REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO. 15 OF 2011
IN THE MATTER OF ARTICLE 27 OF THE CONSTITUTION
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(4) & 43 (f) OF THE CONSTITUTION AND SECTION 5 OF THE CHILDREN ACT 2001

BETWEEN
THE CHAIRMAN JOHN KABUI MWAI
THE SECRETARY HARRIET MBUTURA
THE TREASURER KABIRU NDIRITU
KENYA PRIVATE SCHOOLS ASSOCIATION.....PETITIONER

VERSUS
KENYA NATIONAL EXAMINATION COUNCIL.....1ST RESPONDENT
THE MINISTER OF EDUCATION .....2ND RESPONDENT
THE HON. ATTORNEY GENERAL (being sued on Behalf of the Government of the Republic of Kenya) ……...3RD RESPONDENT

J U D G E M E N T

On 6th January 2011 the Permanent Secretary in the Ministry of Education issued to all Provincial Directors of Education, all District Education Officers and Principals of Secondary Schools guidelines for form one selection for the year 2011. The guidelines indicated that:-

"1.1.1 (c) To determine the number of candidates to be placed in national schools from public or private institutions of a particular district, the following formula will be used:-

Public: Public schools' district candidature x District quota
District candidature

Private: Private schools' district candidature x District quota
District candidature." (JKM3)

On 11th January 2011 the Minister for Education Prof. Sam K. Ongeri (2nd Respondent) was releasing the 2011 form one selection lists for national Schools when he reiterated the formula (JKM4). The 2nd Respondent noted that in 2010 private schools had registered 107,514 (or 14.41%) candidates as compared to 638,593 (or 85.59%) in public schools. Using the formula above, he announced that out of the 4,517 available spaces in national schools he was going to avail 1,224 to private schools. He explained that Free Primary Education Policy had increased the number of candidates in public schools to 746,107. The Policy was in line with the Government's commitment to Millennium Development Goals,

Education to All, Vision 2030 and the Constitution of Kenya, 2010.

The Constitution provides for free and compulsory basic education as basic human right Article 53(1) (c). The 2nd Respondent acknowledged that the Government's effort to meet these goals was faced with various challenges. These included overcrowded classes, shortage of teachers, inadequate infrastructure and diminished parental support as a result of viewing education as being free. The policy that determine the number
of candidates to be placed in national schools from public or private schools was, according to the 2nd Respondent, one of the interventions to achieve the above goals.

On 1st February 2011 the Applicants filed this Petition on behalf of the Kenya Private Schools Association to challenge the 2nd Respondent's policy guidelines regarding the selection of candidates to national schools. Their petition was brought under Articles 3, 19, 20, 21, 22, 23, 27 and 43 (f) of the Constitution of Kenya. The Applicants sought that this policy be found to be discriminatory against candidates from private schools and therefore unconstitutional. They asked that an Order of Prohibition be issued against the 2nd Respondent and all those acting under him.

The basic contention by the Applicants was that under Article 53 (1) (b) and (d) of the Constitution every child has a right not only to free and compulsory education but also to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour, and also that a child's best interests are of paramount importance in every matter concerning the child. It was alleged that the policy violated the rights of their candidates. Under Article 27 (1) every person has the right to equal protection and equal benefit of the law and under Article 27(4) the state should not directly or indirectly discriminate against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language and birth. It was contended that the policy is discriminatory to the candidates from private schools who seek places in national schools when it puts quotas. Under Article 19 (2) of the Constitution it is provided that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings. The Applicants argue that the policy does not afford candidates from private schools the opportunity for them to realize their full potential.

The parties filed their respective affidavits and annextures and also written submissions. The Applicants were represented by Mr. Gachuhi, the 1st Respondent by Mrs Kiarie and the 2nd and 3rd Respondents by Mr. Onyiso.

Mr. Gachuhi pointed out, and this was conceded by the Respondents, that private schools are a response to the Government's acknowledgement of the financial challenges that it faces in providing education to all as a result of which it called for a partnership between itself and the private sector in provision of education. The Government's position in this regard is contained in Sessional Paper No. 1 2005 on **"A Policy Framework for Education, Training and Research"** whose page 90 states as follows:-

"(10.4) In view of the heavy public support required for basic education, there is need for increased participation by the Private Sector in the provision and expansion of education, particularly at Secondary, Tivet and University levels. Encouraging investments from the private sector will be crucial for sustained sector expansion and will require a new policy frame work within which to promote and regulate private investment, private school registration as well as quality assurance and supervision. The policy focus here will be on resolving the constraints to private sector participation in education, for example, in the areas of school financing and land acquisition by giving incentives to investors. Increased private sector investments will relieve public funds to finance the implementation of curriculum reform and assure quality and relevance on the provision of basic education."

Counsel submitted that his clients are supplementing the Government's effort in the provision of basic education and that previous to the policy in question the candidates of both public and private schools were being treated equally in accessing form one places in national schools. The only criteria was merit. The policy has now given only 14.41% of the available spaces in national schools to candidates from private schools and 85.5% to those from public schools. The effect of the policy is that a candidate from a private school wishing to join a national school has to score a higher mark than the one from a public school. In "JKM 7" it is shown that to join Alliance High School a candidate from a private school has to score at least 403 marks whereas his counterpart from a public school can join the same national school with as low as 360 marks. This, it was submitted, was unequal treatment of the candidates and therefore discriminatory. Mr. Gachuhi asked the court to consider that national schools are centres of excellence and that all candidates aspire to join them. He further asked the court to consider that there were certain courses that are only offered in national schools. He gave the example of pilot course which is only offered at Mangu High School. Counsel pointed out that there was an erroneous perception that children from private schools have parents/guardians who are more financially endowned than those in public school. Even if that were true, it was argued, the children in private schools cannot be discriminated against on basis of:-

"their social origin, place of birth and or perceived economic status of their parents and or guardian."

Counsel asked the court to take judicial notice of the fact that public schools have more infrastructure in terms of classrooms and playgrounds as opposed to private school who mostly are located in urban centres where they operate from residential flats.

The affidavit sworn by Paul M. Wasanga of the 1st Respondent states that the responsibility of the Respondent is to regulate and conduct public examinations under the Kenya National Examinations Act (Cap. 225A). It is in this capacity that it annually conducts the Kenya Certificate of Primary Education Examination for class eight pupils. The 1st Respondent's role is that of facilitation to have candidates indicate their choice of schools at the time of registration for the examination. This is done in readiness for the selection process. The selection process to form one is done by the 2nd Respondent, and not by the 1st Respondent, it was stated. Mr. Wasanga stated that the stated quota policy did not affect Provincial and District schools to which the Applicants' candidates will have unhindered access.

We have considered the arguments, submissions, and authorities cited on behalf of the respective parties.

This court is being asked to determine whether the 2nd Respondents' policy in relation to admission into national schools discriminated against candidates from private schools. In dealing with this question the court recognizes that under Article 10 (2) (b) of the Constitution there are national values and principles of governance that should be borne in mind. They include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Article 19(2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Under Article 20(4) (a) the court, in interpreting the Bill of Rights, shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. Article 21 (3) enjoins the court to address the needs of the vulnerable groups within the society, including women, older members of society, persons with disability, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. The state is commanded by Article 27 (6) to give full effect to the realization of the right to equality and freedom from discrimination by taking legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's

transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b).

The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.

Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.

Article 43(1) (f) provides that every person has the right to education. Under article 53 (1) (b) every child has the right to free and compulsory basic education. Article 53 (2) provides that child's best interests are of paramount importance in every matter concerning the child. Kenya has ratified the International Convention on Economic, Social and Cultural Rights (ICESCR). Under article 2(6) of the Constitution the Convention forms part of our laws. Articles 13 and 14 of the Convention set out detailed provisions on the right to education. Article 13 contains a general statement that everyone has the right to education and that education should contribute to the full development of the human personality.

The Committee on Economic, Social and Cultural Rights adopted General Comment 13 with a view to assisting State Parties' implementation of the ICESCR and the fulfillment of their reporting obligations. The General Comment focuses on the normative content of article 13 and some of the obligations arising from it. It states that while the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State Party, education in all its forms and at all levels shall exhibit accessibility as an essential feature. That accessibility to educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State Party. One of the dimensions of accessibility is non-discrimination. Thus education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds. It is envisaged that secondary education shall be generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education. The phrase "generally available" signifies, firstly, that secondary education is not dependant on a students' apparent capacity or ability and, secondly, that secondary education will be distributed throughout the state in such a way that it is available on the same basis to all. The phrase "every appropriate means" reinforces the point that State Parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts. The General Comment goes on that, the adoption of temporary special measures intended to bring about a *de facto* equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as the measures do not lead to the maintenance of unequal or separate standards for different groups and provided they are not continued after the objectives for which they were taken have been achieved. Lastly, State Parties must closely, monitor education – including all relevant polices, institutions, programmes, especially patterns and other practices so as to identify and take measures to redress any *de facto* discrimination.

Article 27 deals with equality and freedom from discrimination. We understand the term "discrimination" to imply any distinction, exclusion, restriction or preference which is based on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. For the purpose of this case, one is thinking about any distinction, exclusion, limitation or preference based on the grounds above and which has the purpose of nullifying or impairing equality of treatment in education. It may manifest itself in depriving any person or group of persons of access to education of any type or at any level; of limiting

any person or group of persons to education of inferior standard; or of establishing or maintaining separate education systems or institutions for persons or groups of persons.

The submission by Mrs. Kiarie was that the Applicants had not demonstrated that the children in private schools are a group capable of being discriminated against under the provisions of article 27 (4), and that their attempt to place the children under "social origin" cannot be legally tenable. Counsel cited the decisions in **Rose Moraa and another Attorney General [2006] e KLR** and **Matadeen & Another –Vs- Pointu And Others [1998] 3 WLR 18**. However, Article 27 (4) should be read together with Article 259 (4) (b). The framers of the Constitution did not intend to declare the categories mentioned in Article 27(4) to be closed. The categories mentioned are by way of example only. The children in private schools cannot therefore be said to be a group not capable of being discriminated against.

But, has the Policy by the 2nd Respondent discriminated against these children? It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. **(James Nyasora Ngarangi And Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi)**. The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in **President of the Republic of South Africa & Another –Vs- John Phillip Hugo 1997 (4) SAICC Para 41** as follows:-

"We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context."

At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component. The core of the contention by the Applicants is concerned with that portion of Article 27(2) and (4) which precludes the State from discriminating against any person with regard to enumerated situations. Adoption of the contention would mean that it would be unlawful to pursue a policy favouring any individual or group on the ground that in so doing other individuals would be discriminated against. This theory has been characterized as "reverse discrimination" and it has been considered in the United States Supreme Court where it has met with differing treatment in the case of **Regents of the University of California –Vs- Bakke 985. Ct.2733 (1978)**, where a special admission program applying to "economically and/or educationally disadvantaged" members of a "minority group" was held to be invalid, and the case of the **United Steelworkers of America –Vs- Weber 99 S. Ct. 2721 (1979)**, where an affirmative action program was upheld.

The special provisions of Article 27(6) make it a unique set of constitutional provisions. When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection. Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognising the necessity of corrective measures, namely those envisaged in article 27 (6), which were at the same time given the status of constitutional guarantee. It was out of the realization that unequal people cannot be treated equally. Comparisons between different groups are necessary to discern the differential effect of policy and to assist the court in properly characterizing and identifying the groups that are relevant to the particular Article 27 at hand. In **R. V. Turpin [1989] 1 S.C.R 1296 at pp.1331 – 32**, Wilson J. explained how this comparative analysis is linked to the examination of the large context. In her words:-

"In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context ……"

Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, on the other hand, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.

The policy by the 2nd Respondent sought to remove merit on the part of the candidates from private schools as the only criteria for accessing secondary school places in national schools. It stated that their access would be further limited by a set quota calculated as a percentage of the total number of candidates who sit for the Kenya Certificate of Primary Education examination each year. The policy was certainly discriminatory when it sought to treat the candidates differently. But was this unfair discrimination? In **Willis –Vs- The United Kingdom, No. 36042/97, ECHR 2002 – IV** and **Okpisz –Vs- Germany, No. 59140/00, 25th October, 2005**, the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in relevantly similar situations. The Court went ahead to interpret that Article 14 (non-discrimination) of the European Convention on Human Rights does not prohibit a member state from treating groups differently in order to correct "factual inequalities" between them; the Court has recognized that indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14. **(See Case relating to certain aspects of the laws on the use of languages in education in Belgium, (The Belgium Linguistic case (merits), judgment on 23rd July 1968, etc)**. This, in our view, is good law.

The 2nd Respondent's case is that the Government invited the private sector to help in the provision of education because it did not have sufficient resources. The public schools that the Government was funding were characterized by overcrowded classes, shortage of teachers, inadequate infrastructure and diminished parental support as a result of viewing education as free. Because of Free Primary Education Policy, these public schools were wholly depended on this limited funding. The reasonable consequence was that quality in these schools was compromised. It would follow that the results of the candidates from public schools seeking to join form one were inferior compared to those from private schools. This would mean that, if merit was the only criteria for admission into national schools, candidates from private schools would take most of the 4,517 places available. This is why the 2nd Respondent sought to temper merit with equity. The 2nd Respondent realized that the previous policy, based on merit alone, had occasioned unfairness and prejudice to the candidates from public schools and he sought to right it. Article 27 (6) allowed him to do this. We find that the transformative agenda proposed in the Constitution could only be realized through such a policy.

In conclusion, we find that the policy directive contained in "JKM3" and "JKM 4" was not discriminatory to the Applicants, their schools or the children in those schools in relation to accessing form one places in national schools. The Petition is consequently dismissed with costs.

DATED, PRONOUNCED AND DELIVERED AT NAIROBI
THIS 16TH DAY OF SEPTEMBER 2011

JEANNE GACHECHE
J U D G E

GEORGE. M. DULU
J U D G E

A. O. MUCHELULE

J U D G E