REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Petition 407 of 2007

CONSTITUTIONAL LAW

Freedom of conscience and religion

- **Extent of protection – rites practices and observances protected**
- **Consent may be implied**
- **Where there is no doctrinal nexus to a practice or observation there is no protection of such practice under s 78**
- **The Right itself is subject to the rights of others including the right of equality and the norms standards and discipline shared with others in a democratic society**
- **Conservatory orders to allow the putting on of Headscarfs n public and secular schools refused**
- **No infringement where the practice or manifestation is not shown to be an essential part of religion in terms of doctrine**
- **Test is whether a belief is genuinely and consciously held by the believers and the court cannot substitute its belief**

REPUBLIC OF KENYA

E HIGH COURT OF KENYA AT NAIROBI

CENTRAL REGISTRY

PETITION NO. 407 OF 2007

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION

AND

IN TE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 74 AND 78 OF THE CONSTITUTION

BETWEEN

NDANU MUTAMBUKI & 119 OTHERS...PETITIONERS

(Suing through their next friend and spiritual leader MUSILI KITEME)

VERSUS

MINISTER FOR EDUCATION ....1ST RESPONDENT

THE HEADTEACHER NGAANI PRIMARY SCHOOL....................2ND RESPONDENT

THE HEADTEACHER IKOONGO PRIMARY SCHOOL................3RD RESPONDENT

THE HEADTEACHER THUA PRIMARY SCHOOL.........................4TH RESPONDENT

THE HEADTEACHER MASUKANINI PRIMARY SCHOOL..........5TH RESPONDENT

THE HEADTEACHER TYAA

KAMUTHALE PRIMARY SCHOOL..6TH RESPONDENT

THE HEADTEACHER KAUNDU PRIMARY SCHOOL...................7TH RESPONDENT

THE HEADTEACHER KAMBUSU PRIMARY SCHOOL................8TH RESPONDENT

THE HEADTEACHER MUTUINU PRIMARY SCHOOL.................9TH RESPONDENT

THE HEADTEACHER NYAMA NZEI PRIMARY SCHOOL........10TH RESPONDENT

THE HEADTEACHER KATUUNI PRIMARY SCHOOL...............11TH RESPONDENT

THE ATTORNEY GENERAL..12TH RESPONDENT

MWINGI COUNTY COUNCIL..13TH RESPONDENT

RULING

The Petitioners are all female minors and were schooling at various public primary schools within Mwingi District and they claim to be members of a church known ***as Arata Aroho Mutheru Society.*** In Ukambani they are described as "***Kavonokya***." It is claimed that it is a principal teaching and doctrinal practice of the Petitioners church that all members of the female sex must put on headscarfs at all times and that this practice is mandatory. The headscarf should be in use whether at home, church or school, in other words all the time. The minors' have sued through their spiritual leader Musili Kiteme as the next friend.

They claim that the Head teachers of the schools named and who have all been made respondents in the petition have refused to allow the petitioners to continue schooling in the respective primary schools while putting on headscarfs.

All concerned schools have specific uniforms.

The first respondent is the Minister for Education.

The 2nd to 11th respondents contend that the activities of Kavonokya sect are inconsistent with Government policies, rules and regulations and in particular the Rules made under the Education Act which touch on discipline and school uniforms.

They have alleged that the sect:

(a) for birds taking of medical drugs by the petitioners in school

(b) It is against inoculation of the petitioners against polio in school

(c) It advocates segregation of the petitioners from pupils of other denominations which interfere with the petitioners overall upbringing

(d) the petitioners are forbidden from participating in Christian religious instructions in schools

(e) it is against teaching in reproductive health

(f) sick followers or adherent to the sect do not attend hospitals

(g) are hostile to teachers who do not belong to the sect

(h) followers including petitioner students are not supposed to participate in any sporting activities in schools.

The respondents deny that the petitioners have been expelled or excluded from school on account of the Headskarf issue.

When the matter came before me on 7th May 2007 in the form of a chamber application seeking conservatory orders under s 84 of the Constitution to prevent the expulsion or exclusion of the students from the schools, I did after hearing the matter inter-parties give an interim order to ensure that status quo is preserved by directing that the students should not be expelled or kept out of school pending this ruling. That order expires today.

Since the mandate of the court is to apply law to proven facts it is important to set out two important observations:

1) The Petitioners have not produced to the court or exhibited any letters expelling them from school or stopping them from attending school

2) It has not been shown to the court on a prima facie basis at this stage, that the headscarf constitutes a manifestation of the petitioners' faith or that a headscarf is necessary part of their tenets.

For obvious reason at this preliminary stage it is important to say as little as possible concerning the ultimate merits so as not prejudice the hearing of the Petition itself.

What is alleged to be at stake in this matter is protection of freedom of conscience and religion. Section 78(1) of the Constitution states:-

1. " Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance

2. ....

3. Except with his own consent (or if he is a minor, the consent of his guardian), no person attending a place of education shall be required to receive religious instruction or to take part in or attend a religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own."

Section 78(5) states:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision which is reasonably required –

a. In the interest of defence public safety, public order, public morality or public health; or

b. For the purpose of protecting the rights and freedoms of other persons including the rights to observe and practice a religion without the unsolicited intervention of members of another religion and except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The petitioners contend that wearing the headscarf in school is an expression of their right to manifest their religion. The court was urged to take the position taken earlier by the European Court of Human Rights in the case of ***LEYLA SAHIN v TURKEY Application 447 of 1998*** at para 71 where the court proceeded or the assumption that the petitioners right to manifest had been interfered because the court does not question the petitioners belief. They also contend that the onus is on the respondents to show that the limitation of the right as defined in s 78 above is by a "law" and they further contend that there is no such "law" prohibiting the wearing of headscarfs in schools.

The respondents have submitted that the right of the petitioners to put on headscarfs while in school is necessary for the sake of public order in the primary schools and that the scarfs do not constitute a manifestation of their faith. The respondents further contend that there is no infringement or contravention of the right enshrined in s 78 of the Constitution.

I have read the skeleton arguments and authorities cited by the parties and I have taken them into account in preparing this ruling.

At the outset I must explain that my findings and holdings are of necessity, only tentative this being an application for conservatory orders. However this being a novel matter in our jurisdiction and both parties having submitted at length on the law supporting their respective positions, I find it necessary to make tentative findings and holdings although I shall keep my mind open for further persuation should I have the privilege of hearing or being part of the panel hearing the actual Petition.

I must state I agree with the position taken by Counsel for the Petitioner Mr Oriaro that it is for the respondents, to demonstrate to the court, in the event of a finding that there is a contravention of a fundamental right under s 78, that they fall under the limitation requirements. The requirements are:

1) proof of infringement or contravention or interference

2) was the interference or limitation vide a law and which law

3) was the interference pursuant to a legitimate aim

4) was it necessary in a democratic society.

Indeed the above requirements were endorsed by the Constitutional Court in the recent leading decision of RM (infant suit by next friend

JOSEPHINE KAVINDA v ATTORNEY GENERAL & ANOTHER H.C.C.C. 1351 OF 2002 (O.S.)

I should also add that I do accept the learned counsel for the respondents argument that in determining this matter the court has to be systematic and start from the top of the above requirements namely has there been a contravention or infringement of the right. The respondent contend that there is no such infringement and if the court finds that there is no such infringement it will not be necessary to consider

the other requirements set out above including the need for a limiting law. In the alternative if there was an infringement the Education Act and the regulations which give the School governors and School Committees power or authority to prescribe uniforms and also deal with the discipline in schools do constitute the "law" envisaged in the section and further that the wearing of school uniforms by all is a practice accepted by a democratic society such as Kenya and that ***LEYLA SAHIN v TURKEY*** should serve as a persuasive authority in this court because Article 9 of the European Convention is on all fours with s 78 of the Kenya Constitution. However the petitioners Counsel has forcefully argued that the Higher Education Act of Turkey had specific provisions on the required dress for Higher Education institutions whereas the Education Act has nothing specific. For this reason he has submitted that the SAHIN decision is distinguishable from the facts in the matter before this court. He makes the point and quite rightly so that the South African decision, which also turned on the prescribed law, is distinguishable from this case because there was a Drugs Act that prohibited the use of cannabis even when its use as argued by the petitioner was ".inspired" by religion this is the case of ***GARRETH ANVER PRINCE v PRESIDENT OF THE LAW SOCIETY OF CAPE OF GOOD HOPE case CC736/00.***

As a mater of constitutional law the starting point is for this court to establish on a prima facie basis whether the facts as presented reveal any infringement or as per the wording of our Constitution, a threatened infringement or violation.

My finding on this is that no infringement or threatened infringement has been established for the following reasons:

i. The Petitioners have not produced any proof of expulsion or exclusion e.g. a letter expelling the students or teachers to do so. On the contrary the respondents state that the petitioners have continued to attend school

ii. The Petitioners are not new entrants to the schools and they have at all material times come to school in the prescribed school uniform without the scarf. The headscarf is an afterthought instigated by their spiritual leader

iii. No substantive rights under s 78 are being infringed because the scarf does not constitute part of the petitioner's faith, religion or creed and is not a manifestation of their religion. They have produced nothing to back that the scarf is part of their religious belief

iv. They wear the uniform because upon registering in the respective schools they are deemed to have consented to the uniforms since they have been using them

v. Alternatively if there is any infringement (although (i) to (iv) above reveal none) the interference is sufficiently provided for in the Education Act and the relevant Rules and the uniform traditions established over the years concerning the requirement of uniform in schools in order to instil discipline order and equality in schools and under s 70 all fundamental rights are subject to the rights of others and the rights of others in the school context include the right to equality in uniform without the headscarf and so that there is a pressing social need to maintain the school uniform because discipline in schools is necessary in a democratic society. It must also be appreciated that the respondents run public schools which under the relevant rules and traditions are secular and they accommodate all faiths. 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 hallmack 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 essential part of faith it cannot be right for a pupil to get up one morning and decided to put on headscarf as well, this derogates from the hallmarks of a democratic society and violates the principle of equality. In weighing the individual's fundamental right under s 78 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. To reinforce the point I adopt and apply the South African case of ***CHRISTIAN EDUCATION SOUTH AFRICA v MINISTER***

OF EDUCATION where the court observed:

"**The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientiousness and religious freedom has to be regarded with appropriate seriousness, is how far such democracy, can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly believers cannot claim, an automatic right to be exempted by their beliefs from the laws of the land. At the same time the State should, whenever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."**

In the case before me there is evidence that the petitioners have always consented to putting on school uniforms before the new requirement on headscarfs was made necessary by their spiritual leader. I find that the consent contemplated by s 78(1) is in existence and the headscarfs are the antithesis of the school uniforms to which they have always consented.

The upshot is that there is no infringement for this reason as well.

It is also important to observe that notwithstanding the above conclusion this court is perfectly aware that s 78 of the Constitution does not only protect the right of religion and conscience but also acts done in pursuance of religious belief as part of religion. Religion is on the other hand a matter of faith or lack of it, belief and practice.

The acts or manifestation of faith must constitute an essential part of religion for them to be protected under s 78 which is not the case with the headscarfs and this sect. The right of religion and religious practices going with it, are protected under s 78 except where they run counter to public order, health and morality.

Finally the other reason why the application for conservatory orders must fail is that on a prima facie basis there is nothing that has been produced to link the headscarfs with any known tenets of the sect in question. The court is of course acutely aware that as a secular judge I have a duty under the Constitution to accept the belief of the Petitioners as expressed by them but unfortunately in this case they have failed to express the belief and its linkage to the headscarfs and unless this is established there is no protection of that practice under s 78 of the Constitution. In support of this linkage I wish to reproduce here the finding of the Indian Supreme Court in the case of ***BIJOE EMMANUEL v KERALA 8 7 ASC 788 (1986) SCR 518*** where Readdy J and Dutt J observed:

"**We do endorse the view suggested by Davar J's observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If belief is generally and conscientiously held it attracts the protection of Art 25 but subject of course to the inhibits contained therein."**

What constitutes an essential part of a religion is to be determined with reference to the doctrine of that religion and I must emphasise that this has not come out clearly in this case – that the headscarf is an essential part of the sect's doctrine.

If it is not an essential part of religion it cannot in my view enjoy the protection contained in s 78 of the Constitution. Similarly the Petitioners have willingly or as a matter of school discipline or tradition always put on school uniforms and must be deemed to have consented to the uniforms in terms of s 78(1) which section starts with the important words "***Except with his own consent."*** Prima facie a spiritual leader cannot withdraw the consent on the minors' behalf. It is the parents' role and it has not been suggested that they have done this on behalf of their minor children.

Perhaps I should add that I accept the European jurisprudence on the point as set out in ***R (on application***

of BEGUM v HEADTEACHER AND GOVERNORS OF DENBIGH HIGH SCHOOL 2006 UK HL 15 (HL) para 23:

"**The Strasbourg institutions have not been ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted employment or role which does not accommodate that practice or observance and there are other means open to the person to practice or observe his or her religion without undue hardship or inconvenience. Thus in** X v DENMARK (1976) 5 DR 157 **a clergyman was held to have accepted the discipline of his church when he took employment and his or her right to leave the church guaranteed his freedom of religion. His claim under Article 9 failed. In *KJELDSEN BUSK MADSEN AND PEDERSEN v DEMNARK (1976) I EHRR 7*" para 54 and 57, parents philosophical and religious objections to sex education in state school was rejected on the ground that they could send their children to state schools or educate them at home. The applicants Article 9 claim in AHMAD, above, paras 13,14 and 15, failed because he had accepted a contract which did not provide for him to absent himself from his teaching duties to attend prayers, he had not brought his religious requirements to the employers' notice when seeking employment and he was at all times free to seek other employment which would accommodate his religious observance. *KARADUMAN v TURKEY (1993) 74 DR 93* is a strong case. The applicant was denied a certificate of graduation because a photograph of her without a headscarf was required and she was unwilling for religious reasons to be photographed without a headscarf! The Commission found (p109) no interference within Article 9 because (p108) "by choosing to pursue her higher education in a secular university a student submits to those university rules which may make the freedom of students to manifest their religion subject to restriction as to place and manner intended to ensure harmonious co-existence between students of different faiths."**

I find striking similarities between the facts in the case before me and KARADUMAN – it is the correct way. An individual cannot reasonably be allowed to get out of bed and go against the rules he has always accepted in the name of religion – individual right must be accompanied by an individual's responsibly to the society he lives in – there must always be a respectable coexistence and mutuality and respect for the right of others in a democratic society.

No doctrinal linkage or nexus has been shown in these proceedings between the use of the Headscarf and the tenets of the professed faith.

To conclude I would like to pay tribute to the Framers of our Constitution for their great vision in subjecting the fundamental rights in the chapter 5 to the rights of others and the public interest in section 70 of the Constitution. The rights of others and the public interest are not limitations as such but rights which co-exist along those of the individual. Thus, there are situations where the individual right when put on the scales must be subordinated to those of others and the public interest. This has to be done by the court using the concepts of balance, reasonableness and proportionality. It follows therefore in the context of the matter before me school uniforms and sporting activities constitute the public interest. A group of individuals should not be allowed to upset the public interest. Our Constitution does not contain abstract concepts – no – it has and must have teeth to always achieve the common good – this is an inheritance we received and must pas it on to the next generations. We must resist the temptation to give in to a few in the name of freedom.

For this reason again I find no infringement as well.

I will therefore dismiss the application for the conservatory orders and direct that the petition be heard on merit after the giving of usual directions. I make no order as to costs this being a public law matter.

DATED and delivered at Nairobi this 11th day of May 2007.

J.G. NYAMU

JUDGE

Mr Oriaro - Counsel for the petitioner

Mr Nzilli - Counsel for 2nd respondent

Mr Mwaniki - Counsel for the 13th respondent