, remand homes were permanent institutions and nothing would prevent the 2nd respondent in conjunction with the 3rd respondent to initiate and offer basic education to the children in remand homes at any given time for the duration of their detention. Secondly, offering education to such children would be appropriate and of great benefit so that when they were either acquitted or reunited with their families or placed in other institutions (for children in need of care and protection), they would be able to continue with their education and catch up with their peers.
17. Moreover, if the fact of detention of children was incompatible with learning, the 2nd respondent would not have enacted in section 29 of the Basic Education Regulations of 2015 that learners of school going age residing in children's homes, borstal institutions or other corrective facilities should be provided with basic education and training to enforce their right to education as guaranteed by several constitutional provisions.
18. The reason given by the respondents to justify their failure to offer basic education to detained children, that was, their alleged short stay in detention was not backed by any statutory provision. The respondents had therefore failed to satisfy the first test set under article 24 of the Constitution for the limitation of constitutional rights. They had failed to demonstrate that the constitutional right of children held in detention facilities in the country to access free and compulsory basic education was limited by any law.
19. It was not necessary to proceed to the next step of considering whether the limitation by the respondents was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors set out in article 24(1) (a) and (b) of the Constitution. The constitutional right of children to free and compulsory basic education enshrined under article 53(1)(b) of the Constitution should not be limited in any way in a civilized and democratic society like the one in Kenya taking into account the nature of that right and its importance.
20. Children and the youth were the future of any country and it was only education when imparted at the right time that would enable them live a dignified and fulfilling life in future and to positively contribute to the economy of the country. Under article 20 of the Constitution, courts were enjoined to interpret the Bill of Rights in a way that ensured that a person enjoyed the rights and fundamental freedoms enshrined therein to the greatest extent consistent with the nature of the right or fundamental freedom and to adopt an interpretation that most favoured the enforcement of a right or fundamental freedom.
21. The framers of the Constitution in providing for the right of children to free and compulsory basic education intended to have the right afforded to children wherever they were irrespective of their



circumstances. That was why for children, the Constitution specifically provided for basic education that was free and compulsory as opposed to the plain right of education granted to any person under article 43(1)(f). The fact of detention could not override the constitutional guarantee to children of access to basic education. The respondent's failure to offer or facilitate free and compulsory basic education to children detained at KJRH was unlawful as it contravened the provisions of the Children Act and the Basic Education Act and was also unconstitutional as it violated article 53(1)(b) of the Constitution.

22. The right of children to free and compulsory basic education was immediate and was not subject to progressive realization under article 21(2) of the Constitution since it was not one of the social economic rights guaranteed under article 43 of the Constitution. The right to basic education was not to be progressively realized. That right was to be enjoyed now and to argue otherwise would be to cheapen the Constitution and even in a society where we lived with great wealth disparities and millions wallowing in abject poverty, only education could give everyone the chance and opportunity to realize their dream and aspirations. That opportunity was not granted in the circumstances obtaining in the Petition.
23. Children in detention facilities did not fall within the category of minority and marginalized groups provided for under article 56 of the Constitution. They were just children who for some reason found themselves in conflict with the law or in need of care and protection but who still enjoyed the right to equal protection and benefit of the law.

Petition allowed.

Orders

- i. *A declaration was issued that all children including those in remand homes and detention facilities controlled by the State had a constitutional and legal right to be accorded free basic education by the State.*
- ii. *An order was issued compelling the 2nd and 3rd respondents to make available to children in KJRH and all other children in detention facilities, educational programs which were integrated with the public education system.*
- iii. *The 2nd respondent, in consultation with the 3rd respondent to develop a policy within the next 120 days clearly setting out a comprehensive framework through which basic education would be provided to children detained at KJRH and all other detention facilities in Kenya.*
- iv. *The 2nd respondent to file an affidavit within 120 days of the judgment's date detailing the policy measures put in place to offer basic education to children held at KJRH and other detention facilities in the Kenya.*
- v. *Each party to bear its own costs.*

Citations

Statutes

1. Basic Education Act
2. Children Act
3. Constitution of Kenya, 2010

Advocates

Mr. Komen holding brief for Mr. Sang for Petitioner

Mr. Ngumi for respondents

JUDGMENT

1. The Petitioner who describes himself as a volunteer legal aid service provider at the Moi University Legal Aid clinic, filed this petition on behalf of minors remanded at the Kapsoya Juvenile remand home (KJRH) and children held in other detention facilities on grounds that the state had violated



their constitutional rights especially the right to free and compulsory basic education guaranteed by both *the Constitution* of Kenya 2010, The *Basic Education Act* and the *Children Act*.

2. The 1st respondent is the Attorney General of the Republic of Kenya. He has been joined to these proceedings by virtue of the functions of his office which is created under Article 156 of *the Constitution*.
3. The second respondent, the Cabinet Secretary for Education has been sued because he leads the state organ responsible for all matters related to basic education and training as provided for under the *Basic Education Act* No. 14 of 2013 while the 3rd respondent, the Cabinet Secretary for Labour, Social Security and Services was in charge of the Children's Services Department which oversees the operations and general administration of Juvenile Remand Homes across the country.

The Petitioner's Case

4. The petitioner's case is contained in his petition dated 30th October, 2014, the affidavit sworn in its support and written submissions filed by his learned counsel Mr. Oscar Sang on 12th October, 2015.
5. In his affidavit, the petitioner avers that by the time the petition was filed, there were approximately one hundred and twenty children of school going age held at the KJRH located in Eldoret; that KJRH was one of the biggest child detention facilities in the country serving seven counties in the North Rift namely Uasin Gishu, Nandi, Trans Nzoia, West Pokot, Baringo and Turkana Counties.
6. The Petitioner contended that although the KJRH was established to act as a committal institution for children in conflict with the law, it also houses children in need of care and protection which include children with disabilities; that the 2nd and 3rd respondents have failed to put in place mechanisms to facilitate access to education for children in the remand home which contravenes the right to free and compulsory basic education guaranteed to all children by *the Constitution* and the law.
7. It is the petitioner's case that the failure by the respondents to facilitate or offer basic education to minors in lawful custody infringes on their right to inherent dignity and undermines the best interest of children contrary to the dictates of Article 53 of *the Constitution*. The Petitioner asserts that the act or omissions of the respondents are discriminatory in nature and violates the detained children's right to equality and freedom from discrimination protected by Article 27 of *the Constitution* because they were denied their right to education which was being accorded to other children who were not in custody.
8. It is his case that he has interacted with children in conflict with the law through participating in initiatives of the Moi University legal aid clinic and he has visited other institutions in the country to check whether the KJRH was unique; that at Shimo la Tewa borstal he found that some learning was taking place but basic education in line with the approved national curriculum was not being considered compulsory for all children as envisioned by the law; that the right to access free education for children in detention facilities was being treated as an opportunity rather than a constitutional guarantee.
9. The petitioner advanced the view that the respondent's failure to offer education to children in lawful custody was not unique to Kapsoya juvenile remand home but was prevalent in all juvenile detention facilities across the country. He therefore asked the court to grant the following orders;
 - i. That the court be pleased to issue a declaratory order, that all children subject to compulsory education including those in remand homes and other children detention facilities controlled by the state have access to, and participate in, basic education.



- ii. The Court be pleased to issue an order compelling the 2nd and 3rd respondents to make available to all children, whether sentenced or in remand, education programmes that would cover at least the curriculum of compulsory education at the primary and, if possible, at the secondary level also;
 - iii. The Court be pleased to issue an order compelling the 2nd and 3rd respondents to arrange comprehensive education programmes integrated with the public system so as to allow for continuation of education of every child upon being remanded or detained and upon release.
 - iv. The court be pleased to issue an order compelling the respondents to put in place measures for the systematic and appropriate screening of all children lawfully detained upon entry to places of detention.
 - v. The Court be pleased to issue an order compelling the 2nd and 3rd respondents to ensure that all child detention institutions maintain well-funded and accessible libraries, stocked with an adequate and appropriate range of resources available for all categories of detainees.
 - vi. The court be pleased to issue a mandatory order compelling the 2nd and 3rd respondents to put in place measures to ensure that all children detention and holding facilities conduct screening on all detainees to determine eligibility and plan appropriate education, and to obtain records from schools that the children had previously attended.
 - vii. All parties bear their own costs.
 - viii. Any other appropriate relief that the court deems fit.
10. In his submissions, the petitioner expounded on the averments in his petition regarding the alleged violation of various constitutional provisions as a result of the respondent's failure to facilitate provision of basic education to children at the KJRH as required by Article 53 (1) (b) of *the Constitution*.
11. Besides relying on Article 53 1 (b) of *the Constitution*, the petitioner placed reliance on Section 7 of the Children's Act which also provides for every child's entitlement to free and compulsory basic education and Section 28 and 29 of the *Basic Education Act* 2013. The petitioner also referred the court to several international and regional human rights instruments ratified by the Republic of Kenya which recognize the rights of children to access basic education. These include; The Universal Declaration of Human Rights; Convention Against Discrimination in Education; United Nations Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child and International Covenant on Economic Social and Cultural Rights.
12. It was further submitted that access to education for the children at KJRH was intrinsically bound up with their future prospects and has a practical effect on their chances of securing their social economic well being in future; that failure to grant children access to education denies them their right to human dignity under Article 28 of *the Constitution* as this fails to promote self reliance and active participation of the Children in the community.
13. According to the petitioner, the 2nd respondent's failure to comply with the obligations imposed on him by Section 29 of the *Basic Education Act* translated into the state's failure to discharge its obligation under Article 21 (1) of *the Constitution* which enjoins it to promote and fulfill the rights and fundamental freedoms in the Bill of Rights.
14. The petitioner also submitted and correctly so I might add, that the basic education envisaged under Article 53(1) of *the Constitution* and the *Basic Education Act* included both primary and secondary



education. For this proposition, he relied on the holding of *Majanja J in Gabriel Nyabola v Attorney General & 2* [2014] eKLR which holding I entirely agree with.

15. Lastly, the petitioner submitted that the respondent's failure to offer or facilitate access to education for children in KJRH constituted a limitation which was not imposed by any law and does not meet the conditions for limitation of rights as spelt out by Article 24 of *the Constitution*. He implored me to allow the petition as prayed.

The Respondents Case

16. The respondents opposed the petition through a replying affidavit sworn on their behalf by Ms Mary Mbugua, an Assistant Director of Children's Services in the Ministry of Labour, Social Security and Services.

In her deposition, Ms. Mbugua averred that Children Remand Homes provide safe custody to children aged between 10 and 17 years who are committed by the court as their cases were being processed.

17. Relying on the provisions of the fifth schedule of the Children's Act, the deponent contended that courts are empowered to deal with children cases expeditiously and determine them in a period of between three to six months; that committal to Children Remand Homes either of children in conflict with the law or those that are in need of care and attention is temporal and for that reason, no formal learning is undertaken in the facilities.
18. It was further contended that children who are committed for being in need of care and protection have different needs and the Children's Department undertakes risk and needs assessment to determine the type of service each child required which may not include basic education.
19. In their submissions, the respondents argued that the right to basic education is not absolute and can be limited under Article 24 of *the Constitution*; that the right flows from the right to liberty; that under Section 50 of the Children's Act and the fifth schedule thereto, the right to liberty for children in conflict with the law was curtailed through remand orders issued by the court; and that the right to basic education for such children was limited for the period of their detention.
20. It was also the respondent's case that the petitioner is not entitled to the orders sought as he had allegedly failed to prove the alleged violations of rights enshrined under Article 27, 28 and 53 of *the Constitution*; that children in detention centres fall under the category of minorities and marginalized groups and that therefore their right to basic education should be realized progressively. They prayed that the petition be dismissed with costs.

Determination

21. Having analysed the positions taken by each of the protagonists to this dispute as summarized herein above, I find that the following two key issues emerge for my determination namely;
 - (i) Whether the 2nd and 3rd respondent's failure to offer or facilitate formal education to children held at the KJRH and by extension other detention facilities in the country contravenes their constitutional right to free and compulsory basic education.
 - (ii) Whether as a consequence of findings in (1) above if in the affirmative, what orders were appropriate to remedy the breach?
22. I have distilled the above issues for determination having in mind the gist of the petitioner's case that the other constitutional rights allegedly violated by the respondents, that is, the right to equality before the law and freedom from discrimination; the right to human dignity and to have that right respected



stemmed from the alleged violation of the right of children in detention centres to access free and compulsory basic education. It therefore follows that the main question to be answered in this petition is whether the respondents by their acts or omission have infringed on the right of children held at KJRH or any other remand facility to access basic education.

23. I wish to start by setting out the law that provides for the right of children to free and compulsory basic education.

Under Article 43 (1) (f) of *the Constitution*, the right of every person to education is enshrined as part of the economic and social rights enumerated therein but *the Constitution* does not stop there. It proceeds further to specifically provide for the right of children to basic education by declaring under Article 53 (1) (b) that “Every child has the right to free and compulsory basic education”.

24. To give effect to the above right, the *Basic Education Act* No. 14 of 2013 (the Act) was enacted with one of its purposes being to promote and regulate free and compulsory basic education. Section 28 of the Act requires the cabinet secretary responsible for basic education and training to implement the right of every child to free and compulsory education. Section 29 of the Act proceeds to provide the different ways which the 2nd respondent should employ to ensure that all children are afforded free and compulsory education.

25. The Children Act Chapter 141 of the Laws of Kenya which according to its preamble was enacted to give effect to Kenya’s treaty obligations in the convention on the Rights of the Child and the African Charter on the Rights and welfare of the child and other connected purposes also secures the right of children to free and compulsory basic education. Section 7 thereof states as follows;

i “Every child shall be entitled to education the provision of which shall be the responsibility of Government and the parents.

ii Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the child”.

26. Article 28 of the United Nations Convention on the Rights of the Child which as can be seen above is incorporated in Section 7 (ii) of the *Children Act* provides as follows:-

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop - out rates....”

27. Other key international instruments ratified by Kenya which obligates state parties to provide free and compulsory basic education are the universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights (ICESR) which identify education



as a means to ensure full development of the human personality and dignity. In this regard, Article 13 (1) of the ICESCR provides that;

“the state parties to the present covenant recognize the right to everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms....”

28. The UDHR also recognizes the right to free and compulsory basic education. It states in Article 26 that “everyone has the right to education, that education shall be free, at least in the elementary and fundamental stages and that elementary education shall be compulsory”.

It is important to note that all the above international instruments form part of the laws of Kenya by virtue of Article 2(5) and (6) of *the Constitution* of Kenya 2010.

29. The central role that education plays in driving societal change and in empowering people to realize their full potential cannot be gainsaid. The right to education has not only been recognized as a basic human right but also as one which is essential for the enjoyment of all other human rights.

30. The importance of this right in shaping people’s lives was captured by the committee on Social, Economic and Cultural rights in General comment No. 13 on the right to education guarantee under Article 13 of the ICESCR 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 exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments states can make. But the importance of education is not just practical; a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”.

31. Having set out both the domestic and international law that provides for the right to basic education, I now turn back to the petition to consider whether the petitioner has proved that the 2nd and 3rd respondents as the organs of state responsible for providing basic education and management of detention facilities have violated the constitutional right to free and compulsory basic education to children in the KJ RH and or other detention facilities in the country.

32. It must be remembered that under Article 21(1) of *the Constitution*, the state and all state organs have an obligation to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights which include the right of all children to free and compulsory basic education. And under Article 3 thereof, every person has an obligation to respect, uphold and defend *the constitution*.

33. The petitioner has claimed that the respondents have contravened the aforesaid right as they have not taken any step to offer or facilitate basic education to the children at KJRH and other detention facilities. The respondents have not disputed this claim. They have instead contended that the right of these children to basic education is not absolute as it is not one of the rights that cannot be limited under Article 25 of *the Constitution*.



34. The people of Kenya in promulgating *the Constitution* of Kenya 2010 decided that of all the rights and freedoms that are guaranteed in *the constitution*, only four of those rights and freedoms should be absolute; that all the other rights would be subject to limitation but only to the extent and circumstances permitted by Article 24 of *the Constitution*. The rights that cannot be limited are listed in Article 25 as follows;
- (a) “Freedom from torture and cruel, inhuman or degrading treatment or punishment.
 - (b) Freedom from slavery or servitude
 - (c) The right to a fair trial and
 - (d) The right to an order of habeas corpus.”
35. It therefore follows that the right of children to free and compulsory basic education can be limited under Article 24 of *the Constitution* which states as follows;
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.”
- Under Article 24(3), the burden of demonstrating to the court, tribunal or other authority that the requirements warranting the limitation of a right under Article 24(1) have been satisfied falls on the state or on the person seeking to justify a particular limitation.
36. In a bid to discharge this burden, the respondents submitted that the right to basic education flows from the right to liberty and that under Article 51 of *the Constitution*, where a person’s right to liberty is curtailed through a legal process, his rights may be limited to a certain extent; that under Section 50 of the *Children Act* and provisions of the fifth schedule, the liberty of children is curtailed by the court through remand orders for a period of upto six months and that their right to basic education should be limited for the period of their detention.
37. The respondents also argued that the short stay of children in remand homes as they wait for their cases to be processed or to be reunited with their family or placement to other institutions for children in need of care and protection makes it impossible for them to be exposed to formal learning.
38. I concur with the Petitioner’s submission that the respondent’s failure to offer basic education to the children at K J R H or any other remand facility constitutes a limitation on their right to free and compulsory education. The question that arises is whether the said limitation for the reasons given meets the constitutional threshold for the limitation of rights as provided for under Article 24 of *the Constitution*.
39. The first test under Article 24 is whether the limitation in question is prescribed by the law. This means that the limitation must be expressly contained in a statute. It is only after the limitation passes this



first test that the court would be called upon to consider if it was reasonable and justifiable in a free and democratic society taking into account all the relevant factors spelt out in the Article, that is , the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of the others, the relation between the limitation and its purpose and lastly, whether there are less restrictive means to achieve the purpose.

40. In view of the foregoing, the question that I now need to resolve is whether the respondents have satisfied the aforesaid first test. I have looked at Section 57 of the [Children Act](#) which is the provision that empowers the court to issue committal orders remanding children to remand homes. It is not Section 50 as submitted by the respondents. Section 50 only establishes Children Remand Homes. Having done so, I have not found in the provision any limitation express or otherwise limiting the right of children held in remand homes to basic education. For the avoidance of doubt, the provision states as follows; -

“The order committing a child to custody in a children’s remand home or ordering him to be sent to a rehabilitation school shall be sufficient authority for his confinement in that place in accordance with the tenor thereof, or in a health institution under section 56, and a child while confined and while being conveyed to or from a children’s remand home or a rehabilitation school to from a health institution, as the case may be, shall be deemed to be in lawful custody”.

41. I with respect do not find any substance in the respondent’s submission that the children’s right to basic education is dependent on their liberty; that once their liberty was taken away by a committal order to a remand home, that right was limited by Article 51 of [the Constitution](#) for the period of their detention.

Article 51 in so far as is relevant for purposes of this petition are in the following terms;

- (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.
- (2)

42. It is clear from the above that persons, who include children in legal custody retain all their rights and fundamental freedoms in the Bill of Rights unless any particular right is incompatible with their detention.

It is important to note that the respondents did not demonstrate how the right to basic education for children held in detention centres was incompatible with the fact of their detention.

43. The expected period of stay of children in remand homes which the respondent described as short but which in my view is long in terms of the school calendar (between one and three school terms considering that a child was to be discharged if after one year, the case was still pending) cannot be said to be incompatible with the right to basic education for two main reasons: First, remand homes are permanent institutions and nothing would prevent the 2nd respondent in conjunction with the 3rd respondent to initiate and offer basic education to the children in remand homes at any given time for the duration of their detention. Secondly, offering education to such children would be appropriate and of great benefit so that when they are either acquitted or reunited with their families or placed in



other institutions (for children in need of care and protection), they would be able to continue with their education and catch up with their peers.

44. Moreover, if the fact of detention of children was incompatible with learning, the 2nd respondent would not have enacted in Section 29 of the Basic Education Regulations of 2015 that learners of school going age residing in children's homes, borstal institutions or other corrective facilities shall be provided with basic education and training to enforce their right to education as guaranteed by several constitutional provisions.
45. It may also be useful to add that the reason given by the respondents to justify their failure to offer basic education to detained children, that is, their alleged short stay in detention is not backed by any statutory provision.
46. In view of the foregoing, I find that the respondents have failed to satisfy the first test set under Article 24 of *the Constitution* for the limitation of constitutional rights. They have failed to demonstrate that the constitutional right of children held in detention facilities in the country to access free and compulsory basic education is limited by any law.
47. In the circumstances, it is not necessary for me to proceed to the next step of considering whether the limitation by the respondents was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors set out in Article 24 (1) (a) and (b) of *the Constitution*. Suffice it to say that in my considered opinion, the constitutional right of children to free and compulsory basic education enshrined under Article 53 (1) (b) of *the Constitution* should not be limited in any way in a civilized and democratic society like the one in Kenya taking into account the nature of that right and its importance as discussed earlier in this judgment.

It must always be remembered that children and the youth are the future of any country and it is only education when imparted at the right time that will enable them live a dignified and fulfilling life in future and to positively contribute to the economy of the country.

48. It is also worth noting that under Article 20 of *the Constitution*, courts are enjoined to interpret the Bill of Rights in a way that ensures that a person enjoys the rights and fundamental freedoms enshrined therein to the greatest extent consistent with the nature of the right or fundamental freedom and to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.
49. In this case, it is my view that the framers of *the Constitution* in providing for the right of children to free and compulsory basic education intended to have the right afforded to children wherever they were irrespective of their circumstances. That is why for children, *the constitution* specifically provided for basic education that was free and compulsory as opposed to the plain right of education granted to any person under Article 43 1 (f) [emphasis mine]

It is thus my finding that the fact of detention cannot override the constitutional guarantee to children of access to basic education.

50. For all the foregoing reasons, I am satisfied that the respondent's failure to offer or facilitate free and compulsory basic education to children detained at KJ R H is unlawful as it contravenes the provisions of the *Children Act* and the *Basic Education Act* and is also unconstitutional as it violates Article 53 (1) (b) of *the Constitution*.
51. Finally, the respondents urged the court to find that the right of children to free basic education was not an immediate right but one that should be realized progressively more so because in their view, children in detention facilities fell in the category of minority and marginalized groups who require affirmative action under Article 56 of *the Constitution*.



52. I wish to respond briefly to this submission by saying that the right of children to free and compulsory basic education is immediate and is not subject to progressive realization under Article 21 (2) of *the Constitution* since it is not one of the social economic rights guaranteed under Article 43 of *the Constitution*. I wholly agree with the sentiments expressed by Lenaola J in *Githunguri Residents Association v Cabinet Secretary Ministry of Education & 6 others* [2015] eKLR where in a case challenging the charging of extra levies in several schools in Githunguri District, Kiambu County, on grounds that they were a hindrance to free and compulsory basic education, he stated as follows:-

“It is therefore the conviction and strong view of this court that the right to basic education is not to be progressively realized as seems to be the expectation of school management bodies. That right is to be enjoyed now and to argue otherwise would be to cheapen *the Constitution* and even in a society where we live with great wealth disparities and millions wallowing in abject poverty, only education can give everyone the chance and opportunity to realize their dream and aspirations. That opportunity was not granted in the circumstances obtaining in this Petition”.

53. I need not say more on this matter except to add that I disagree with the respondent’s submission that children in detention facilities fall within the category of minority and marginalized groups provided for under Article 56. In my opinion, they are just children who for some reason find themselves in conflict with the law or in need of care and protection but who still enjoy the right to equal protection and benefit of the law.

Final Orders.

54. Having found as I have above and considering the issues I had framed for determination, I now make the following final orders;

- (i) A declaration that all children including those in remand homes and detention facilities controlled by the state have a constitutional and legal right to be accorded free basic education by the state.
- (ii) An order compelling the 2nd and 3rd respondents to make available to children in KJRH and all other children in detention facilities, educational programs which are integrated with the public education system.
- (iii) That the 2nd respondent does, in consultation with the 3rd respondent develop a policy within the next 120 days clearly setting out a comprehensive framework through which basic education will be provided to children detained at KJRH and all other detention facilities in Kenya.
- (iv) That the 2nd respondent shall file an affidavit within 120 days of today’s date detailing the policy measures put in place to offer basic education to children held at K J R H and other detention facilities in the country.

55. On costs, as the petition was filed in the public interest, the best order that best commends itself to me is that each party shall bear its own costs.

56. It is so ordered

C.W. GITHUA

JUDGE



DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF SEPTEMBER 2016

In the presence of:-

Mr. Komen holding brief for Mr. Sang for the Petitioner

Mr. Ngumi for the respondents

Naomi Court Clerk.

