IN THE MATTER OF: APPLICATION BY SMY *(SUING THROUGH HER MOTHER AND NEXT FRIEND, ANISA BASHIR)* FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS.

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES.

IN THE MATTER OF: THE DIRECTIVE FROM THE MINISTRY OF EDUCATION DATED 14TH JULY 2009 AND REFERENCED PR/14/07.

IN THE MATTER OF: THE REFUSAL BY THE HEAD AND THE BOARD OF GOVERNORS OF THE KENYA HIGH SCHOOL TO ALLOW MUSLIM GIRLS AT THE SCHOOL TO WEAR A HIJAB.

IN THE MATTER OF: THE CONSTITUTION OF KENYA, SECTIONS 23(3)(F) AND 27,28,32,33,44 AND 165 (6) OF THE CONSTITUTION.

BETWEEN

REPUBLIC ……........................……………………………………………APPLICANT

VERSUS

THE HEAD TEACHER, KENYA HIGH SCHOOL…………………………1st RESPONDENT

THE BOARD OF GOVERNORS KENYA HIGH SCHOOL……..………..2nd RESPONDENT

EX-PARTE

SMY (a minor suing through her mother and next friend A.B)

JUDGEMENT

In a representative suit commenced by way of Notice of Motion dated 1st of November 2010, the applicant SMY a minor suing through her mother and next friend Anisa Bashir sought on her own behalf and on behalf of other Muslim students at the Kenya High School the following Judicial Review Remedies –

1) An order of Mandamus to issue directed to the Respondents compelling them to fulfill their duty, as embodied in the directive from the Ministry of Education, dated 14th July 2009 and referenced PR/14/07 by allowing the applicant and other Muslim students to wear the Hijab at Kenya High School.

2) An order of Certiorari to bring to this Honourable Court to quash the decision of the Respondent

denying the applicant the right to wear Hijab in school.

3) An order of prohibition prohibiting the Respondents from interfering with the applicant's right to wear a Hijab as a form of expression and manifestation of her religious right as provided for under Section 32 of the Constitution of Kenya.

4) That the honourable Court be pleased to give further orders and other reliefs as may be deemed just and expedient.

5) That the costs of and incidental to the application be provided for.

The application was filed pursuant to leave granted on 28th October 2010 and is supported by a statement of facts dated 27th October 2010, a verifying affidavit sworn by the applicant's mother and next friend Anisa Bashir on even date and her further affidavit sworn on 30th June 2011. It is also supported by two other affidavits one sworn by a Muslim scholar one Sheik Khalfan Kamisi on 17th August 2011 and another one sworn by one Fatuma Hirsi Mohamed on 30th June 2011.

The applicant SMY at the time of filing this suit was a form two student at the Kenya High School.

The 1st respondent is the Head teacher of the Kenya High School while the 2nd respondent is the Board of Governors of the said School, a body corporate duly established under the Education Act Chapter 211 Laws of Kenya.

BACKGROUND.

The background against which these judicial review proceedings were filed is well captured in the pleadings filed by the applicant particularly the annexures to the verifying affidavit. The annexures marked ''AB-1'' show that on diverse dates between 18th of May 2009 and 26th May 2009, several persons made complaints in writing concerning the refusal by some schools to allow students to wear religious dressing particularly the hijab for Muslim students. The complaints were made in the form of letters addressed to Hon. David Koech, in his capacity as the Chairman of the Departmental Committee on Education, Research and Technology, a Committee of Parliament. The letters were authored by the following organizations;

(a) The National Muslim Leaders Forum.

(b) The Kenya Council of Imams and Ulamaa.

(c) The Young Muslim Association.

(d) The Family resource Centre located at the Jamia Mosque's Administration block.

The said complaints were forwarded to the Ministry of Education and in response thereto, the Ministry of Education through the Permanent Secretary Prof, Karega Mutahi wrote a letter on 14th July 2009 which was addressed to all Provincial Directors of Education, all District Officers and all Municipal Education Officers and copied to all Heads of schools. The letter reads as follows;

RE: RELIGIOUS DRESSING

It has come to my attention that some heads of school have refused to permit Muslim girls dressed in the Hijab an Islamic headgear, to attend school.

I wish to remind you that no child should be denied the right to education on the basis of religion, a right enshrined in the Constitution. Further, I direct principals who may have expelled students on

the basis of wearing the Hijab to admit them immediately.

Prof. Karega Mutahi

PERMANENT SECRETARY

It is the applicant's case that the respondents herein have failed and/or refused to comply with the ministerial directive in letter dated 14th July 2009 requiring them to allow their Muslim students to wear a hijab while in school. The applicant contends that following the said directive and being a Muslim student desirous of practicing and manifesting her religion and beliefs, she had a legitimate expectation that she would be allowed to wear the hijab while in school which expectation the respondents failed to meet.

In Para 9 of the verifying affidavit, it is deponed that wearing a hijab means that a woman must cover herself save for the hands and face and for school girls it would mean wearing a headscarf and pair of trousers or long skirts up to the ankles. For men, hijab means that a man must cover himself between the navel and knees.

In support of the applicant's case, Sheikh Ahmed M. Athman who is a religious scholar and Imam of Jamia Landhies Mosques stated in his affidavit that Islam as a religion is very particular about matters of clothing and ornaments. He stated that wearing of a hijab which for women meant covering themselves save for their hands and face was a religious edict of the Quran which was mandatory for all Muslim women.

According to him, the adornment of the hijab was meant to protect and safeguard the honor, dignity, chastity, purity, integrity and moral character of Muslim women. The applicant complains that the practice by the respondents of refusing her and other Muslim girls to wear the Hijab while in school as a manifestation of their religion and beliefs amounted to discrimination on the basis of religion and was a violation of their constitutional rights under Article 27 and Article 32 of the Constitution of Kenya.

THE RESPONDENTS CASE

The respondents in opposing the applicant's motion filed the following documents:-

(a) Replying affidavit sworn on 09th June 2011 and further affidavits sworn on 7th July 2011 and 29th February 2012 by Rosemary Saina the Chief Principal of the Kenya High school who also serves as the Secretary to the 2nd Respondent's Board.

(b) Replying affidavit sworn on 09th June 2011 by Samuel Gitonga Mutungi, the Chairman of the Parent Teachers Association of the Kenya High School.

(c) Replying affidavit sworn on 9th June 2011 by Dr. Eddah W. Gachukia an educationalist.

(d) Replying affidavit sworn by an Islamic scholar one Prof. Dr. Imam Al-Hajj Ibrahi B. Syed.

The Respondent's case is well captured in the very long and elaborate Replying Affidavit sworn by the 1st Respondent on 9th June 2011.

It is the Respondent's case and this is not disputed by the applicant that the Kenya High School ***(hereinafter referred to as the school)*** is an all-girls public national secondary school which was founded over 100 years ago in 1910. It admits qualified students from all corners of the Republic of Kenya who come from different social-cultural backgrounds and who practice different religions and have different religious inclinations. The character of the school and the caliber of its student community is well spelt out in the 1st Respondent's replying affidavit at Para B and E where she states as follows;

Para B –

‘\'**The students community, both past and current is multi-faceted, and comprises and represents various and ethnic, cultural, socio-economic, class, racial and religious sphere who have their different dress codes, traditions, practice, who have been brought together under a delicately balanced schooling environment where equalization as a policy plays the pivotalrole in the set–up and maintenance of students co-existence.’’**

Para E –

“**Though the school was originally designed to be a Christian institution and has a strong Anglican Christian background and population, it has over the years evolved to accommodate students from other religions and religious inclination such as the Muslim, Hindus, Buddhist, Sikhs and known sects such as the Legio Maria, Akorino and other traditionalist, albeit within reasonably defined and generally accepted/standard parameters dictated by the equalization policy within the school environment.’’**

The 1st respondent avers that under the Education Act Cap 211 Laws of Kenya, and the rules made thereunder the school is mandated to make rules and regulations for the proper administration, discipline and functioning of the school community. The rules once made apply to all students across the board and have been unreservedly accepted and issued to parents prior to admission of the students who wish to be enrolled in the school. The school rules necessarily cover the standard dress code expected to be worn by every student while in school.

According to the respondents, the school uniform serves a critical role in the education set up as it creates harmony, cohesion and unity among students which in turn contributes to high academic performance. It is the standard dress code that identifies and associates students to a particular school and helps to maintain uniformity, order and discipline in schools.

The 1st respondent denied having directly received the letter dated 14th July 2009 authored by the Permanent Secretary, Ministry of Education and claims that the letter was brought to her attention by the applicant in September 2009. It was subsequently discussed at the Board level as well as by parents in the Annual General Meeting (AGM) of the Parents Teachers Association (PTA) held on 20th March 2010 which resolved that all students should continue wearing the school uniform in order to promote discipline, identity, harmony, equality and uniformity in the school.

Looking at the replying and further affidavits filed on behalf of the respondents, it is clear that the respondents have denied the applicant’s claim that their decision to refuse the applicant and other Muslim girls in the school the right to wear the hijab amounts to discrimination on the basis of religion and that it violated their constitutional right to manifest their religion and beliefs through worship, teaching or observance as guaranteed under Article 32 of the Constitution.

The respondents argued that the school has never denied any of its students the right to education and has never expelled or prevented the Muslim students from attending school based on religious considerations.

It is the respondents’ case that they have allowed the applicant and other students the freedom to manifest and practice their religion through worship and observance of other religious practices.

According to the respondents, facilities had been deliberately put in place to make it possible for the Muslim students to enjoy their religious freedom for example equipping the school’s washrooms with water bottles for the convenience of the Muslim faithful’s and setting aside of prayer rooms in each dormitory. In addition, Islamic Religious Education is taught in the school and examined as part of the education curriculum and an Islamic preacher is allowed to the school once a week to attend to their spiritual needs - ***see Para H (i),(j) and (k) of the 1st Respondents affidavit of 9th June 2011.***

The Respondents further contended that the applicant having unreservedly accepted to abide by the school rules and regulations which require inter alia, dressing in the school uniform at all times without a

hijab whilst being aware of their professed conviction to wear a hijab at all times, consented to wearing the standard school uniform and they cannot now be heard to complain that the school was infringing on their constitutional rights.

The respondents further expounded the position that the freedom of religion enshrined in our constitution and other international instruments to which Kenya subscribes is not absolute. That in the peculiar circumstance of this case and quite apart from the fact that the applicant had freely and knowingly consented to its limitation, it is necessary, legitimate and proportionate to limit the said freedom for the sake of equality, equity, harmony, cohesion, discipline, tolerance, inclusivity and the overriding educational need for multi religious, multi-cultural,, and multi-racial student community integrating all social classes.

The respondents also claimed that they had properly exercised their statutory discretion to come up with an acceptable and reasonable dress code for students and the court ought not to interfere with such informed and objective exercise use of discretion.

Counsel appearing for the parties herein filed written submissions which they highlighted before me on 30th of January 2012 and on 21st of May 2012.

ISSUES ARISING, ANALYSIS AND DETERMINATION

Having carefully read through the pleadings filed in this case and considered the submissions made by Mr Omwanza for the applicant and Mr Ngatia for the respondents alongside all the authorities cited, it is my finding that five main issues emerge for determination by this court namely;

(1) Whether the Permanent Secretary's directive in letter dated 14th July 2011 was valid in law and whether the respondents were legally obligated to comply with the same.

2) Whether the said directive created a legitimate expectation on the applicant which the respondents had a duty to fulfill.

3) Whether the respondent's decision refusing the applicant and other Muslim students the right to wear a hijab while in school violated any of their constitutional rights.

4) Whether the applicant is entitled to the reliefs sought?

5) What order should be made on costs?

Before I begin to consider the issues identified above for determination, I wish to commend the counsel appearing for the parties herein for their industry and for their thorough research into the issues raised in the applicant's Notice of Motion. I am indeed very grateful for the assistance they have availed to the court.

Having said that, I now wish to consider the above listed issues with a view to determining whether the applicant is entitled to the reliefs sought in her application. I propose to deal with them together as opposed to sequentially since in my view most of them are interrelated.

Starting with the first issue, Mr Omwanza, learned
counsel for the applicant submitted that the respondents' should be compelled to comply with the directive from the Ministry of Education requiring that schools allow Muslim girls to wear a hijab in school. The applicant argued that the respondents being in charge of the management of the Kenya High School a public funded national school had a duty to comply with the said directive.

Mr Ngatia, learned counsel for the respondents argued that the said directive was issued by the Permanent Secretary in the ministry and was issued without jurisdiction and/or in excess of authority as it was only the Minister for Education who was empowered under Section 27 of the Education Act to give

directions to schools in response to complaints received by him. It was further argued on behalf of the respondents that since the directive of 14th July 2009 was issued by Prof. Karega Mutahi in his capacity as a Permanent Secretary not as a minister, the said directive was issued illegally and was therefore not valid in law. It was further submitted that the court had no power to order a party to comply with a directive that was inherently invalid or illegal. In their submissions on this point, the respondents relied on the case of **Thika**

Coffee Mills Ltd Vs Coffee Board of Kenya HCC No 1068 of 1998.

I do agree with the position taken by the respondents that in so far as the letter dated 14th July 2011 was written by the Permanent Secretary in the Ministry of Education in his own name not on behalf of the minister, it did not amount to a direction issued under Section 27 of the Education Act which if lawfully issued by the minister or under his authority through delegated powers by a person duly appointed by him for that purpose would have been binding on the respondents and all other School Management Boards in the country. I am fortified in this finding by Section 38(1) of The Interpretations And General Provisions Act Cap 2 laws of Kenya which reads as follows:

Section 38(1)

"where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the Attorney General, or a minister, the President, the Attorney General or the minister, may unless by law expressly prohibited from doing so, delegate by notice in the gazette, to a person by name, or to the person for the time being holding an office specified in the notice, the exercise of that power or the performance of that duty, subject to such conditions, exceptions or qualifications as the president, the Attorney General may specify in the notice.''

Section 3 thereof defines a minister as the minister for the time being responsible for the matter in question. It also defines a minister as a person appointed under the Constitution. The court takes judicial notice that Prof. Karega Mutahi has never been appointed as a Minister for Education.

A reading of Section 38 of Cap 2 Laws of Kenya reveals that the Minister for Education is allowed to delegate his powers under Section 27 of the Act but this had to be done through a gazette notice. It has not been suggested by the applicant in this case nor is there evidence to prove that in issuing the directive in letter dated 14th July 2011, the Permanent Secretary was exercising powers delegated to him by the minister through a gazette notice. A perusal of the said letter shows clearly that it was not issued on behalf of the minister. The said directives were therefore issued ultra vires the powers of the Permanent Secretary in the Ministry of Education under the Education Act. The said directions were therefore unlawful as any act done in excess or in breach of a statutory power is null and void. In short, the said directive had no legal effect - see the case of **Mohamed Zafar Niaz & 2 Others Vs Permanent Secretary, Ministry of Education (2006) eKLR and Woollette Vs Minister of Agriculture & Fisheries 1955 1Q.B**. The respondents therefore had no legal obligation to comply with a directive that had been issued illegally.

I have gone to some length to determine the legality of the directive in letter dated 14th July 2011 not only because it appeared to form the backbone of the applicant's case but also because the applicant had claimed in her pleadings that the directive had given rise to her legitimate expectation that the Respondents would allow her and other Muslim students to outwardly manifest their religion by wearing a hijab while in school.

As clearly demonstrated above, there is no room for doubt that the said directive was a nullity in law and it was consequently not capable of giving rise to a legitimate expectation of any kind to the applicant or to anyone else for that matter. The evidence tendered in this case shows that the Respondents on their part had not made any promise or representation to the applicant which could have given rise to any legitimate expectation that they would allow the applicant to wear the hijab in school. A legitimate expectation is said to arise from an expectation arising from a promise or representation given on behalf of a public body or from the existence of a regular practice which the claimant can reasonably expect to

continue.

Lord Diplock while discussing this principle in **Council of Civil Service Unions Vs Minister for Civil Service (1995) AC 374** set out the parameters within which the principle applied in judicial review proceedings as one way of demonstrating that a public body had failed in its duty to act fairly. Lord Diplock said that for legitimate expectation to arise, the impugned decision -

‘’……must affect the other person by depriving him of some benefit or advantage which either -

(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue doing until there has been communicated to him some rational grounds for withdrawing it in which he has been given an opportunity to comment, or

(ii) He has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity to advance reasons for contending that they should not be withdrawn .”

In this case, it is clear from the material placed before the court that the Applicant had not been given the benefit of manifesting her religion through the wearing of a hijab before the institution of this suit. In the context of our case, a legitimate expectation would only have arisen if the applicant had been allowed to exercise that right and the Respondents without notice withdrew or threatened to withdraw the exercise of that right.

In view of the foregoing, I find that the applicant has not demonstrated that she had any legitimate expectations which the Respondents could have violated.

Secondly, since the directive was a nullity in law, the respondents did not have either a statutory or public duty to comply with it. The result of this is that this court cannot issue an order of mandamus to compel the respondents to allow the applicants to wear a hijab while in school as had been directed by the Permanent Secretary. I make this finding because it is settled law that an order of mandamus will only issue to compel a public officer or body to perform a public duty imposed by statute which it had failed to perform to the detriment of the claimant. It is my finding that directives issued contrary to the law cannot give rise to a public duty. In the premises, I am satisfied that the applicant is not entitled to an order of mandamus and the same is hereby declined.

However, this is not the only reason why the court cannot issue an order of mandamus in this case. A close scrutiny of the court record reveals that though the applicant had sought leave to apply for an order of mandamus, J. Maraga when granting leave specifically granted leave to the applicant to commence judicial review proceedings for the remedies of certiorari and prohibition and did not grant leave to apply for an order of mandamus. The court had discretion to grant or not to grant leave to the applicant to apply for all or any of the reliefs sought in the application for leave. The fact that the court specifically granted leave to the applicant to commence proceedings for orders of certiorari and prohibition and said nothing concerning the orders of mandamus means that leave was denied to include a prayer for an order of mandamus in the substantive motion. Order 53 rule (1) of the Civil Procedure Rules is very clear. All proceedings for orders of Mandamus, Certiorari and Prohibition cannot be commenced without leave of the court. As the applicant was not granted court’s leave to apply for an order of mandamus, it is my finding that he is not entitled to the said remedy.

Turning now to the issue of whether the respondents’ impugned decision violated any of the applicant’s constitutional rights, it was submitted on behalf of the applicant that the respondents refusal to allow the applicant and other Muslim students the right to adorn a hijab as part of their school uniform as a manifestation of their religion amounted to discrimination on the basis of religion and that it violated their rights guaranteed under Article 27 and 32 of the Constitution.

Article 27 provides for the right to equality before the law and safeguards the right to equal protection and equal benefit of the law.

It also prohibits discrimination against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, belief, culture, dress, language, or birth.

Article 32 states as follows;

“(1) every person has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because ofthe person’s belief or religion.

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

Before embarking on an interpretation of the above constitutional provisions in the context of the issues raised in this application, I think it is important to first remind ourselves of some of the principles that guide the court when undertaking constitutional interpretation.

I wish to begin with Article 259 (1) of the constitution which obligates the court to interpret the constitution in a manner that promotes its purpose, values and principles and which advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits development of the law and contributes to good governance.

Secondly, the court should bear in mind the principle of harmonization which is to the effect that all provisions of the Constitution with a bearing on a specific issue should be considered together as a whole - see the case of **Olum Vs Attorney General of Uganda [2002] 2 E.A 508.**

On the claim that the applicant’s rights under Article 27 have been violated by the respondents, having carefully evaluated the evidence tendered in this case, I find that though the claim by the respondents that a special place of worship for Muslim students had been set aside in each dormitory has been contested by the applicant, the applicant did not dispute the respondents claim that the Muslim students in the school were given the freedom to manifest and practice their religion through worship and receiving Islamic teachings besides being allowed to observe some other aspects of their religious beliefs. There is no evidence that the Muslim girls were ever treated differently on account of their religion or religious beliefs.

The respondent’s contention that the school has never denied any of its Muslim students the right to education and has not expelled or prevented any of them from attending school on religious grounds has also not been disputed by the applicant.

On the material placed before me, it is my finding that no evidence has been tendered to show that the applicant has at any time been subjected to any form of discrimination by the respondents on any of the grounds envisaged under Art 27. If anything, the evidence on record reveals that the respondents have applied the principle of equality and has treated the applicant and all other students in exactly the same way.

In the premises, I am persuaded to find that the respondents have not violated the applicant’s constitutional rights under Art 27 as alleged. The court would have looked at this matter differently and may have reached different conclusions had it been established that the respondents had denied the applicants and other Muslim students the right to worship and to observe other religious practices while in school while allowing other students to practice their respective religions.

The next question that falls for determination by this court is whether the impugned decision infringed on the applicant's rights under Art 32.

As expected, the applicant answered this question in the affirmative claiming that under the Constitution, no person including Muslim students should be compelled to act, or engage in any act which was contrary to their religion or belief. The school, the applicant argued, had made Muslim believers make a painful choice between remaining true to their faith or obeying the school rules.

It was further submitted on behalf of the applicant that there was an obligation imposed on the respondents to ensure that students are tolerant to the religious rights and beliefs of others as this is the only way that we can hope to build a cohesive and multi-cultural society.

The applicants therefore urged the court to find that their constitutional rights under Art 32 had been violated and that consequently they were entitled to the reliefs sought.

In order to further advance their case, the applicant relied on several authorities namely, **Pillay Vs Kwazulu Natal MEC & 5 others, Case No: AR 761/05, Chu Woan Chyi & 6 others Vs Director ofImmigration, Christian Education vs Minister of Education** and **Dzvova Vs. Minister of Education, Sports and Culture and Others (2007).**

The respondents on their part submitted that under the constitution, the right to express and manifest one's religion and religious beliefs is one of those fundamental rights and freedoms that are not absolute. That it had not been shown or alleged that the standardization of the school's dress code was unreasonable or unjustifiable. It is the Respondents submission that they have not denied the applicant the right to belong to, profess, practice and or manifest her religion whether in private or in public. The only thing that has been denied is the right to outwardly manifest her religion by wearing a hijab. Mr Ngatia argued that if this was allowed, it would distort the school uniform which had served the school well for over 100 years and introduce inequality in the treatment of students. The Respondents advanced the view that if the applicants were allowed to wear the hijab, the other students from other religions, denominations and religious sects would feel discriminated against and may start agitating to be allowed to outwardly manifest their religions and beliefs through the wearing of religious attires which would translate into disharmony and disorder not only at the Kenya High School but also in other national schools in the country.

The respondent urged the court to be guided by the cases of **Ndanu Mutambuki & 119 Others Vs Minister for Education & 12 Others (2007), Christian Education South Africa Vs. Minister for Education,In R (on the application of Begum) Vs. Governors of Denbigh High School (2006), Kalac Vs Turkey (1997) 27, Multani Vs Commission Scolaire Marguerite-Bourgeoys (2006)**and find that the applicant's right to wear a hijab as a manifestation of her Islamic faith is among those rights that should be limited under Art 24 of the Constitution in the public interest in order to ensure harmonious co-existence in schools.

Having analysed the rival submissions made by the parties, I think it is important to reproduce verbatim Article 24 of the Constitution so that we can appreciate its full meaning and effect.

Article 24 (1) states that,

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

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 the right and fundamental freedom by any individual does not prejudice the right and fundamental freedoms of others; and**

e) **The relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

This court recognizes that every person has a constitutional right to the freedom of conscience, religion, thought, belief and opinion and the right to manifest his religious beliefs through worship and practicing what is required by his religious faith. These rights are however not absolute and can be qualified under Art 24 because they are not among the rights and freedoms that cannot be limited under Art 25. The rights and freedoms which are absolute as specified under Art 25 are;

(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.

The question that now begs determination is whether the test stipulated under Article 24 for the valid limitation of fundamental rights and freedoms has been met in the instant case. I also wish to state that besides the test provided under Article 24, jurisprudence emanating from the European Court of Human Rights seems to suggest that in considering whether there had been interference to freedom of religion, the court must consider all the circumstances of the case including the extent to which the individual could reasonably expect to be at liberty to manifest his beliefs in practice. That in claiming interference to the enjoyment of these rights, individuals must take their specific situations into account – see **In R (on the application of Begum) Vs. Governors of Denbigh High School (2006), Kalac Vs Turkey (1997) 27,**

I wish to state at this juncture that the freedom of thought, conscience and religion which includes the right to manifest ones religion is one of the foundations and pillars of a democratic society. In democratic societies in which several religions co-exist within one another in the same population, it may be necessary to restrict peoples' manifestations of religious beliefs in order to reconcile the interests of the various groups and ensure that every persons beliefs are respected.

In learning institutions, these rights may be limited by rules and regulations made by various organs of management to ensure order and smooth running of the institutions.

In the instant case, it is common ground that the school rules which required that all students without exception should observe a standardized dress code (school uniform) thus limiting the applicants right to wear a hijab were made pursuant to powers donated to the 2nd respondent under Section 11 of the Education Act . The 2nd respondent had authority to make administrative rules for the good governance, control and discipline of students in the school. See also Rule 10 of the Education (School Discipline) Regulations. It is therefore my finding that the said limitation was sanctioned by the law and was also ratified in two Parents Teachers Association (PTA) meetings in which the Applicant's parents participated.

As noted earlier, it is not contested that the respondents have not denied the applicant the right to enjoy and profess their religion and to practice their religious beliefs both in public or in private except the right to wear a hijab in view of the requirement to wear the school uniform. The respondents assert that the limitation of that right to that extent is reasonable and necessary for the proper management, discipline and good governance in the school.

The significant and critical role played by standardized dress codes and observance of rules in controlled environments which one would expect to find in any national secondary school in Kenya or say for example in the Armed Forces cannot be overemphasized. It is not disputed that school uniforms assist in the identification of students and gives them a sense of belonging to one community of students. It promotes discipline, unity and harmonious co-existence among students. It instills a sense of inclusivity and unity of purpose. In my view, the most important role played by a standardized school uniform is that it creates uniformity and visual equality that obscures the economic disparities and religious backgrounds of students who hail from all walks of life.

If the court were to allow the applicant's quest to wear hijab in school, the 48 Muslim girls in the school would look different from the others and this might give the impression that the applicants were being accorded special or preferential treatment. This may in all probability lead to agitation by students who profess different faiths to demand the right to adorn their different and perhaps multi-coloured religious attires of all shapes and sizes which the school administrators will not be in a position to resist if the Muslim students are allowed to wear a hijab. The result of these turn of events would be that students will be turning up in school dressed in a mosaic of colours and consequently, the concept of equality and harmonization brought about by the school uniform would come to an abrupt end. It goes without saying that this kind of scenario would invite disorder, indiscipline, social disintegration and disharmony in our learning institutions. Such an eventuality should be avoided at all costs since it is in the public interest to have order and harmonious co-existence in schools. It is also in the public interest to have well managed and disciplined schools in a democratic society.

It is important to bear in mind that the Republic of Kenya is a secular State. This has been pronounced boldly and in no uncertain terms by Article 8 of the Constitution. This in effect means that no religion is superior than the other in the eyes of the law. Considering that the Kenya High School, just like any other national school is a secular public school admitting students of all faiths and religious inclinations, allowing the applicant's prayer in this motion would in my opinion be tantamount to elevating the applicant and their religion to a different category from the other students who belong to other religions.. This would infact amount to discrimination of the other students who would be required to continue wearing the prescribed school uniform.

From the foregoing, it is clear that if the practice sought to be enforced by the applicant was allowed, it would fly in the face of the constitutional principles of non-discrimination on the basis of religion and the principle of equality before the law which ironically the applicant is seeking to enforce in the instant application.

For the foregoing reasons, I am satisfied that in the circumstances of this case, the respondents limitation of the applicant's right to outwardly manifest her religion by wearing a hijab in school was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. I am persuaded to find that the uniform school policy was designed by the Respondents with the legitimate aim ensuring equality among all students and to facilitate enforcement of discipline for continued improvement of academic standards in the school.

A raft of authorities from the European Court of Human Rights were cited by both parties and I have read and considered all of them. I am however more persuaded by the decision of J. Nyamu (as he then was) in the local case of **Ndanu Mutambuki & 119 Others Vs Minister for Education & 12 Others [2007]** eKLR because the facts in that case are by and large similar to those in the instant case. In that case J. Nyamu stated that:

"School uniforms and discipline do constitute and have been generally required as part and parcel of the management of schools and further constitute basic norms and standards in any democratic society.

No doubt the hallmark of a democratic society is respect for human rights, tolerance and broadmindedness. In the case of schools, nothing represents the concept of equality more than school uniforms. Unless it is an essentialpart of faith it cannot be right for a pupil to get up one

morning and decide to put on headscarf as well, this derogates from the hallmarks of a democratic society and violates the principle of equality. In weighing the individuals fundamental right under Section 78 (of the repealed constitution) against those of the others, I find myself unable to disregard the weight of these basic standards and norms and in my view they do tilt the scales in favour of a finding of no infringement in the circumstances of this case……" I wholly associate myself with those sentiments .

In view of the foregoing, It is my finding and decision that the limitation imposed by the respondents in this case was justifiable in an open and democratic society like Kenya's whose face and diversity was represented by students at the Kenya High School. It was therefore lawful and did not amount to an infringement of the applicant's constitutional rights.

Considering the above finding, is the applicant then entitled to the judicial review remedies of certiorari and prohibition as sought in prayers 2 and 3 of the motion?

I have deliberately singled out the remedies of certiorari and prohibition since I have already made a finding on the prayer for an order of mandamus.

The remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.

The nature and scope of certiorari was discussed in the case of **Captain Geoffrey Kujoga Murungi Vs Attorney General** **Misc Civil Application No. 293 of 1993** where it was stated;

"Certiorari deals with decisions already made ….Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice, or contrary to the law. Thus anorder of certiorari is not a restraining order."

It is trite law that a court can only issue the orders of certiorari and prohibition where a claimant has proved that the impugned decision had been made either in excess or without jurisdiction, irrationally or unreasonably or in breach of the rules of natural justice. This was one of the holdings by the Court of Appeal in the case of Republic Vs The Kenya National Examination Council Exparte Geoffrey Githinji and 9 Others, Civil Appeal No.266 of 1996

In the instant case, I have already established that the impugned decision had been made within the respondents statutory mandate. I have also made a finding that the said decision was lawful as it did not violate the applicant's constitutional rights. It has not been proved that there was any procedural impropriety when the decision was made.

In the circumstances, I find no basis upon which this court can grant the remedies sought in the applicant's motion.

It must be remembered that judicial review is concerned with the process of arriving at a decision and not with the merits of a decision. Taking everything into account, It is my finding that the applicant has not demonstrated that she is deserving of the reliefs sought in this case.

Lastly and in conclusion, I wish to observe that the prayer for the remedy of Certiorari would not have succeeded in any event since the applicant failed to satisfy the mandatory requirements of the law which must be fulfilled before the court can invoke its jurisdiction to grant the same.

To start with, the applicant did not specify the decision which the two respondents allegedly made which was to be quashed by orders of Certiorari. She did not also annex/attach the said decision to her

pleadings or avail the same verified by an affidavit to the court through the Registrar before the hearing of the Notice of Motion or account for failure to do so. She therefore failed to satisfy the mandatory requirements prescribed by Order 53 Rule 7 of the Civil Procedure Rules.

The court while considering the merits or otherwise of the applicant\'s motion was proceeding on the assumption that the decision which was being challenged by the applicant was the one which required students to wear a standardized dress code while in school which was contained in the rules and regulations formulated by the 2nd Respondent under the Education Act.

It is on record that this decision was made over a 100 years ago but in the context of this case, it was communicated to the applicant on admission to the school in the Year 2009. It was also ratified by the school\'s Parent Teachers Association (PTA) in March 2010 with the participation of the applicant\'s mother and next friend. The applicant or the other students represented in this suit and/or their parents having been aggrieved by the impugned decision should have approached the court for redress without delay. Instead, they waited until 28th October 2010 when they instituted the instant judicial review proceedings well beyond the statutory period of 6 months provided by the law for challenging the validity of decisions made by public bodies or public authorities. This requirement is prescribed by Order 53 Rule 2 of the Civil Procedure Rules and the applicant failed to observe the same.

It is clear from the pleadings that, the applicant’s prayer for an order of Certiorari was statutorily time barred by the time the instant proceedings were instituted.

The upshot of this judgment is that the applicant\'s Notice of Motion

dated 1st November 2010 fails in its entirety for lack of merit and it is hereby dismissed.

Considering that the application raised serious and weighty constitutional issues, the best order that commends itself in terms of costs is that each party should bear its own costs. I will not therefore make any order as to costs. It is so ordered.

Dated, **Signed**and**Delivered** by me at Nairobi this 18th day of September, 2012.

C. W. GITHUA
JUDGE

In the presence of:

Florence – Court Clerk

…………………………….. for Applicant

…………………………….... for Respondents