



**Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others
(Constitutional Petition 40 of 2011) [2015] KEHC 1762 (KLR) (29 October 2015) (Ruling)**

Council of Imams and Preachers of Kenya, Malindi & 4 others v Attorney General & 5 others [2015] eKLR

Neutral citation: [2015] KEHC 1762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION 40 OF 2011**

SJ CHITEMBWE, J

OCTOBER 29, 2015

IN THE MATTER OF CHAPTER 4 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF ARTICLE 2 (4), 19 (1) (2) (3) (A), (B) AND (C), 20 (1), (2), (3)
(B), (4) (A), (B), 21 (1), 22 (1), (2) (A), (B), (C) AND (D), (3) (A), (B), (C), (D) AND
(E), (4) 23 (1), (3) (A), (B), (C), (D), (E) AND (F), 24 (1), (A), (B), (C), (D) AND (E), (2)
(B) AND (C), (3) 165 (3) (B) AND (D) (I) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS PARTICULARLY ARTICLES 32 (1), (2),
(3) AND (4) 45 (2), 4 (A) AND (B), 50 (2) (N), AND 170 (5) THEREOF**

**IN THE MATTER OF ARTICLE 19 OF THE TRANSITIONAL AND CONSEQUENTIAL
PROVISIONS UNDER THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF SECTION 2, 4, 8 (1) AND (2), 14, 20, 22 (1), (2) AND (3)
23 (2) (C) (I) AND 73 (A), (B), (C) AND (D) OF THE CHILDREN'S ACT 2001**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S PROTECTION AND
CARE CASE NO.11 OF 2011 - REPUBLIC (NK) -VRS- MB (MINOR)**

AND

**IN THE CRIMINAL CASE NO.150 OF 2011 REPUBLIC -VRS- BORA
FAMAU, HALIMA MOHAMED AND YUNUS ABDULRAHMAN**

BETWEEN

**COUNCIL OF IMAMS AND PREACHERS OF KENYA,
MALINDI 1ST PETITIONER
MBF (SUING THROUGH THE FATHER BF) 2ND PETITIONER
BF 3RD PETITIONER**



HALIMA MOHAMMED ABDALLA 4TH PETITIONER

YUNUS ABDULRAHMAN 5TH PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE INSPECTOR GENERAL 3RD RESPONDENT

THE OFFICER COMMANDING, MALINDI POLICE STATION 4TH
RESPONDENT

THE MINISTER FOR GENDER, CHILDREN AND SOCIAL
DEVELOPMENT 5TH RESPONDENT

THE CHIEF MAGISTRATE' S COURT MALINDI 6TH RESPONDENT

Prohibition of marriage to persons below 18 years is not a limitation to freedom of conscience or religion

The 3rd and 4th petitioners were charged with the offence of subjecting a child to harmful cultural rites by arranging for the early marriage of a child. The court held that no child in Kenya was capable of contracting a marriage. The court noted that early marriages were permissible under Islamic practice. However, in Kenya, such marriages were not allowed and that the law limiting such marriages was constitutional.

Reported by Kakai Toili

Family Law – marriage – Islamic marriage - capacity to enter into a marriage relationship - whether a child professing the Islamic faith had the capacity to marry and/ or be married under the Islamic laws and whether such a marriage was lawful under the laws of Kenya – Constitution of Kenya, 2010 article 45.

Constitutional Law – fundamental rights and freedoms – right to a family – Islamic marriages – limitations relating to marriage - whether the prohibition of marriage for persons below the age of eighteen years was a limitation of freedom of conscience or religious practice for persons professing the Islamic faith Constitution of Kenya, 2010 article 45

Brief facts

The 3rd and 4th petitioners were charged with the offence of subjecting a child to harmful cultural rites contrary to section 14 as read with section 20 of the Children Act. The particulars of the offence were that the three on the July 27, 2011 in Kilifi County jointly and unlawfully subjected a girl aged 16 years to harmful cultural practices, by arranging for the early marriage, a practice that was likely to negatively affect her psychological development.

The petitioners filed the instant petition seeking among other orders; a declaration that the arrest and arraignment in court of the 2nd to 5th petitioners and the charging of the 3rd to 5th petitioners was unconstitutional; and that the provisions of sections 2, 4, 8(1), (2), 14 and 20 of the Children Act did not apply to marriages conducted under Islamic Law. The 1st respondent filed a preliminary objection raising among other issues; that the 2nd petitioner was still a child when the petition was filed and lacked the capacity to sue; and that the petitioners had admitted that they married off a child and therefore the criminal case must proceed.

Issues

i. Whether a child professing the Islamic faith had the capacity to marry and/ or be married under the Islamic laws and whether such a marriage was lawful under the laws of Kenya.



ii. Whether the prohibition of marriage for persons below the age of eighteen years was a limitation on the freedom of conscience or religious practice for persons professing the Islamic faith.

Held

1. Kenya ratified the Convention on the Rights of the Child on July 31, 1990 which defined a child as, every human being below the age of eighteen years unless under the law applicable to the child, majority was attained earlier. The definition of the child was universal.
2. The Constitution of Kenya, 2010 at article 45 (2) recognised the right to marriage only as between adults of opposite gender. Similarly, article 45(4) called upon Parliament to enact legislation that recognised certain marriages. A proviso to article 45(4) provided that such marriages or system of personal law had to be to the extent that they were consistent with the Constitution. In essence therefore, any marriage that was not in line with the provisions of the Constitution, whether conducted under any tradition, system of religion or family law had to be in line with the provisions of the Constitution. Therefore, no child in Kenya was capable of contracting a marriage.
3. Religious expression included the right to form a family through marriage and the right to practice one's religion. Article 24 of the Constitution was an appreciation and acknowledgment by the people of Kenya that not all rights and fundamental freedoms in the bill of rights were absolute. It was obvious that the writers of the Constitution contemplated that rights and fundamental freedoms could be curtailed as provided for under article 19(3) (c) of the Constitution.
4. Under article 24 of the Constitution of Kenya, 2010 there was a code to follow in limiting rights and fundamental freedoms. It could not be arbitrarily done. It had to be limited by law. Even in the construction of a 'limiting provision' of the law, there was a provision prescribed under article 24 which stated that in construing the 'limiting provision' it had to be considered that the limiting provision was clear and specific about the right or freedom to be limited and the nature and extent of that limitation. The 'limiting provision' could not limit the right or fundamental freedom so far as to derogate from its core or essential content. Therefore, unless a right or fundamental freedom was one considered under article 25 of the Constitution (rights that could not be limited), it was not an absolute right. Islamic rights were not one of those rights which could not be limited under article 25.
5. The Constitution could be interpreted to give effect to marriage under Islamic Law. However, the Constitution could not be interpreted to allow children to be married before they reached the age of majority for purposes of expressing their religious freedom. Article 52 of the Constitution emphasised that children's rights had a special place if not an important place. Those rights as encapsulated under article 53 of the Constitution included the right to be protected from early marriages as was the case in the instant matter.
6. Article 53(1)(d) of the Constitution provided that, every child had to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour. That provision had to be interpreted in a manner that did not derogate from its core essential or bring an absurdity or embarrass the Constitution.
7. The Constitution put part of the responsibility of protecting children on State organs. All State organs and public officers had the duty to address the needs of vulnerable groups within the society including women, older members of the society, persons with disabilities, children, and youth, members of minority or marginalised communities and members of particular ethnic, religious or cultural communities.
8. "Harmful cultural practise" had to be broadly interpreted to include religious practises which were not in line with the Constitution. In the Kenyan context, the law condemned marriages for those aged below 18 years (section 2, 14 and 119(1) (h) of the Children Act).
9. The second petitioner was a child in every sense at the material time. The State would not have done its duty under the Constitution if it were to condone early marriages in the name of religion. It had a duty to protect the best interest of the child and it would not be in the interest of the child no matter



- the child's creed, sex, intellectual capacity or socio-economic background to be married off before the age of majority.
10. Early marriages were permissible under Islamic practice. However, in Kenya, such marriages were not allowed. The law limiting such marriages was constitutional. Muslims living in Kenya had to obey the Kenyan laws and ensure that they conducted marriage when the bride and the bridegroom were above eighteen years. That was not limitation of freedom or religious practice.
 11. The 3rd, 4th and 5th petitioners in allowing or orchestrating the marriage perpetrated a crime and the Constitution could not be interpreted so as to further the commission of a crime. Due to the passage of time, the 2nd petitioner had already reached the age of majority and was free to marry as per article 45 of the Constitution and in accordance with Islamic laws as per article 32 of the Constitution. However, by the time she was getting married, she was under eighteen years and lacked the capacity to marry.
 12. The supposed husband was indeed committing an offence of defilement under section 8 of the Sexual Offences Act. Under the Sexual Offences Act, a child under 18 years could not give her consent to sex. Since there was no evidence that the marriage was consummated, it could not be concluded with finality that the purported husband committed the offence of defilement. That was why the respondents were charged with a different offence.

Preliminary objection allowed.

Citations

East Africa

1. *Anolo, Dominic Arony v Attorney General* Miscellaneous Application No 494 of 2003 – (Explained)
2. *Center for Rights Education and Awareness (CREAW) & another v Mwau & 6 others* [2012] 2 KLR 261 – (Explained)
3. *El-Busaidy v Commissioner of Lands & 2 others* [2002] 1 KLR 508 – (Explained)
4. *Kanyua, Priscilla Nyokabi v Attorney General & another* Constitutional Petition No 7 of 2010 – (Explained)
5. *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 – (Explained)
6. *Patel, Dileep Manibhai & 3 others v Municipal Council of Nakuru & another* Petition No 6 of 2009 – (Explained)
7. *Ruturi & 2 others v Minister of Finance & another* (No 2) [2002] 1 KLR 54; [2001] 1 EA 253 – (Explained)

Texts and Journals

1. Babu,VR.,(Ed)(1968) *Mohammedan Law in India and Pakistan* Allahabad: Law Publishers 3rd Edn
2. Garner, AB.,(Ed)(1951) *Black's Law Dictionary* Minnesota: West Publishers 4th Edn
3. Hidayatullah, M., Hidayatullah, A.,(Eds)(1977)*Principles of Mahomedan Law* Bombay: Tripathi Publishers 18th Edn
4. Pearl, D.,(Ed)(1987) *A Textbook on Muslim Personal Law* London: Cambridge University Press 2nd Edn

Statutes

East Africa

1. Children's Act, 2001 (cap 141) sections 2, 4, 7,8(1),(2); 14; 20,(4); 22(1), (2)(3); 23(2)(c)(i); 73(a)(b) (c)(d); 119,(1)(h) – (Interpreted)
2. Constitution of Kenya, 2010 articles 2(4); 19(c)(3); 20; 21; 24(4); 32,(1)(2)(4); 45,(1)(2); 50; 53;(1)(d), (2); 170(5); 258(2); 260 – (Interpreted)
3. Marriage Act, 2014 (Act No 4 of 2014) section 49(3) – (Interpreted)
4. Sexual Offences Act, 2006 (cap 62A) section 8 – (Interpreted)

International Instruments

1. African Charter on the Rights and Welfare of the Child (ACRWC), 1999



2. Convention on the Rights of the Child, 1990

RULING

1. The 3rd and 4th petitioners together with BF were charged with the offence of subjecting a child to harmful cultural rites contrary to section 14 as read with section 20 of the Children Act Number 8 of 2001. The particulars of the offence are that the three on the July 27, 2011 in [particulars withheld] District within Kilifi County jointly and unlawfully subjected MB a girl aged 16 years to a harmful cultural rites, by arranging for the early marriage, a practice that was likely to negatively affect her psychological development.
2. The petitioners filed the current petition seeking the following prayers:
 - (1) For a declaration that the arrest and arraignment in court of the 2nd to 5th petitioners and the charging of the 3rd to 5th petitioners in Criminal Case No 150 of 2011 was unconstitutional wrong and illegal.
 - (2) The declaration that the provisions of sections 2, 4, 8(1), (2), 14 and 20 of the Children Act do not apply to marriages conducted under Islamic Law.
 - (3) A restraining order against all the respondents from preventing the 2nd to 5th petitioners from exercising their religious rights and beliefs and in particular entering into a relationship of marriage as provided for under the Constitution.
 - (4) Any other orders the court may deem appropriate to grant in the circumstances of this petition.
3. The 1st respondent filed a preliminary objection raising the following issues:
 - i. That the petition is frivolous, vexatious and an abuse of the court process.
 - ii. That the petition should be struck in limini without further directions.
 - iii. That articles 32(2) and (4) of the Constitution cannot be read in isolation/or in disregard of article 455(1), 53 and 260 of the Constitution.
 - iv. That the 2nd petitioner was still a child when the petition was filed and lacked the capacity to sue.
 - v. That the petition raises no triable issues.
 - vi. That the petitioners have admitted that they married off a child and therefore the criminal case must proceed.
4. Parties agreed to determine the preliminary objection by way of written submissions. The petitioners' claim in a nutshell is that their religious rights and freedoms enshrined under article 32(1), (2) & (4) of the Constitution were breached. The infringement occurred whilst they were celebrating a marriage ceremony between the 2nd and 5th petitioner in an exercise of their religious rights and freedoms. The 3rd and 4th petitioners are the parents of the 2nd petitioner and 'niqaa' had already taken place when the events unfolded. The 3rd and 4th respondents at the instigation of the 5th respondent (or his officers/agents) caused the arrest of the 2nd to 5th petitioners.
5. The 3rd, 4th and 5th petitioners were subsequently charged with the offence of subjecting a child to harmful cultural rites contrary to section 14 as read with section 20 of the Children Act. The arrest and the charges were unconstitutional, illegal and without a legal basis infringing on their rights guaranteed



under articles 32, 45, 50 and 170(5) of the Constitution. The 2nd petitioner was detained at Malindi Juvenile Remand Centre from July 24, 2011 to July 27, 2011. At the remand home she was forced to cut off her hair altering her “lovely and feminine appearance”. She was arraigned in court thereafter and the 6th respondent committed her to a rescue centre with the full knowledge of her legal marital status done in accordance with Islamic law breaching her constitutional rights. At the rescue centre the 2nd petitioner was allegedly compelled to discontinue her fast and attend church in violation of her Islamic teachings and beliefs as per article 32(4) of the Constitution.

6. The actions of the respondent were illegal as the petitioner was a Muslim of 17 years of age of sound mind and health at the material time capable of entering into a contract of marriage with the consent of the 3rd petitioner, her father; a right recognizable under articles 45 and 170(5) of the Constitution. That the 5th and 6th respondents misapprehended, misrepresented and or misinterpreted sections 2, 4, 8(1),(2), 14, 20, 22(1),(2),(3), 23(2)(c)(i) and 73(a),(b), (c),(d) of the Children Act as read together with articles 2(4), 32, 45 and 170(5) of the Constitution. Hence the 2nd to 5th petitioners have suffered sacrilege, blasphemy, mockery profanity and a violation of their religious beliefs causing them mental anguish and the 2nd petitioner also suffered physical abuse, pain and suffering.
7. The 5th respondent's replying affidavit filed on November 1, 2011 indicates that the Children Officer got a report from the head teacher that his student, a child was in need of rescue from a ploy to marry her off early, the marriage ceremony was scheduled for July 24, 2011. That with the assistance of the local administration police, they were able to rescue the child who was being escorted together with her alleged groom. The child was then placed at the Children remand home and the 5th Petitioner in police custody. The parents of the child were not traced on that day but were later arrested. It was established via an age assessment report that the child was 16 years of age and was an absentee student of a local primary school. The child was after a court session taken to a rescue centre as the parents refused to receive her upon release from the remand home, for according to them she was legally married.
8. The Children Officer averred that the child was never compelled to break her fast, attend church or break her daily prayers. The marriage of a child constituted a breach of the provisions of the Constitution in particular article 53(1)(d) and a violation of the Children Act. It is the contention of the respondent that the Constitution was debated and passed by all Kenyans and the prayers sought if granted would be an affront to the gains of the Constitution.
9. The 1st respondent on behalf of the 1st, 3rd, 4th & 5th respondents thereafter filed a preliminary objection grounds of which are: The frivolity, vexatious and abuse of court process nature the petition allegedly has. That the article 32(1),(2) and (4) ought not to be read in isolation or in disregard of articles 45(1), 53 and 260 of the Constitution that a child cannot file on its own behalf. That there is admission of commission of crime namely marrying off a child. That article 53(2) was upheld by all respondents. That there are no triable issues raised or any breach or violation of any right disclosed.
10. The respondents in urging for the dismissal of the petition submitted that the petition is an abuse of court process as the petitioners had admitted to the commission of a criminal offence in particular the engaging in marriage of a child as defined by article 260 of the Constitution. For this, the respondents call for the striking out of the petition in limine. Secondly, the respondents pray for a broad interpretation of the Constitution and not the proposed narrow view of of the Constitution more so of article 32 taken up by the petitioners who have disregarded article 45(2) recognising marriage between adults of opposite gender and article 53 guaranteeing rights of children. They buttressed their point leaning on the finding on interpretation of the Constitution by A Emukule, J, in Dileep Manibhai Patel & 3 Others v Municipal Council of Nakuru & Another [2014] eKLR. They urged finally that the petition seeks to further an illegality which the court ought not to entertain as it is bound as with



all state organs under article 20 and 21 of the Constitution which also provides that the bill of rights should be interpreted

“to the greatest extent consistent with the nature of right or fundamental freedom amongst others”

11. The petitioners on the other hand submitted that the Constitution is the supreme law and relied upon the finding of Al Hayanga, J in Nairobi High Court Misc App No 494 of 2003 Dominic Arony Amolo v AG [eKLR] in his adoption of the treatise of Prof Dr Mr Pylee where the professor from India did state that in interpretation of law the Constitution supercedes all laws and the goals and purpose of the Constitution must always be kept in mind.
12. The petitioners submitted that the Constitution authorizes the practice of Islamic religion to the Muslim followers under article 32(1) and only limited by the provisions of article 24(1) and (4). That any law limiting a right or fundamental freedom has to be clear and specific, it has to show the nature and extent of the limitation and not limit the right or fundamental freedom so as to derogate from its core or essential content. Further any person seeking to justify a limitation must demonstrate to a court, tribunal or other authority that the requirement of article 24 has been satisfied. They conceded to facts that the 2nd and 5th petitioners were practicing Islam, had contracted an Islamic marriage and that the 2nd petitioner was under 18 years further maintain that had the Constitution intended to limit matters of marriage in relation to age where Muslims are concerned it would have been expressed so under article 24. The petitioners in addition submitted that the practice of marriage involving a Muslim below the age of 18 years was not a cultural rite but an Islamic practice founded in the Holy Quran and Sunnah that dictate the capacity to marry. To buttress this point they relied upon the following Texts on Islamic law: A Textbook on Muslim Personal Law, 2nd ed. by David Pearl, Mohammedan Law in India and Pakistan, 3rd ed. by Babu Ram Verma and Mulla Principles of Mahomedan Law, 18th ed. by M. Hidayatullah and Arshad Hidayatullah .
13. It was their submission that in Islamic marriages the female has to consent to the marriage proposal as a prerequisite. The 2nd petitioner was 17 years at the material time and consented to the marriage and expressed her wish to be released to her husband and not be taken back to school. Furthermore, section 49(3) of the Marriage Act ousts any provision of the Act that is inconsistent with Islamic faith shall not apply to those who profess Islam, hence the 2nd petitioner's age was not an issue.
14. The petitioners then faulted the respondents view on article 53 on what the best interest of the child, the 2nd petitioner, was. It is their view that according to the religion she professes she was no longer a child and was capable of marriage. They proposed that she should be queried by the court so as to gauge her mental fitness and maturity. Finally, the petitioners stated that the petition was filed was filed on behalf of the 2nd petitioner as she was a child at the time and that the petition raises triable issues.

Analysis and Determination:

15. It is important to note that for a preliminary objection to succeed it first and foremost must raise pure points of law and secondly all the facts pleaded by the opposing side must be undisputed. As was held by Law, JA in Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd(1969) EA 696 where he held that:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”



16. The undisputed facts of the case are that the 2nd petitioner was at the material time a child professing Islamic faith and was married off in accordance with Islamic Law. The respondents contention is that this marriage was illegal on account of her age to which the petitioners respond that she had capacity to contract a marriage under Islamic law, hence the criminal proceedings. The preliminary objection is based on the petitioners claim over the alleged infringement of their rights and fundamental freedoms at the same time seeking to further what the respondents term as an illegality.
17. In my view, it would be best to first and foremost eliminate the jurisdictional contentions. Such as *locus standi*. The Attorney General has attacked the incompetency of the petition stating that the petition was filed by a child. The Justice DA Onyanya, in [Khelef Kbalifa El-Busaidy v Commissioner of Lands & 2 others](#) [2002] eKLR was faced with a preliminary objection to dismiss the petition for want of capacity to sue as the party that instituted the suit had not suffered the alleged constitutional breaches or threats to their rights or fundamental freedom. The court adopted the finding in the Nairobi High Court Misc Civil Application No 908 of 2001 *Albert Ruturi, JK Wanywela & Kenya Bankers Association v the Minister of Finance & Attorney General and Central Bank of Kenya* famously referred to as the *Donde* case. In the *Donde* case the court it held in part that:

...We state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In this type of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of the [Constitution](#), or injury to the nation. In such cases the court will not insist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception.”

18. This *Donde* case finding was subsequently followed by the High Court 5 judge bench in [Priscilla Nyokabi Kanyua v Attorney General & another](#) [2010] eKLR a constitutional petition burdened with issues of *locus standi* similar to the [El-Busaidy](#) case (*supra*). Article 258(2) of the [Constitution](#) does provide that :

In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;”

19. As the entitlement of the petition indicates that the 2nd petitioner is suing through her father, the 3rd petitioner, it is ought to be taken that she commenced the same through an adult who as per the afore stated provision of the [Constitution](#) could do so.
20. The rest of the issues can be addressed as one as they all border on the interpretation of the constitutional provisions. In the circumstances of this case there is need to interpret the [Constitution](#) in so far as capacity to marry under Islamic law in relation to a child professing Muslim faith . It is an established principle that in interpretation of the [Constitution](#) it must be interpreted broadly, liberally and purposely. The Court of Appeal resounded this principle in [Center for Rights Education and Awareness & Another v John Harun Mwaui & 6 others](#) [2012] eKLR. The principles are that in interpreting the [Constitution](#):



- a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by article 259.
 - b. The spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.
 - c. It must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
 - d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).
21. EM Githinji, JA also held in that particular case that:
- “There are other important principles which apply to the construction of statutes which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.”
22. In Dileep Manibabi Patel case(*supra*) A Emukule, J did enunciate the same aforementioned principles whilst referring to different jurisdictions that have held the same purposive approach in the interpretation of the Constitution. Now with this backdrop in mind, issue is whether or not a child aged 17 years old professing Islamic faith can contract a marriage under Islamic Law and the said marriage be lawful under Kenyan laws. I propose to split the main issue of capacity to marry into the following: Can a child contract a marriage in the context of the Constitution and Laws in Kenya and secondly can a child professing Islam contract a Muslim marriage in the context of the Constitution and laws in Kenya?
23. Can a child contract a marriage in the context of the Constitution and laws in Kenya. It is paramount first and foremost to define who a child is? Under article 260 of the Constitution a “child” means an individual who has not attained the age of eighteen years. According to Black's Law Dictionary, 4th ed “a minor” is: A person who has not reached full legal age; a child or juvenile. And “a child” is defined as : A person under the age of majority. Under the Children Act section 2 'a child' is defined to be: any humanbeing under the age of eighteen years. Under article 2 of the African Charter on the Rights and Welfare of the Child ratified by the Republic of Kenya on July 25, 2000 'a child' means every human being below the age of 18 years. The United Nations Convention on the Rights of the Child defines 'a child' as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Kenya ratified the Convention on the Rights of the Child on July 31, 1990. It is clear that the definition of a child is universal.



24. The Constitution of Kenya recognises the right to marriage only as between adults of opposite gender article 45(2) provides as follows:

“Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”

Similarly, article 45(4) calls upon parliament to enact legislation that recognizes certain marriages. A proviso to article 45(4) provides that such marriages or system of personal law should be to the extent that they are consistent with the Constitution. In essence therefore, any marriage that is not in line with the provisions of the Constitution, whether conducted under any tradition, system of religion or family law should be in line with the provisions of the Constitution.

25. The answer to the issue then is that no child in Kenya is capable of contracting a marriage. What of in context of article 32 of the Constitution which guarantees religious rights and freedoms and allows for one's expression of the same as read together with article 45(4) which recognises marriages under religious laws? Religious expression in my view includes the right to form a family through marriage and right to practice one's religion. The petitioners have proposed that the fact that the Constitution under article 24 is silent on the limitation of marriages under the Islamic Law then it would imply that the intention of the Constitution was not to limit this expression of religious practice. This cannot be further than the proper positioning of article 24.

26. It is clear that article 24 is an appreciation and acknowledgement by the people of Kenya that not all rights and fundamental freedoms in the Bill of Rights are absolute. It is obvious that the writers of the Constitution contemplated that rights and fundamental freedoms can be curtailed hence it is provided under article 19(c)(3) that :

“The rights and fundamental freedoms in the Bill of Rights—(c) are subject only to the limitations contemplated in this Constitution.

27. Further under article 24 there is a code to follow in limiting these rights and fundamental freedoms, it should not be arbitrarily done. It has to be limited by law. Even in the construction of a 'limiting provision' of the law there is provision prescribed under article 24 which states that in construing the 'limiting provision' it must be considered that the 'limiting provision' is clear and specific about the right or freedom to be limited and the nature and extent of the limitation. The 'limiting provision' shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. Therefore unless a right or fundamental freedom is one considered under article 25 (rights that cannot be limited) of the Constitution, it is not an absolute right. Islamic Marriages are not one of those rights which cannot be limited under article 25.

28. The question that now stands to be answered is: What is the law that has limited Islamic Marriages involving minors? As per the treatises relied upon by the petitioners it is clear that Islamic Law permits marriages involving minors so long as the minor has reached puberty and is of mature mind and has consented to the same. The Petitioners have submitted that whatever construction is adopted it must not limit the right or fundamental freedom so as to derogate from its core or essential content as per article 24(4). Any interpretation of the Constitution, should take into account other articles, it must thereof be read wholesomely and in context.

29. The petitioners seem to be reading into article 32 in the absence of the other provisions of the Constitution. Its writers included article 53 which looks into the rights of the Children. Article 53(1) provides that:



53.

- (1) Every child has the right—
 - (a) ...
 - (b) to free and compulsory basic education
 - (c) ...

30. The further affidavit of the petitioners indicate that the 2nd petitioner dropped out of school due to various undisclosed reasons. It is an undisputed fact that she was a primary school pupil before dropping out. Article 53(2) of the Constitution is clear in its clarion call that, ' A child's best interests are of paramount importance in every matter concerning the child.' If therefore a child has a right to free and compulsory basic education, the parents and the state are under obligation to ensure that the child receives this education. This is captured under the Children Act section 7 which provides that:

- (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.

31. In fact under the Constitution, article 3(1) it provides that: Every person has an obligation to respect, uphold and defend this Constitution. The 3rd and 4th petitioners were therefore obligated under the law to see to it that the 2nd petitioner did not drop out of school and obtain proper redress were the child to refuse to attend school and not to marry her off. Section 119 of the Children Act offers this redress, they would have moved the Children Court for appropriate orders. It provides that:

- (1) For the purposes of this Act, a child is in need of care and protection—
 - (d) whose parents or guardian find difficulty in parenting
 - (g) who is prevented from receiving education;

32. The afore stated notwithstanding the issue of a Muslim minor contracting an Islamic marriage in light of religious freedom still needs an answer. What if the child was to marry/be married off and still continues receiving her education? The petitioners have rightly pointed out that Islam is a universal religion and it is clear that in the Muslim religious practice girls can be married off before they reach the age of majority. The petitioners also rightly pointed out that the Constitution is supreme. Article 2 encapsulate this principle. It is the supreme law of this Republic and it binds all persons and all state organs. The petitioners' are grounding this emphasis on the fact that the Constitution recognises the right to religion and the expression of the same so as to demonstrate that there is no law limiting marriages in so far as they involve minors under Islamic law. Should the Constitution be interpreted to give effect to marriage under Islamic law. To this I give a resounding yes. Should the same Constitution bent on protecting the best interest of a child allow children to be married before they reach the age of majority for purposes of expressing their religious freedom. To this, I categorically state no. Article 52 reminds the people within the soils of Kenya that Children's right have a special if not important place.



These rights as encapsulated under article 53 include a right to be protected from early marriages as is the case here. Article 53(1)(d) provides that :

“Every child has the right—(d)to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour; (own emphasis)

33. The petitioners have further stated that the marriage was not a cultural rite. It was practice of religion. The interpretation of the Constitution must be given the broadest interpretation that upholds the spirit of the Constitution keeping in mind the principles of interpretation earlier on discussed. Article 53(1) (d) ought to be interpreted in a manner that does not derogate from its core essential or bring an absurdity or embarrass the Constitution.
34. Article 20(4) provides that: In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-
- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
 - (b) the spirit, purport and objects of the Bill of Rights.
35. The Constitution puts part of the responsibility of protecting children on state organs. Article 21 further provides that:
- (1) It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.
 - (3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. (own emphasis)
36. It is at this point that the idea of “harmful cultural practice” must be broadly interpreted to include religious practices which are currently not in line with the Constitution. I take cognizance to the fact that some European countries like Spain have lowered the marriage age for women to 16 years. In the context of the Republic of Kenya , the law condemns marriages for those aged below 18 years. The Children Act section 2 defines “early marriage” as “marriage or cohabitation with a child or any arrangement made for such marriage or cohabitation,” section 14 of that Act proscribes early marriages states as follows:
- “No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child’s life, health, social welfare, dignity or psychological development .” (own emphasis)
37. Section 119(1)(h) of the Children Act also provides that a child subject to early marriage is in need of care and protection in this context:
- (h) who, being a female, is subjected or is likely to be subjected to female circumcision or early marriage or to customs and practices prejudicial to the child’s life, education and health;
38. The 2nd petitioner was a child in every sense at the material time. The state would not have done its duty under the Constitution if it were to condone early marriages in the name of religion. It has a duty to protect the best interest of a child and it would not be in the interest of the child no



matter the child's creed, sex, intellectual capacity or socio-economic background, to be married off before the age of majority. The Kenyan Constitution as rightly submitted by the respondents, was democratically debated and agreed upon by the Kenyan people, they agreed to protect their children and any child within its borders no matter its beliefs. Early marriages are permissible under Islamic practice. However, in Kenya, such marriages are not allowed. The law limiting such marriages is constitutional. Muslims living in Kenya should obey the Kenyan laws and ensure that they conduct marriage when the bride and the bride groom are above eighteen years. This is not limitation of freedom of conscience or religious practice.

39. Hence in my view the 3rd, 4th and 5th petitioners in 'allowing' or orchestrating the marriage perpetrated a crime and the Constitution cannot be interpreted so as to further the commission of a crime. Due to passage of time the 2nd petitioner has already reached the age of majority and is free to marry as per article 45 of the Constitution and in accordance with Islamic law as per article 32. However, by the time she was getting married, she was under eighteen years and lacked the capacity to marry. The supposed husband was indeed committing an offence of defilement under section 8 of the Sexual Offences Act number 3 of 2006. Under the Sexual Offences Act, a child under 18 years cannot give her consent to sex. Since there is no evidence that the marriage was consummated, it cannot be concluded with finality that the purported husband committed the offence of defilement. That is why the respondents were charged with a different offence.
40. The bottom-line is that the Kenyan Law does not permit marriages of people below the age of 18 years. The 2nd respondent was a child under the provisions of article 260 of the Constitution. The right to marry under article 45(2) of the Constitution is only available to adults. Article 260 defines an adult as someone who has attained the age of 18 years. the Constitution grants the freedom to exercise one's religion. However, that freedom has to be carried out in line with the other Constitutional provisions. If each religion is given a freehand to exercise its belief without a common ground, then the end result will be disharmony in the Kenyan society. Some religious beliefs do not entertain medical treatment. The belief is that prayers can heal the sick. The government in its effort to eliminate diseases such as polio or bilhazia, is empowered to forcefully vaccinate or administer medicine on those whose religious beliefs are against medication. In the same line, the Constitution outlaws marriages of people below 18 years. This is irrespective of one's religious belief.
41. In the end, I do find that the preliminary objection is merited and is hereby allowed. The respondents should face the charges before the trial magistrate. All interim orders herein are hereby vacated. Each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER, 2015.

SAID J. CHITEMBWE

JUDGE

