



**Stephen v Minister for Education & 2 others (Petition 464 of 2012)  
[2015] KEHC 3437 (KLR) (Constitutional and Human Rights) (30 July 2015) (Judgment)**

*Ndoria Stephen v Minister for Education & 2 others [2015] eKLR*

Neutral citation: [2015] KEHC 3437 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION 464 OF 2012**

**M NGUGI, J**

**JULY 30, 2015**

**BETWEEN**

**REV NDORIA STEPHEN ..... PETITIONER**

**AND**

**MINISTER FOR EDUCATION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATIONS COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**The scope of Government’s obligation in the realization of the right to education of children from marginalized and minority groups**

*The case challenged what the petitioner termed “discriminatory government policies” in provision of education to children from the north and north eastern regions as well as parts of the coast and Rift Valley (what are considered marginalised areas), that barred the children from enjoying their right to education. The petitioner argued that the deliberate discrimination and consequently disparity in government resource allocation towards education resulted into the violation of its obligation to provide access to basic and compulsory education to all children. The court highlighted the scope of the Government’s obligation in the realization of the right to education of children from marginalized and minority groups.*

Reported by Teddy Musiga & Daniel Hadoto

**Constitutional Law** - fundamental rights and freedoms – right to education - 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 by children from marginalised areas and minorities - provision of special education opportunities to children from marginalised areas and minorities - whether the Government of Kenya had violated the right to education of children from marginalised and hardship areas - whether the children from marginalized and hardship areas were entitled to special provisions in the admission to secondary schools



and public universities. - Constitution of Kenya, articles 53(1)(b) 56(b), 27, 10, 43 (1)(f) and 26; International Covenant on Economic, Social and Cultural Rights (ICESR), article 2(1); Convention on the Rights of the Child (CRC), article 28.

**Administrative law** – formulation of government policies - duty of the executive to formulate and implement policies - supervisory power of court over formulation and implementation of policies - Constitution of Kenya, article 21(2) and 43.

**Words and Phrases** – discrimination – definition - the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not - Black's Law Dictionary, 11<sup>th</sup> Edition.

### **Brief facts**

The petition was brought to challenge what the petitioner termed “discriminatory government policies” in provision of education to children from the north and north eastern regions as well as parts of the coast and Rift Valley (what are considered marginalised areas), that barred the children from enjoying their right to education. As a result of discriminatory educational policies by the government, children in those areas were unable to access the right to education on the same basis as children in other more developed parts of the country.

The petitioner amongst others urged the Court to stop the holding of Kenya Certificate of Primary Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examinations, arguing that if the examinations were allowed to proceed without the issues raised in the instant matter being determined would violate the right to education of the poor, marginalized and children displaced by war.

### **Issues**

- i. Whether the Government of Kenya had violated the right to education of children from marginalised and hardship areas.
- ii. Whether the children from marginalized and hardship areas were entitled to special provisions in the admission to secondary schools and public universities.
- iii. Whether there was deliberate discrimination and consequently disparity in Government resource allocation towards education that resulted into the violation of its obligation to provide access to basic and compulsory education to all children.
- iv. Whether the respondents had failed to provide learning facilities equitably, as a result of which children from marginalized areas were learning under extreme hardship, thereby, the respondents had violated the provisions of the Constitution and had to be compelled to provide a mechanism that would ensure that facilities were availed to those children.
- v. Whether the court could order the abolishing/scrapping out K.C.P.E and K.C.S.E for being unconstitutional and in violation of the right to equality before the law and equal enjoyment of the benefit of the law.
- vi. Whether the court could order the respondents to produce before it the policies and quotas to be used to ensure that the students from marginalized areas are not disadvantaged or discriminated.

### **Held**

1. The Constitution of Kenya had expressly recognized education as a right for all. Article 43(1) (f) of the Constitution provided that every person had the right to education. With respect to children, article 53 of the Constitution guaranteed to every child the right to free and compulsory education; and article 56 of Constitution required that children from marginalized areas and minorities were to be provided with special educational opportunities
2. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESR) and article 28 of the Convention on the Rights of the Child (CRC), provided that, the right to education



- had to be realized progressively through local and international economic and technical assistance to the maximum of a state's available resources.
3. The Committee on the rights of the child and the Committee on Economic, Social and Cultural General Comment No 13 on the right to education provided that, although the right to education was a progressive right and was subject to availability of resources, the prohibition against discrimination and inequality was subject neither to progressive realization nor availability of resources but applied fully and immediately to all aspects of education.
  4. The Government had taken steps with respect to realization of the right to education for all. Therefore there was no a basis for alleging discrimination against the children by government. The petitioner's arguments with respect to discrimination had not met the legal definition of the term.
  5. The Constitution provided that, the formulation of policy and implementations thereof were within the province of the executive. The state had shown that it had policies in place, and that it had been taking measures, including affirmative action, to ensure that children in marginalized areas accessed education. Article 21 (2) of the Constitution of Kenya enjoined the Executive to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43 of the Constitution of Kenya.
  6. Even assuming that the disparities in the area of education were as a result of discrimination, from the material placed before the court the State was acting in accordance with its constitutional duty under article 27(6) of the Constitution which required the State, "to give full effect to the realisation of the rights guaranteed under that article, the State had to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."
  7. The State had not failed in its obligations to set policies that would have accorded children in marginalized areas access to basic education.
  8. The State had put in place a quota system for admission of children from marginalized areas to secondary and university. Making a declaration to the effect that children from marginalised and hardship areas were entitled to special provision in the admission to secondary schools and public universities in the circumstances would have been redundant as the State was already doing that which the petitioner wished it to be compelled to do.
  9. The Government had taken various steps to ensure access to education of children in the marginalized areas. Those included the setting up of grants and bursaries, mobile schools, boarding primary and secondary schools, and in some cases, lunch in school. What had not emerged from the proceedings was the effectiveness of such measures.
  10. The State was taking deliberate steps to ensure that children in marginalized areas had access to education on the same level with children in other areas of the country.
  11. Ordering the respondents to produce before the court policies and quotas that had to be used to ensure that the students from marginalised areas were not disadvantaged or discriminated was unnecessary as the respondents did produce the policies and measures aimed to ensuring access to education.
  12. The petitioner by asking court to abolish Kenya Certificate of Primary Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) was metaphorically speaking, asking the court to throw out the baby with the bath water: because the children from marginalized communities did not access educational facilities and opportunities at the same level as those from other parts of the country, then the entire examination system had to be thrown out.
  13. The prayers to abolish KCPE and KCSE, were essentially, somewhat reckless orders to seek, and the court could in good conscience even not contemplate them.
  14. There were concerted efforts being made to ensure access to education for the petitioner's target group. The challenge had been to monitor the implementation of the programmes to ensure realization of the right to education.



15. Scrapping the national examinations through an order of the court, without careful consideration of the advantages or benefits of such action against the shortcomings of the present situation, could not work for the benefit of the children in marginalized areas.

*Petition dismissed; each party was to bear its own costs of the petition.*

### **Citations**

#### **Statutes**

1. Constitution of Kenya, 2010

#### **Advocates**

*Mr. Kiarie Mungai instructed by the firm of Nchogu, Omwanza & Nyasimi & Co. Advocates for Petitioner*

*Mr. Obura instructed by the State Law Office for 1st and 3rd Respondents*

*Ms. Njenga instructed by the firm of Kiarie & Kariuki & Associates & Co. Advocates for 2nd Respondent*

## **JUDGMENT**

### **Introduction**

1. At the core of this petition is the challenge facing the provision of education to children living in what are considered marginalized areas of the country, the north and north eastern regions as well as parts of the coast and Rift Valley. The petitioner alleges that as a result of discriminatory educational policies by the government, children in these areas are unable to access the right to education on the same basis as children in other, more developed parts of the country.
2. The petitioner first approached the Court under Certificate of Urgency on 11<sup>th</sup> October 2012 seeking orders:

That this Honourable Court certifies this applicant as urgent and services thereof of this application on the respondent be dispensed within the first instance and the application be heard ex parte; That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue and hereby issues an order restraining the respondents by themselves, their agents or servants from issuing Kenya Certificate of Primary School Education [K.C.P.E] and Kenya Certificate of Secondary Education [K.C.S.E] examinations for the year 2012 in the entire country. That in the alternative pending hearing and determination of this application inter partes, this Honourable Court be pleased to issue and hereby issues an order compelling the respondents either by themselves, agents and servants to produce before court the policies and quotas to be used to ensure that the students from marginalized areas are not disadvantaged, unequally examined or discriminated against using the K.C.P.E and K.C.S.E. That pending the hearing and determination of this petition this Honourable Court be pleased to issue and hereby issues an order restraining the respondent by themselves, their agents or servants from issuing K.C.P.E and K.C.S.E examinations for the entire 2012 in the entire country. That in the alternative pending hearing and determination of this petition, this Honourable court be pleased to issue and hereby issues an order compelling the respondents either by themselves, agents and servants to produce before court the policies, quotas and any other program to be used to ensure that the students from marginalized areas are not disadvantaged or discriminated. That the cost of this application be provided for by the respondents.

3. The Court declined to issue the interim orders, and directed the petitioner to serve the respondents and for the matter to be mentioned on 16<sup>th</sup> October 2012. The matter was mentioned on that day



before Majanja J, but the petition had not been served, and the Court directed that it be served and mentioned on 2<sup>nd</sup> November 2012.

4. When the matter was next mentioned on 5<sup>th</sup> November 2012, Counsel for the petitioner indicated that the application for conservatory orders had been overtaken by events and sought leave to amend the petition, which was granted.
5. The file was next in Court on 20<sup>th</sup> December 2013 before Lenaola J who directed that the matter be mentioned before this Court on 20<sup>th</sup> January 2014. Directions were thereafter given with respect to the filing of replies and submissions, and the matter eventually proceeded for hearing on 19<sup>th</sup> November 2014.

### **The Case for the Petitioner**

6. In his affidavit sworn in support of the petition, the petitioner makes various averments with regard to the state of education for children in marginalised areas which has precipitated the filing of this petition. He describes himself as a church minister with the Presbyterian Church of East Africa currently in charge of the entire Samburu County. He states that he brings the petition on behalf of the marginalized communities in Kenya who have been denied an equal chance in life through unequal access to education and competition.
7. The petitioner contends that since independence children from geographically disadvantaged and marginalized areas have been sidelined by policies that have denied them equal access to education to enable them to compete fairly for the few slots in secondary schools and public universities with the rest of the children in the country. As a result, they have been performing so badly that few of them have managed to go to secondary schools and public universities. He states that several commissions have been set up by the government to establish the best way forward to resolve the problem.
8. According to the petitioner, one of these commissions, the Ominde Commission, identified Tana River, Garissa, Wajir, Mandera, Isiolo, Marsabit, Turkana, Samburu, West Pokot and Taita Taveta as area warranting higher allocation of funds to facilitate access to education. He argues that despite these recommendations, these areas have continued to be discriminated against in the allocation of resources and as a result, access to education has been practically impossible for children in the region. He contends that children in these areas are forced to travel miles to access schools, and have no water and proper sanitation, as a result of which schools in these areas are deserted. In his view, the greatest form of inequality is to treat un-equals equally; that requiring students from marginalized areas to sit for the same examinations with children from developed areas is therefore discriminatory.
9. The petitioner contends that the respondents have, despite the non-discrimination provisions in the *Constitution*, devised policies that discriminate and disadvantage students from marginalized communities. He illustrates the allegations of discrimination by, among others, pointing out that national examinations were postponed for three weeks following a countrywide teachers' strike, but no such postponement was given following tribal clashes in the large Tana River County and other areas in the former North Eastern Province, Rift Valley Province and parts of Nyanza Province even though most schools were closed during the clashes.
10. The petitioner also makes reference to the fact that many students were displaced during the post-election violence of 2008 and were still learning in camps under very strenuous conditions, but no effort has been made by the respondents to ensure that they are not disadvantaged.
11. The petitioner complains that the respondents have not, since independence, devised a proper policy to ensure equality between students from the marginalized areas and students from developed areas,



- and students from such areas have no classrooms and have to learn under trees. This has created great disparities in performance that deny such children access to secondary schools and public universities.
12. The petitioner avers that the respondents have purported to establish admission quotas to secondary schools and public universities. It is his contention, however, that the system of setting exams is discriminatory and ineffective and does not ensure that children from marginalized areas get slots in these institutions. In his opinion, such policies do not distinguish the hardship areas in terms of locations, but in terms of district and provinces, thus making it difficult to identify the really affected students as there are schools and areas within the (marginalized) districts or provinces which have adequate facilities like the developed areas in the country. It is also his contention that such quotas do not benefit the affected students but only those students whose parents can afford to take them to good private schools, and who only enroll, for purposes of doing examinations, in the hardship areas so that they can benefit from the quotas.
  13. The petitioner further argues that the respondents set exams without regard to the circumstances of the people in the geographical hardships areas.
  14. It was submitted on behalf of the petitioner that his case is anchored on Articles 53(1)(b) 56(b), 27, 10 and 26 of the *Constitution*; that every child has a right to free basic education, which children living in marginalized areas have been denied by the policies of the government. It is his case that the right to education guaranteed under Article 53 is different from that under Article 43 in that the right under Article 43 is supposed to be achieved progressively, while the right under Article 53 is not mentioned in article 21, and is therefore intended to be achieved immediately.
  15. The petitioner referred the Court to General Comment No 13 on the essential features of education, paragraph 6 of which states that the essentials of the right to education such as availability, accessibility and adaptability are not to be progressively achieved but are immediate. In his view, teaching materials are to be available immediately, yet even where they have been provided in the marginalized areas, they are not at the same level as in other parts of the country.
  16. The petitioner argues that despite this difference in conditions and the provision of materials and facilities for education, children in school are subjected to the same exams despite the difference in conditions. He therefore prayed that national examinations should be abolished and a system for doing things on an equal footing be put in place. He asks the court to grant the following orders:
    - a. A declaration that children from marginalized and hardship areas are entitled to special provisions in the admission to secondary schools and public universities.
    - b. A declaration that the Respondents have violated the right to education of the children from marginalized and hardship areas.
    - c. A declaration that the Respondents are discriminating against the children from marginalized communities in providing education.
    - d. An order compelling the Respondents either by themselves, agents and servants to produce before court the policies and quotas to be used to ensure that the students from marginalized areas are not disadvantaged or discriminated.
    - e. An order abolishing/scrapping out K.C.P.E and K.C.S.E for being unconstitutional and in violation of the right to equality before the law and equal enjoyment of the benefit of the law.
    - f. An order that the costs consequent upon this Petition be borne by the Respondents.
    - g. All such other orders as this Honorable Court shall deem just in the circumstances.



### **The 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Case**

17. In their response to the petition, the 1<sup>st</sup> and 3<sup>rd</sup> respondents filed an affidavit sworn on 26<sup>th</sup> February 2012 by Prof. G Godia and submissions dated 26<sup>th</sup> February 2013.
18. Their contention is that the petitioner's allegation of discrimination is untrue as the government has embarked on various interventions to ensure that children from marginalized areas get education. While the respondents concede that there are challenges for children in marginalized areas, they set out in Prof. Godia's affidavit policies which the government has put in place to ensure students sitting exams in marginalized areas do so in a conducive environment.
19. Their case is that the government is doing its best to provide finances in schools; it provides lunch in schools to encourage children to attend school, as well as mobile schools for pastoralist communities. The respondents therefore pray that the petition be dismissed.

### **The Case for the 2<sup>nd</sup> Respondent**

20. The 2<sup>nd</sup> respondent, the Kenya National Examination Council (KNEC), also opposes the petition. It relies on an affidavit sworn by Dr. Joseph M Kivilu on 17<sup>th</sup> January 2014 and submissions dated 14<sup>th</sup> March 2014.
21. In his affidavit, Dr. Kivilu, a Senior Deputy Secretary-Test Development, with the 2<sup>nd</sup> respondent deposes that the Kenya Institute of Curriculum Development (KICD) is the body mandated by Parliament to develop syllabuses for all areas in the education system except the university level. The mandate of the 2<sup>nd</sup> respondent is to set and maintain examination standards, and to conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels.
22. KNEC states that it receives syllabuses from KICD to assess if they are appropriate and can be examined; and it is mandated by law to provide external independent assessment of the syllabus at the national level. It is also Dr Kivilu's averment that one of the key roles of KNEC is to set standards of performance and maintain them through development and administration of credible examinations that are fair and devoid of bias.
23. Dr Kivilu further deposes that in developing exams, KNEC assumes that learners have been provided with a conducive learning environment in order to learn and attain the set educational objectives specified for various levels; that its role is to examine the attainment of these objectives at the end of primary and secondary levels by administering KCPE and KCSE respectively, and that it seeks to maintain the credibility of the examinations by ensuring that they are based on syllabuses that are valid, reliable, fair and devoid of bias. It is also his deposition that the 2<sup>nd</sup> respondent seeks to ensure, through rules and regulations, that all candidates take the examinations under similar conditions.
24. It is also KNEC's contention that it is not its responsibility but that of the government and local communities to ensure that learning and sanitation facilities, teaching and reading materials, buildings, food and water are available for learners.
25. While conceding that there may have been disparities in the performance of candidates from different geographical regions of the country that could be considered to be marginalized, its contention is that such disparities are not attributable to the respondents having adopted discriminatory policies and/or practices as alleged by the petitioner.



26. It is therefore KNEC'S case that the petition is wrongly filed against it as it is premised on the right to education while its mandate is to regulate and oversee the conduct of examinations from a set curriculum.
27. To the claim of discrimination against children from marginalized areas, it contends that such a claim is unfounded as against it as it sets uniform exam questions for all candidates irrespective of the geographical area. Where there are, as alleged by the petitioner, questions that are specific to some areas, the 2<sup>nd</sup> respondent ensures that there are other questions for candidates to choose from. It was its contention that the petitioner had not made a compelling case to warrant the orders that he was seeking, particularly the prayer for scrapping of the national examinations, and it prayed that the petition be dismissed.

### **Determination**

28. This petition raises the critical question of access to education for children in Kenya, but more so for children in areas of Kenya which are, for a variety of factors, marginalized and where access to adequate learning facilities, to say nothing of teachers and teaching materials, is difficult.
29. The petitioner rightly argues, and this has not been disputed by the respondents, that Article 53 of the Constitution guarantees to every child the right to free and compulsory education; and further, that Article 56 of Constitution requires that children from marginalized areas and minorities are provided with special educational opportunities.
30. The Constitution of Kenya 2010 has expressly recognized education as a right for all. Article 43(1) (f) provides that every person has the right to education. With respect to children, the Constitution provides at Article 53(1) (b) that "Every child has the right to free and compulsory basic education."
31. The petitioner submits, and again I have not heard the respondents dispute this point, that while the right to education under Article 43 is progressive as provided under Article 21, the right of children to compulsory basic education under Article 53 is not subject to progressive realization.
32. The petitioner also calls in aid the provisions of Article 56 on the rights of marginalized groups. This Article is in the following terms:
  56. The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—
    - (b) are provided special opportunities in educational and economic fields;
33. He also relies on the provisions of international conventions to which Kenya is a party to support his case.
34. The central dispute in this matter is whether the respondents have failed to provide learning facilities equitably, as a result of which children from marginalized areas are learning under extreme hardship, and as a result, the respondents have violated the provisions of the Constitution and should be compelled to provide a mechanism that will ensure that facilities are availed to these children.
35. The petitioner submits that under article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESR) and article 28 of the Convention on the Rights of the Child (CRC), the right to education should be realized progressively through local and international economic and technical assistance to the maximum of a state's available resources. It is his case, however, that the requirement for "progressive realization" does not waive obligations to ensure that the right to education is enjoyed



- in equal measure across the country. Rather, the state is under an obligation to move expeditiously and effectively to ensure that children in marginalized areas access education.
36. The petitioner cites the views of the Committee on the rights of the child and the Committee on Economic, Social and Cultural Rights in which they have observed in General Comment No 13 on the right to education that although the right to education is a progressive right and is subject to availability of resources, the prohibition against discrimination and inequality is subject neither to progressive realization nor availability of resources but applies fully and immediately to all aspects of education.
  37. The petitioner argues that as established by the two committees, sharp disparities in spending policies that result in differing qualities of education for person residing in different geographic locations constitute discrimination under the Covenants. The respondents do not counter these submissions, and I believe that there is no serious dispute with regard to the obligations of the state to provide access to basic and compulsory education to all children.
  38. The question is whether there is such discrimination in resource allocation that violates this obligation. The evidence that the petitioner cites to support this contention is that he has information that counties in the country, especially those which have had representation in the Ministry of Education, have extremely large numbers of schools compared to other counties that have never had representation. He cites the examples of Kisii with 306 schools, Meru with 283, Kakamega 250, Makueni 250 and Muranga 249, compared to Garissa and Marsabit with 13 schools, Lamu with 12, Tana River with 10 and Isiolo with 7.
  39. It is on this basis that the petitioner urged the Court to stop the holding of KCPE and KCSE examinations, arguing that if the examinations are allowed to proceed without the issues raised in this matter being determined, the right to education of the poor, marginalized and children displaced by war will be violated.
  40. I have considered the response by the 1<sup>st</sup> and 3<sup>rd</sup> respondents on this issue, noting that the 2<sup>nd</sup> respondent, as it correctly argues, is not involved in the allocation of resources to schools. The then Permanent Secretary in the Ministry of Education, Prof. Godia, in his affidavit in response to the petition sworn on 12<sup>th</sup> March 2012, has set out the steps taken by the government to ensure that children in marginalized areas get access to education on an equal footing with others. In particular, Prof. Godia states that the government has, over the years made various interventions to ensure that all children in the country are accorded quality basic education. The interventions, at basic secondary and tertiary level, include the disbursements of grants for Free Day Secondary Education, the Constituency Development Bursary Fund, the Special Scholarship Fund, Laboratory Equipment Grant, and the Arid and Semi-arid Areas Grant.
  41. The respondents further state that the government has what it refers to as Pockets of Poverty Grants, Infrastructure Grants, Service Gratuity Grant and National Schools Expansion Programme. It has placed in evidence a copy of the operational guidelines for disbursement of bursaries and grants to schools and colleges dated 3rd September 2012.
  42. With respect to basic education, the respondents state that the Directorate of Basic Education disburses funds in a number of categories. These include Free Primary Education Infrastructure Improvement Grants, Emergency Response, Non Formal Schools and Centres, Mobile Schools, Low Cost Boarding Primary Schools, and Special Needs Schools.
  43. In order to ensure that children from marginalized areas are accorded fairness and equity in form one selection, the respondents aver that the government has taken affirmative action in Form One selection through the use of quotas for admission to secondary school on the strength of KCPE performance



in every district. The aim of these quotas is to ensure that children from disadvantaged areas are given opportunities to study in high performing national, extra-county and county schools.

44. The respondents also aver that the government has established two national schools in every county thus ensuring that children from marginalized areas are afforded more opportunities. With respect to girls from marginalized areas, the government, in collaboration with UNICEF, allocates sixty slots to girls from North Eastern region and other marginalized areas to study in high performing schools in other parts of the country. It states that this number is set to rise to 200 in 2013. Reference is also made to the establishment of mobile schools for nomadic communities including Turkana, Samburu and the entire North Eastern region.
45. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have conceded that there are indeed areas of this country that are marginalized in terms of economic activities. They observe, however, that such marginalization is caused by various historical factors which the government is seeking to address. In this regard, they observe that the government is developing a policy framework for nomadic communities such as Samburu, where the petitioner comes from, in which the residents are always on the move in a search for pasture for livestock.
46. The respondents submit that the policy framework for pastoralists was developed in collaboration between the Ministry of Education and the United Nations Children’s Fund, and is aimed at achieving education for all, including the marginalised communities.
47. The basis of the petition is the perceived discrimination against children from marginalized communities in education. The petitioner is convinced that such discrimination is deliberate, and results from a failure by government to take steps in accordance with the Constitution and international conventions to ensure that they have access to education on the same level as children from other areas.
48. Having read the averments on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> respondents and noted the steps taken with respect to education in such areas, I am not satisfied that there is a basis for alleging discrimination against the children by government.
49. As submitted by the 2<sup>nd</sup> respondent, the petitioner’s arguments with respect to discrimination do not meet the legal definition of the term.
50. In the case of Peter K. Waweru vs Republic [2006] elk, the Court, in considering the non-discrimination provisions in the (now repealed) constitution, observed as follows:

“Under Section 82 (3) of the Constitution of Kenya, “discriminatory” means “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”.

Blacks Law Dictionary 11<sup>th</sup> Edition defines “discrimination” as under:

“Discrimination” in constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found. Unfair treatment or denial of normal privileges to persons because of



their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.” Baker v California Land Title Co. D.C. CAL 349 F. Supp 235, 238, 239.”

51. In the present case, it has been conceded that there have been disparities in access to education for children in marginalised areas such as Samburu. As a result, the government has put in place policies and mechanisms, which have been set out briefly above, to ensure that children in these areas get access to education, as far as possible, on an equal basis with others. The petitioner does not deny the existence of these policies, such as the bursary funds and quota system, as well as the Policy Framework for Nomadic Education. This latter document, in fact, identifies the marginalized communities in Kenya such as the nomadic and fishing pastoralists, as well as the hunter gatherers. It also identifies their geographical locations such as the then north eastern province, Lamu and areas of Rift Valley, which roughly correspond with the areas that the petitioner contends were identified in the Ominde Commission report.
52. What the petitioner is aggrieved by, and what he states, is that there has been non-implementation or abuse of these measures, so that it is those who are already advantaged from the marginalized areas who get the benefit of the systems and policies put in place by government.
53. That being the case, can the government be faulted, and the orders sought against it in the petition be merited?
54. The Court acknowledges that all it has are the averments of the respondents, and the copies of policies and guidelines that the respondents say are in place, to guide its deliberations on the questions before it. The Court has no way of establishing whether such system operates as the respondents say it does, or as the petitioner alleges.
55. However, as the Constitution provides, the formulation of policy and implementation thereof are within the province of the executive. The state has shown that it has policies in place, and that it is taking measures, including affirmative action, to ensure that children in marginalized areas access education. This is in line with its obligation under Article 21 (2) which enjoins it to “take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.”
56. Even assuming that the disparities in the area of education in the country were a result of discrimination, from the material placed before me, the state can be said to be acting in accordance with its constitutional duty under Article 27(6) of the Constitution which requires the state, in order “To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.”

## **Disposition**

57. In the circumstances, I am unable to find that the state has failed in its obligations to set policies that would accord children in marginalized areas access to basic education. I note that the orders that the petitioner seeks include:

A declaration that children from marginalized and hardship areas are entitled to special provisions in the admission to secondary schools and public universities.



58. The respondent has already put in place a quota system for admission of children from marginalized areas to secondary and university. Making the said declaration in the circumstances is therefore redundant as the state is already doing that which the petitioner wishes it to be compelled to do.
59. The petitioner also seeks, at order (b):
- b. A declaration that the Respondents have violated the right to education of the children from marginalized and hardship areas.
60. This, again, is an order that, given the facts before me, I cannot issue. The evidence available shows that the government has taken various steps to ensure access to education of children in the marginalized areas, including the setting up of grants and bursaries, mobile schools, boarding primary and secondary schools, and in some cases, lunch in school. What has not emerged from the proceedings before me is the effectiveness of such measures, the suggestion from the respondents being that they may not have worked because of practices in the nomadic areas such as the movement from place to place in search of pasture.
61. The petitioner also seeks a declaration at prayer (c) as follows:
- c. A declaration that the Respondents are discriminating against the children from marginalized communities in providing education.
62. Again, in light of the findings above, this is an order that is not justified by the material before the Court. If anything, the evidence suggests that the state is taking deliberate steps to ensure that children in marginalized areas do access education on the same level with children in other areas of the country.
63. At prayer (d), the petitioner has sought an order to compel the respondents to “produce before court the policies and quotas to be used to ensure that the students from marginalized areas are not disadvantaged or discriminated”. (sic). It is noteworthy, however, that the petitioner did not challenge the averments by Prof. Godia with respect to the policies and quotas that the state has put in place to ensure access to education for children in marginalized areas. In the circumstances, the said order is unnecessary as the respondents did produce the policies and measures aimed to ensuring access to education.
64. Finally, the petitioner seeks an order, at prayer (e), as follows:
- e. An order abolishing/scrapping out K.C.P.E and K.C.S.E for being unconstitutional and in violation of the right to equality before the law and equal enjoyment of the benefit of the law.
65. The petitioner has not, in my view, demonstrated how the grant of such a drastic and far reaching order, were the Court minded to find in his favour, would address the inequalities he perceives to have been perpetrated against children from marginalized communities. In a sense, he is, metaphorically speaking, asking the court to throw out the baby with the bath water: because the children from marginalized communities do not access educational facilities and opportunities at the same level as those from other parts of the country, then the entire examination system must be thrown out. He does not suggest what is to replace it, and how abolishing or scrapping it would realize the equal benefit of the law and non-discrimination that he seeks for children from marginalized areas. It is, essentially, a somewhat reckless order to seek, and the Court cannot in good conscience even contemplate it.
66. Granted, there are doubtless many shortcomings with the education system in Kenya, and perhaps also with the system of examinations. However, at least on paper, there appears to be concerted efforts being made to ensure access to education for the petitioner’s target group. The challenge is to monitor the implementation of the programmes to ensure realization of the right to education. It does not appear



to the Court that scrapping the national examinations through an order of the Court, without careful consideration of the advantages or benefits of such action against the shortcomings of the present situation, would work for the benefit of the children in marginalized areas.

67. In the circumstances, I am unable to grant any of the orders that the petitioner seeks. This petition must therefore fail, and is hereby dismissed.
68. The petitioner's concerns, however, with respect to the right of children in marginalized areas to access education, and the limitations to such access, are laudable. It is my view therefore that the petition raises issues of great public interest, and the petitioner should not be penalized with costs for raising them.
69. In the circumstances, I direct that each party bears its own costs of the petition.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2015.**

**MUMBI NGUGI**

**JUDGE**

Mr. Kiarie Mungai instructed by the firm of Nchogu, Omwanza & Nyasimi & Co. Advocates for the petitioner.

Mr. Obura instructed by the State Law Office for the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

Ms. Njenga instructed by the firm of Kiarie & Kariuki & Associates & Co. Advocates for the 2<sup>nd</sup> respondent.

