



**Otakwa v Board of Management Archbishop Njenga Girls High School
Catholic Diocese of Kakamega & 3 others (Constitutional Petition
E007 of 2023) [2025] KEHC 3841 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CONSTITUTIONAL PETITION E007 OF 2023
SC CHIRCHIR, J
MARCH 20, 2025**

**IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 33, 35,
43, 46, 47, 48, 53 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

RAPHAEL OTAKWA PETITIONER

AND

**THE BOARD OF MANAGEMENT ARCHBISHOP NJENGA GIRLS HIGH
SCHOOL CATHOLIC DIOCESE OF KAKAMEGA 1ST RESPONDENT**

**THE HONOURABLE CABINET SECRETARY MINISTRY OF
EDUCATION 2ND RESPONDENT**

**THE COUNTY DIRECTOR OF EDUCATION KAKAMEGA
COUNTY 3RD RESPONDENT**

HON. ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. In the Amended Petition dated 15/01/2024 the Petitioner seeks orders as follows;
 - a) A declaration that the 1st Respondent's action of failing to involve the parents in decisions regarding payment for purchase of school bus, and inclusion of the costs as to part of payment for their children learning in its school, as well as the requirement that purchase of school uniforms and sporting garments, be made solely within the school and by way of cash, payment of school fees be done in two terms as opposed to three terms, payment for extra learning programme or remedial, demand for students to participate in activities that deny them their right to freedom of religion, and the ban on students carrying to school some selected food



items while the same are sold at school at higher prices than the market rate is arbitrary unconstitutional null and void.

- b) An order declaring Section 29(2)(b) of the BEA unconstitutional, null and void.
- c) An order do issue that this cause of action being a matter of public interest, each party to bear its own costs.

The petitioner's case

- 2. The Petitioner states that on 2/9/2022 he received a notification from the 1st Respondent about an Annual General Meeting(AGM) for the school, scheduled for 10/9/2022. The Notice was sent via WhatsApp; that during the meeting, parents were informed of some additional costs which would go towards the purchase of school bus and for remedial classes or tuition. The petitioner states that the AGM Notice was short, that there was no prior notification about the added costs and the contributions to the discussions during the AGM was restricted.
- 3. The petitioner further states that the decision to include the costs of the school bus and extra tuition to the school fees was made unilaterally by the 1st Respondent.
- 4. The Petitioner further states that in month of November 2022 the 1st Respondent directed that all students must purchase school uniforms from school, and that payments must be made in cash; that the school uniforms must be purchased annually, thus causing financial strain to the parents and restricting them from purchasing uniforms from other distributors .
- 5. The Petitioner further complains that the 1st Respondent has since directed that annual school fees would be cleared within 2 terms of the school year as opposed to the usual payments within three(3) terms and that this change was done without the participation of the parents.
- 6. The petitioner states that the school has banned the purchase of certain foods items outside of the school yet the same items are in school, but sold at exorbitant prices.
- 7. The Petitioner states that Section 29 (2) (b) BEA, which the respondent has used to levy the extra charges , violates, infringes and threatens the children's right to free and compulsory education, especially in the light of the provisions of Article 53 of the Constitution and the Children's Act.
- 8. The Petitioner then sets out various and several provisions of the constitution, the Basic Education Act and the Children's Act which he contends have been violated by the 1st Respondent.

Respondent's case

- 9. It is the Respondent's case that any increment in funds charged by the school was done in consultation with the 2nd respondent the Ministry of Education, and the decision was made in the meeting of Board of Management (BOM) as required by the Basic Education Act; that extra educational expenses benefit the students ,and not the school or Board of Management.
- 10. It is further stated that the decision to buy the school bus was communicated to the parents via the Annual General Meeting and indeed the parents were the ones who approved the purchase; While admitting that school uniforms are sold in school; it is denied that the school is the one selling the uniforms.; that it is meant to ensure consistency in the quality of the uniforms and fair pricing . The allegations that the school dictates the intervals of buying uniforms is denied .The allegation that the school demands payment of school fees twice as opposed to three times a year is equally denied.



11. On the restriction of certain food stuffs that a student can take to school, the respondent states that the decision was made to protect the students from the menace of drugs that had shown a surge in most boarding schools in the county at the time
12. The petition proceeded by way of written submissions.

Petitioner's Submissions

13. The petitioner submits that the Annual General Meeting held on September 2022 was not accompanied by detailed notification about the Agenda of the meeting; that the appropriate public participation forum by parents is a parents Association as per clause 6 (e) of the 3rd schedule of *Basic Education Act* 2013 (BEA). He argues that representation by only 3 parents in Board of Management was not effective, and that as such, Board of Management cannot fairly articulate the issues of parents in comparison to the parents Association(PA)
14. The Petitioner argues that there was not enough participation in the Annual General Meeting as the programme is normally crowded; that there were other invitees other than the parents. The parents therefore did not fully participate. It is also submitted that the Agenda was introduced at the meeting and therefore public participation was not effective.
15. The Petitioner further contends that the 1st Respondent failed to involve the students; that the decision to buy the bus affected the students as the default in payment resulted in the students, including his daughter, being send away from school. That the best interest of the child was therefore not considered.
16. The petitioner further submits that no approval was given by the Cabinet Secretary for the purchase of the bus as required by Section 29 (2) (b) of the BEA. For the cost of remedial tuition, it is submitted that there was no evidence that the students benefited from such remedial tuition.
17. It is the Petitioner's further contention that the decision to purchase uniforms at school was not subjected to public participation and was done in contravention to regulation 67 of the B EA. On the banning of selected food stuffs, the petitioner argues that it forces parents to give more money to their children to buy items at the school at exorbitant prices, that there was no evidence that the drug menace had affected the school and finally that it was a legitimate expectation that since the students had been taking the said foodstuffs to school, then the practice would continue. That consequently the stoppage should have been subjected to public participation.
18. It is stated that the compulsory purchase of Catholic Hymns books and Mass religious service for both parents and students deny them their freedom of worship.
19. On the need for public participation, the Petitioner has relied on Article 10 of *the Constitution*, and the decision in the Case of Communication Commissions of Kenya Vs Royal Media Series & 5 Others (2014) eKLR; Mugo & 14 Others Vs Matiangi & Anor (Citation not provided) and Khalif Khalif & 2 Others Vs IEBC & Anor (2017) eKLR. On the denial to freedom of religion, the petitioner has relied on the decision in the case of R Vs Kombo & 3 Other ex-parte Waweru (2008) eKLR and Phillip Okoth & LSK Vs St. Ann Primary Ahero.
20. On whether Section 292 (b) of the BEA infringes *the Constitution*, the Petitioner argues that it infringes Article 53 of *the constitution*. It is contended that the leeway for the minister to impose charges goes against the constitutional provisions that the basic education is free and compulsory. In this regard the Petitioner has relied the case of Nyabola Vs Attorney General & Anor Export Kenya Private School Association – Nakum Branch (2014) KEHC 2599 (KLR).



Respondent's Submissions

21. The Respondent has equally invited the court to determine the constitutionality of Section 29 (2) and the issue of public Education.
22. On the Constitutionality of the impugned section of the BEA , the respondent argues that the fact that the section prohibits any child from being send away for failure to pay such charges not only ensures that the interest of the child is taken care of but also fulfils the right to education as enshrined under Article 43 (1) (f).
23. It is argued that in any event, the petitioner has failed to prove the unconstitutionality of Section 29 (2) (b) of the Basic Education Act. It is argued that the onus is on the petitioner as held in the case of Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others Vs County Government of Nairobi & 3 Others (2013) e KLR.
24. On the purchase of the school bus, it is submitted that it was approved by the Board of Management and due approval was sought and obtained from the 2nd respondent; and that parents gave their approvals during the Annual General Meeting. That the AGM was well attended and the Petitioner herein was one of those whose approval for the purchase of the bus was recorded. The petitioner refers the court to the minutes of the AGM held on 10/9/2022 and the list of attendees indicated therein.
25. On the purchase of school uniforms, the respondents states that the uniforms are sold by an independent supplier, and the need to sell them in school is to ensure uniformity in texture colour of fabric, timely supply and affordability by parents / students.
26. On the payment of school fees being payable twice a year,, the respondent submits that there was no evidence proving the allegation. The extra levies for remedial lessons is denied and the respondent submits that no evidence of such levies was submitted.
27. On the banning of certain food items, it was submitted that the move was meant to safeguard the health of the students, pursuant to Article 53 (2) of the Constitution as read with Section 8 (1) of the Children's Act.
28. It is finally submitted that although the Appellant has pleaded violation of several Articles of the constitution he has not provided any particulars of violation corresponding to the cited provisions of the constitution. It is therefore submitted that in the circumstances, the Petition is frivolous, vexatious and an abuse of the court process.
29. The respondent seeks for costs.

Analysis and determination

30. I have considered the pleadings and the party's submissions and I have identified the following issues for determination;
 - a. Whether there was sufficient public participation by parents regarding the various undertaking by Archbishop Njenga Girls High School?
 - b. Whether the provisions of Section 29 (2) (b) of the Basic Education Act is unconstitutional.



Public Participation

31. Public participation is one of the fundamental values and principles of governance . It is anchored on Article 10 of *the Constitution*. It is also highlighted under Article 232 as one of the values and principle of public service
32. The principle of public participation has been the subject of numerous past decisions. In the case of *British American Tobacco Ltd Vs Cabinet Secretary for Ministry of Health & 4 Others* (2019) eKLR, the court set out the principles as follows; “
 - i. As a constitutional principle under Article 10 (2) of *the constitution* public participation applies to all aspects of governance.
 - ii. The public officer and of entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
 - iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting : the onus is on the public entity to give effect to this constitutional principles using reasonable means .
 - iv. Public participation must be real and not illusory. It is not a cosmetic or public relations act. It is not a mere formality to be undertaken as a matter of course just to “fulfil” a constitutional requirement. There is need for quantitative and qualitative components in public participation.
 - v. Public participation is not an abstract notion; it must be purposive and meaningful.
 - vi. Public participation must be accompanied by a reasonable notice and reasonable opportunity. Reasonableness will be determined on case by case basis.
 - vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
 - viii. Allegations of lack of public participation does not automatically vitiate the process. The allegation must be considered within the peculiar circumstances of each case, the mode, degree scope and extent of public participation is to be determined on case by case basis.
 - ix. Components of public participation includes the followings;
 - a. Clarity of the subject matter for the public to understand;
 - b. Structure and processes (Medium of engagement) of participation are clear and simple.
 - c. Opportunity for balanced influence from the public in general.
 - d. Commitment to the process
 - e. Inclusive and effective representation.
 - f. Integrity and transparency of the process.
 - g. Capacity to engage on the part of the public; including the fact that the public must first be sensitized on the subject matter.”
33. Thus, the *British American Tobacco* case (Supra) presents almost a complete picture of what public participation looks like.



34. On the purchase of the school bus, there is common ground that an Annual General meeting was held on 10/9/2022 which approved the purchase . There was also BOM meeting held on 15/07/2022 which approved the purchase. According to the petitioner the BOM has three(3) parents as representatives. The issue was also discussed in a meeting of Parents Association (PA) held on 15/6/2022.
35. The Petitioner has discredited the A GM on grounds that the Agenda of the meeting was not communicated to the parents in advance; that the views from the parents were restricted and that the Annual General Meeting was infiltrated by strangers.
36. A perusal of the minutes of the Annual General Meeting held on 10/9/2022 show that there was a briefing on the need to purchase the bus, before the subject was opened for discussions. This can be seen under minute 2/9/2022. It was followed by extensive discussion on the subject, including the estimated cost of the bus and the likely contribution by each student. The parents/Guardians were given a chance and the record shows that 4 parents/guardians gave their views, including the Petitioner herein . The petitioner and the three parents who aired their views gave approval for the purchase of the bus. Notably there were no dissenting views. I also noted that the minutes records the presence of students in the AGM
37. The Petitioner has stated that the contribution by parents were restricted, but he has not elaborated on this. Further he has stated that strangers infiltrated the meeting , but there was no evidence to back up his claims. The respondents filed the minutes, and list of all attendees in the meeting in court , and therefore the petitioner could have easily pointed out which of the attendees were strangers. Something else I noted is that each parent/ guardian signs against the name of their child. This process I believe , serves to eliminate any intruders.
38. It is also evident from the record that the bus project had been discussed earlier in other forums. It was discussed in the PA Meeting of 15/6/2022. The purchase of the school bus appears as one of the infrastructure developments under minute 6/15/6/2023. That meeting had 23 class representatives(parents). Thus when the Petitioner states that the appropriate forum would have been the PA meetings ,he is ignoring the evidence that has been presented, or perhaps he never went through the documents filed by the respondent
39. Finally, the school purchase project was also discussed on 15/7/2022 by the school's Board of Management
40. The AGM, the BOM and PA meetings are thus the available forums of communication between the parents and the school Administration, and by implication the students. There is also ample evidence that there are correspondences sent to parents , apparently at the end of every school term.
41. It is my considered view therefore that the 1st respondent used all the available forums to communicate to the parents about the purchase of school bus. When the petitioner complains that public participation was not sufficient , the pertinent question is , what other avenue of public participation was left out? Hadn't the respondents exhausted all the avenues? In the American Tobacco case (Supra) the mode, degree, scope and extent of public participation is to be determined on a case to case basis. In this case, as between parents and school administration am of the view that the respondent s exhausted all avenues of public participation.
42. On taking food stuffs to school, I also notice that though it may not have been an Agenda during the AGM ,it was brought up by none other than the Petitioner himself. He asked the school to allow the students to take food to school during opening days and after mid-term breaks. The record of minutes show that a parent by the name Joel Masike opposed the idea of students bringing food to school and "his sentiments was echoed by other parents".



43. In any event, the Petitioner has not stated what right was infringed by the directive. In the case of *Mumo Matemo Vs Trusted Society of Human Rights Alliance and 5 Others* (2013) eKLR, the court held inter alia that a party pleading infringement of constitutional right must specify the constitutional right being threatened or violated and the manner of violation, and plead the precise particular & evidential materials. The court further held that a party must also plead the specific Articles of *the constitution* that have been infringed. This is what the petitioner has failed to do.
44. The Petitioner has further pleaded that the requirements that students, and sometimes parents, do participate in religious activities is an infringement of their rights to religious freedom. However the petitioner has failed to demonstrate that this is a compulsory requirement. There is no evidence that students are forced to participate in such religious activities or are denied to participate in their own chosen religious activities or association. The claim has therefore been made without any evidential basis. In the same vein the petitioner failed to demonstrate that any student has been forced to pay school fees twice in a year as opposed to thrice. What the petitioner has done is simply to attach invoices for school fees balances but there is nothing in those invoice that direct a student to clear school fees twice or opposed to 3 times in a given year.
45. The additional costs for remedial lessons have been admitted to by the respondents under paragraph 9, and is contended that it is for the benefit of students. The respondent attempts to retract this admission in their submissions is not tenable. The pleadings, not submissions are binding on the parties. However, the respondent has not pointed out what right has been violated by the respondent in introducing these charges.
46. What the petitioner has done is to cite several Articles of *the constitution* without juxtaposing them with the acts that constitute violation. In the case of *Mumo Matemu* (Supra) the court further stated “The practice of pleading and/or setting out a litany of Articles of *the constitution* and rights of freedoms decreed thereby without juxtaposing them with the compulsory acts that constitute a violation and throwing them on the court for it to decipher must be discouraged. It amounts to nothing but verbiage and inconsequential surplusage. It leads to waste of court’s time to go through such petition and try it”. The lumping together of the acts and lumping and calling them “Arbitrary, inconsequential null and void” – does not help the petitioner either, as it does not cure the lack of specification and juxtapositioning which is missing in the main body of pleadings.
47. To conclude on this issue, am satisfied that there was Adequate public participation for the purchase of the bus as well as the various changes that were effected by the school.

Whether Section 29 (2) (b) of the *Basic Education Act* is unconstitutional

48. It is the petitioner’s case that to the extent that section 29(2) (b) of BEA allows the cabinet secretary to impose levies, then it contravenes Article 53(b) of *the constitution* which guarantees children the right to free and compulsory Education. That the enactment of that section of BEA renders useless Article 53(b) of *the constitution*.
49. Courts are enjoined to interpret *the constitution* in a manner that promotes its purpose, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contribute to good governance. (Ref. Article 259 1(a) (d) of *the constitution*).
50. When it comes the question of the constitutionality of a statute, there is a general presumption that every legislative enactment is constitutional and the burden of proof lies on the person who pleads its unconstitutionality [See *Ndyanabe Vs AG of Tanzania* (2001) E.A 495 as cited in the case of *Council of County Governors Vs Attorney General* (2017) eKLR.)



51. I will now turn my attention to Section 29 (2) (b) of the *Basic Education Act*. The section provides: “Other charges may be imposed at a public school with the approval of the Cabinet Secretary in consultation with the County Education Board provided that no child shall be refused to attend to school because of such charges.”
52. The preamble to BEA states “An Act of parliament to give effect to Article 53 of *the constitution* and other enabling provisions; to promote and regulate free and compulsory basic education to provide for accreditation, and management of institution of basic education-----and for connected purposes”.
53. There is no dispute that the BEA was to operationalize Article 53 of *the constitution*. The imperative question however is, by authorizing the Cabinet Secretary to impose some charges, did the Act violate the right to free and compulsory basic Education provided for under Article 53(b)?
54. It has been stated by the respondent that the prior to the enactment of the Act there imposition of high and unregulated levies was rampant in public schools. There was consequently a task force set up on the re-alignment of the Education sector to *the constitution* 2010. The report was issued to the Ministry on February, 2012 and that among the recommendations of the task force was “rules regulating imposition of levies should be relieved and enforced, levies should not be used to deny children an opportunity to attend school” The respondent has further stated that it is the recommendation of the said task force ,and the need to comply with Article 21 (2) of *the constitution*, which led to the enactment of BEA
55. The alleged policy documents were not produced before court as aforesaid but their existence and purpose have not been disputed by the petitioner. I will therefore accept the respondent submissions that the purpose of BEA was to protect parents from unjustified and uncontrolled levies, and as indicated in the preamble to the Act , to promote free and compulsory basic education.
56. To appreciate the provisions of section 29(2) of BEA, it is necessary to go to back to section 29(1). It provides as follows; No public school shall charge or cause any parent or guardian to pay tuition before for on behalf of any pupil in the school”.
- Then section 29 (2) states: notwithstanding Subsection (1).
- a. -----
- b. Other charges may be imposed at a public school with the approval of Cabinet Secretary in consultation with the County Board provided that no child shall be refused to attend school because of that failure to pay such charges”.
(Emphasis added)
57. It is my considered view that while the enactment of BEA and particularly Section 29 (2) was to control the amount and kind of levies in public schools, the drafters also made sure that while a door was opened for imposition of some levies, such opening would not lead to the contravention of Article 53 (b) of *the constitution*. I arrive at this conclusion based on the fact the proviso to Section 29 (b) provides that no child would be denied school for failing to pay the levies referred to under section 29 (2) (b) of BEA. The proviso to Section 29 (2)(b) therefore protects the right to free education provided for under Article 53(2).
58. Whether public schools actually comply with the proviso to Section 29 (2) (b) is a different matter altogether. Failure to comply is an issue of enforcement and not because the section is unconstitutional.
59. It is my finding therefore that there is no contradiction between Section 29 (2) (b) of the *Basic Education Act* and Article 53 (b) of *the constitution*, to warrant the former being declared null and void.



60. In the end, I find that the Petition lacks merit. It is hereby dismissed.

61. This is being a public interest suit, each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 20TH DAY OF MARCH 2025 IN THE PRESENCE OF:

S Chirchir

Judge.

In the presence of ;

Godwin Luyundi- Court Assistant.

