



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**PETITION NO.11 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**- AND -**

**IN THE MATTER OF A PETITION UNDER ARTICLE 22, 23 AND 47 OF THE CONSTITUTION OF KENYA 2010**

**-AND-**

**IN THE MATTER OF SECTION 4, 28,29,39,54,55,56,59 AND 86 OF BASIC EDUCATION ACT NO14 OF 2013**

**-AND-**

**IN THE MATTER FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**-BETWEEN-**

**REPUBLIC.....APPLICANT**

**AND**

**DANIEL NDUNGU WANGENYE.....1<sup>ST</sup> PETITIONER**

**EVALINE MUTHONI GATHERU.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**CABINET SECRETARY MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF EDUCATION.....2<sup>ND</sup> RESPONDENT**

**HON.ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioner filed petition dated 3<sup>rd</sup> April, 2019, seeking the following orders: -

a. A declaration that the 1<sup>st</sup> respondent decision and actions of restructuring the vote heads as per circular dated 25<sup>th</sup> October, 2018, by creating a maintenance and improvement vote head and further pooling various vote heads is illegal, unlawful and violates the petitioner's rights under **Article 53 (b) of the constitution**.

b. A declaration that the 1<sup>st</sup> respondent's act of deducting and retaining of kshs.1,830 per learner to cater for Ssmasse, co-curricular activities payments, textbooks, and medical cover and retaining a sum of kshs.6000 under maintenance and improvement is illegal, unlawful for failing to accord the various stakeholder participation under **Article 10 and 53(b) of the constitution of Kenya**.

c. An order of injunction to restrain the 1<sup>st</sup> respondent's whether by themselves, servants, agents and /or whosoever authorized on

their behalf from deducting kshs.1,830 to cater for Ssmasse, co-curricular activities, text books and medical cover and a further kshs.6,000 under maintenance and improvement vote head and /or any other amount allocated to learners in implementation of the free day secondary school education

d. A mandatory injunction compelling the 1<sup>st</sup> respondent to forthwith release all the amounts intended for implementation of free secondary education as per respondent's capitation ratio provided for in the circular of 19<sup>th</sup> October, 2017.

e. An order of certiorari quashing the decision by the 1<sup>st</sup> respondent change of vote heads and pooling of vote heads and subsequent retention of monies allocated to students from implementation of free secondary school education.

f. Costs of the petition to be borne by the respondents.

2. This petition is supported by affidavit sworn by **Daniel Ndungu Wangenye** the 1<sup>st</sup> petitioner herein. He averred that he is a parent and a member of **Laikipia County Education Board**.

3. He averred that vide the circular issued on 19<sup>th</sup> October, 2017, the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent did take up provision of Free Day Secondary School in conformity with the **Kenyan Constitution and Basic Education Act 2013** which clearly recognizes education as basic human right, he attached the circular to the affidavit.

4. Further that the Kenyan government through the 1<sup>st</sup> respondent was to take up full payment of school fees in day secondary school at a cost of kshs.22,244 per child per term which was to take effect as from January 2018 which was to be broken into various components and each component given specific amount.

5. He averred that each public school being a beneficiary of the government was to open an account and submit account details to the 1<sup>st</sup> respondent for purposes of disbursement which was to be at a ratio of 50:30:20.

6. That the circular provided that the vote head of activity fee was to cater for school organized co-curricular activities within the sub-county, county level and national level and the activities were to be catered for by the 1<sup>st</sup> respondent based on annual budget prepared by directors of quality assurance and standards.

7. He averred that on 25<sup>th</sup> October, 2018, the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent issued another circular titled guidelines on implementation of Free Day Secondary School Education for 2019. He attached the circular; the said circular changed unilaterally, changed mode of disbursement of resources to school without consultation with stakeholders and introduced new vote head of maintenance and improvement; and with introduction of the new vote head the vote head previously set as individual vote heads and previously provided in the earlier circular of 19<sup>th</sup> October, 2019, were pooled.

8. That the pooled vote heads namely local travel and transport, administration cost, electricity water and conservancy and personal emolument were pooled under a new vote and allocated kshs.7,900 per student per year; and on repair, maintenance and improvement the same were marked under maintenance and improvement and allocated kshs.6,000.

9. He averred that allocation per vote head in the circular of 19<sup>th</sup> October, 2017, were as follows: -

- a) Teaching learning materials and exams..... kshs 4,792
- b) Repairs, maintenance and improvement..... kshs 2,886
- c) Local travel and transport.....kshs 1,833
- d) Administration cost.....kshs1,372
- e) Electricity, water and conservancy.....kshs, 2,131
- f) Activity fee.....kshs 1,256
- g) Personal emolument.....kshs 5,755
- h) Medical.....kshs 1,999
- i) Total .....Kshs 22,244

10. He averred that upon pooling the votes under circular of 25<sup>th</sup> October, 2017, vote heads for local travel and transport, administration cost, electricity, water and conservancy, personal emolument by kshs.3,191 since under the separate, the total allocation was kshs.11,091 while allocation under October 2018 circular is kshs.7,900.

11. He restated that the decision by the 1<sup>st</sup> respondent and communicated through the 2<sup>nd</sup> respondent was made unilaterally and without

consulting concerned stakeholders to board of management of school which has been mandated by law to implement 1<sup>st</sup> respondent's policies and run affairs of schools.

12. He averred that due to the said reduction, implementation of 1<sup>st</sup> respondent's policies and more so running of the schools have become very difficult for lack of adequate funds for basic requirements like water and electricity bill with huge bills which they are unable to settle thus directly affecting the students.

13. Further that the board of management are no longer able to hire subordinate staff due to reduced allocation on personal emolument for some schools forcing them to forego and or underpay the workers to the detriment of students.

14. He further averred that the 1<sup>st</sup> respondent purport that by pooling votes it will improve management and enhance flexibility during budgeting but to the contrary it has resulted in reduction of allocated amounts thus negatively interfering with the major budgetary allocation and no reason has been given for reduction of the amount.

15. That communication made through circular of 19<sup>th</sup> October, 2017, at inception of 100% transition of all learners meant that the petitioners had legitimate expectation that operation of schools were clearly provided to avoid interruptions by lack of water, electricity and or manpower needed to make learning environment conducive.

16. He averred that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have acted arbitrarily without giving regard to fair administrative process despite knowing the challenges such acts or omissions will cause to education system in Kenya.

17. He averred that it will be noted that the new vote head of maintenance and improvement vide circular of 25<sup>th</sup> October, 2018, was intended to improve the existing infrastructure and put up new ones and a sum of kshs.6,000 was allocated; that on 28<sup>th</sup> February, 2019, the 1<sup>st</sup> respondent issued guidelines through the 2<sup>nd</sup> respondent on disbursement of the amounts directed. He attached the said circular. But the same is only available under the arrival of the County Director of Education.

18. He averred that under the **Basic Education Act**, the role of management of the schools rest with Boards of Management and by the 1<sup>st</sup> respondent through 2<sup>nd</sup> respondent taking over running and management of such funds amount to usurping the powers vested upon such boards hence ultra vires.

19. He averred that from the circular, the 1<sup>st</sup> respondent has again unilaterally retained a sum of kshs.1,830 per learner purported to cater for Ssemasse program, co-curriculum activities, pay text books and medical cover.

20. He averred that the 1<sup>st</sup> respondent's acts contravene the **Basic Education Act** as funding is supposed to be managed by boards of management who are also mandated to administer and manage resources of the institution; that 1<sup>st</sup> respondent has no mandate in administration of resources allocated for free primary education by the National Assembly as the 1<sup>st</sup> respondent only set policies and sometimes implementation of such policies to education sector.

21. He averred that as per circular of 19<sup>th</sup> October, 2017, it is clear that a sum of kshs.22,244 per student per year should all be channeled to various schools and managed by boards of management and not 1<sup>st</sup> respondent.

22. That the basis of 1<sup>st</sup> and 2<sup>nd</sup> respondent for retaining the said monies is unwarranted and bereft of any justification in law for reason that the body mandated to manage the resources allocated to schools have been sidelined and further the allocation by parliament for free secondary education is based on provision of students 'needs and not funding projects by the 1<sup>st</sup> respondent.

23. He averred that being KUPPET official, he has received several complaints of serious constraints in implementation of requisite government policies owing to alleged illegal retention and unilateral deduction of funds allocated to students; that owing to the deduction, the amount allocated per student is kshs.12,544 which result in infringement of Free Basic Education. That the said deduction done without involvement of stakeholders is illegal, irregular and null and void.

24. In response, the respondents filed replying affidavit sworn by **Dr. Belio Kipsang** the Principal Secretary in the State Department of Learning and Basic Education in the Ministry of Education dated 12<sup>th</sup> July 2019 filed on even date.

25. He averred that free primary and secondary education predates the new constitution and **Basic Education Act 2013; that Article 53(2) of the constitution of Kenya 2010** compels the Government to provide free and compulsory education to all children in Kenya.

26. He set out responsibilities of Cabinet Secretary as provided under **Section 39 of the Basic Education Act** in paragraph 6 of the affidavit. He further stated that the right to education like all human rights **article 21 of the constitution** imposes on the state the obligation to respect, protect and fulfill the rights and fundamental freedoms in the bill of rights; he added that the obligation to protect requires the state parties to take measures that prevent third parties from interfering with the enjoyment of right to education and obligation to fulfil or facilitate requires states to take positive measures that enable and assist individuals and communities to enjoy the right to education.

27. He averred that the progressive realization of free and compulsory basic education demands the government to properly utilize the allocated financial resources to learning institutions in furtherance to right to education to the intended learners.

28. He averred that the day to day running of the institution rests on the head of the institution, a function delegated by the Cabinet Secretary

to **Basic Education Regulations 5(1)**; that the Ministry of Education relies on information and data filled by heads of schools for release of funds for Free Basic Education Programme to schools in formulating its policies; and since the inception of subsidized secondary education in the year 2008, the government has been releasing secondary school capitation with specific amount for teaching and learning materials; that under tuition vote head which cater for text books and other learning materials. The Ministry allocated kshs.4,792 per child; and since its inception of Free Day Secondary Education in 2009, the Ministry sought to achieve a textbook ratio of 1:1 but despite having released money for textbooks, an audit carried out by the Ministry of Education revealed that the anticipated student book ratio of 1:1 had not been realized.

29. He further averred that by the year 2016, it was apparent that schools were not buying books and the ratio of 1:1 was not being achieved and to mitigate against corruption and cartels, and to cushion the public against loss of funds, the Ministry decided to buy books directly from the publishers.

30. He averred that in the year 2017, the learning materials were revised and the Ministry was tasked to centrally source the books and distribute them to schools and in the process, huge savings were realized as shown in table at paragraph 16; an example being, a book retailing at ksh.500 was sourced at kshs.199.

31. He averred that within one year, the Ministry had achieved textbook ratio of 1:1 in English, Mathematics, Kiswahili, Biology, Physics and Chemistry subjects. That the amount retained in the year 2018 was kshs.3,300 per student leaving the school with kshs.1,492.00 for other teaching and learning resources.

32. He further averred that the government raised the capitation from kshs.10,625.00 to kshs.12,870.00 in 2016 as shown in the vote heads at paragraph 19 and in September 2017 the Ministry further increased capitation from kshs.12,870.00 to kshs.22,244 by absorbing what parents had been paying as shown at paragraph 20; and in the year 2018 the government issued guidelines on capitation by rationalizing vote heads to allow schools flexibility in budgeting as shown at paragraph 21.

33. He averred that the specific items retained from the year 2008 were kshs 200.00 per child for Ssmase training. He stated that this money used to be sent to schools and in turn would be remitted to county directors who would then make payments to CEMASTEIA and the process was found to be tedious leading to training programmes being affected and decision was made to have the money remitted directly to CEMASTEIA.

34. He further averred that in respect to activity fee of kshs.650 per student, which was allocated to schools who would then make payments to sub-county, a decision was reached to remit directly to the various offices as there was a challenge caused by schools failing to remit as required.

35. In respect to medical fee, he averred that money was allocated to schools but whenever a student was sick parents would be called to go to take the student to hospital. He cited an incident in Lokichogio where a student shot and killed another and the other 10 had to be evacuated to Eldoret for treatment prompting the president to ask the Ministry to enroll each student with NHIF and a negotiated premium of kshs.1,350 per child agreed thus the Ministry retains the said amount.

36. He further averred that upon seeking opinion of heads of association on the issue of vote head, it was found that the vote heads were rigid leading to some remaining with money while others being depleted; that this led to pooling together of vote heads namely Local Travel and Transport(LTT), Electricity, Water and Conservancy (EWC), Administration and Personal Emolument (PE) and allocated kshs.7,900.00 to allow flexibility; he added that the ministry is further reviewing this following consultation with leadership of the school principals so that it can be more accommodative.

37. He averred that the vote head named repairs and maintenance was changed to maintenance and improvement and kshs.6000 allocated and is being sent to schools. He stated that change was to allow use of the funds to put up new facilities; that the utilization of the money like all other monies sent lies with the boards of management and it is not true that the schools have to write to access the money.

38. He averred that in the 2018/2019 financial year money retained per child for text books, medical, Smasse and activity was kshs 3,700 and the same is retained in lieu of services to the child.

39. He stated that the schools have achieved the ration of 1:1 for textbooks and no school has written to the ministry complaining that the changes have hampered operations and that the interest of actualizing full realization of the right to compulsory education necessitated the actions complained of by the petitioners, actions which are firmly anchored within law.

40. He concluded by stating that, the respondents are well equipped in handling matters involving issues of policy and court should exercise restrained and caution in interfering with the functions of the respondent.

41. Parties agreed to proceed by way of written submissions.

42. The applicant restated averments in the petition and cited the case of **Canada (Attorney General) v Mavic [2011]2S.C.R.504** where the Supreme Court of Canada held as follows: -

**“where a government official makes representation within the scope of his or her authority, to an individual about an administrative process that the government will follow and the representations are clear, unambiguous and unqualified, the government may be held to its word, provided the representation are procedural in nature and do not conflict with the decision maker’s statutory duty, proof of reliance is not a requisite.”**

43. And the case of **National Director of Public Prosecution vs Philips and others [2002] (4) SA 60 (W)** para 28 where **Hehe J.** Stated as

follows:

**“The law does not protect every expectation but only those which are legitimate & the requirements for legitimacy of expectation, include the following:**

- i. The representation underlying the expectation is clear unambiguous and devoid of relevant qualifications.**
- ii. The expectation must be reasonable.**
- iii. The expectation must have been induced by decision maker.**
- iv. The representation must be one which was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.”**

44. The petitioners submitted that it goes without saying that the application herein passes the test of legitimate expectation and concluded that, by the 1<sup>st</sup> respondent retaining money meant to be released for promotion of free and compulsory basic education, the 1<sup>st</sup> respondent is in breach of **Article 10 c & d and Articles 53 of the constitution** and provisions of **Basic Education Act 2013**.

45. The respondent submitted that the allegations are too general and from the petition, it is not discernible what form of infringement the petitioners are seeking redress from the court. That the manner of infringement/detriment suffered by learners and nature of inhibition on operation have not been disclosed and that the petition does not disclose adequate particularization of violations of the constitution and other quoted laws to enable court grant relieves sought.

46. As to whether the respondents acted within the statutory and legal mandate in issuing circular of 25<sup>th</sup> October, 2018, the respondents quoted **Section 39 (a) of Basic Education Act** which provide that it shall be the duty of the Cabinet Secretary to provide free compulsory basic education to every child and submitted that all circulars issued by the respondents were issued in full compliance with the law and in furtherance of **Article 53 (b) of the constitution**.

47. The respondents adopted averments of **Dr Belio Kipsang (PS)** in their submissions and stated that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have an obligation towards ensuring compulsory primary and secondary education is attained; further that for progressive attainment of free and compulsory basic education to be attained, it requires proper utilization of allocated financial resources; that the allegation that the ministry did not consult is baseless as no school has written to complain and in the year 2018, the Ministry sought opinion of Heads Association.

#### **ANALYSIS AND DETERMINATION**

48. The respondent in their response is agreeable that free compulsory basic education is human right and every child is entitled to the right to basic education. The respondents further admitted that the constitution and the Basic Education Act imposes an obligation in state organs to respect and protect right to education for every child.

49. **Article 53(b) of constitution** provides that every child has a right to free and compulsory basic education. **Article 10 (2) of the constitution** provide national values and principles of good governance. Of importance to this petition is **Article 10 sub article 2 (a)** which provides for public participation while **sub article and 2 (c)** provides for good governance, transparency and accountability.

50. It is not disputed that schools' board of management are mandated to manage the schooling institutions and manage resources of the school.

51. I wish to consider whether petitioners have demonstrated infringement of constitution or any other laws.

52. The Principal Secretary stated that free basic education commenced before promulgation of the constitution and the intention of allocation of funds was to progressively cater for the requirements of school and ensure smooth running of the school. In the end free and compulsory education was to be realized progressively. From averments by the respondent it is evident steps were taken to ensure that parents are freed by paying fees and from purchasing books for their children. At the initial stages there is no doubt that money was released for every student to schools to be managed by schools' board of management. The respondent has not disputed that the arrangement was changed. He attributed the changes to challenges experienced in implementation.

53. I now wish to consider whether the said circular interfered with smooth operation of schools and frustrated attainment of free and compulsory basic education.

54. The Permanent Secretary Ministry of Education **Dr Belio Kipsang** stated that initially, money was allocated to schools to buy books to ensure that schools attained ratio of 1:1 but it was not achieved due to corruption and cartels. This informed the decision to purchase books centrally and according to the Permanent Secretary the ratio of 1:1 was achieved.

55. From averments herein no money was reduced or retained for use other than it was intended by the Ministry. It is admitted by the respondents that money in 3 vote heads namely text books, medical, Smasse and activity totaling kshs.3,700 was retained and paid direct from the Ministry to books and services intended for the students; and money for repairs and maintenance had its vote head title changed to maintenance and improvement to allow for new facilities intended to benefit the student. The money was not retained in the ministry but released to schools to be spent with the approval from the boards of management. There is no reduction of funds in that vote head and the powers of school boards to apply the money to use has not been curtailed.

56. The petitioners alleged that no public participation was carried out but from respondent's averments principles of schools and association leaders were consulted following challenges faced in utilization of the funds at the school level. The funds have not been sent to schools but utilized for the intended purpose to benefit the child and ensure smooth operation of schools. The petitioners have not demonstrated that any complaint has been raised with the Ministry as a result of retention of funds by the Ministry in respect to provision of the intended activity for benefit of the students.

57. Does the Cabinet Secretary have powers to intervene in the event of imprudent use of resources by school management? **Section 39 of Basic Education Act** provide responsibility of Cabinet Secretary which include as follows: -

**“It shall be the duty of Cabinet Secretary to:-**

**(e) to provide infrastructure including schools, learning and teaching equipment and appropriate financial resources.**

**(i) monitor functioning of schools.**

**(j) advise the national government on financing of infrastructure development for basic education.”**

58. From the foregoing I find that the petitioners have failed to demonstrate that the Cabinet Secretary Ministry of Education acted ultra vires in issuing circular of 18<sup>th</sup> October 2018

59. The petitioners failed to demonstrate how retention of funds by the Ministry in the three vote heads namely text books, medical, Smasse and activity for direct payment to service providers affected attainment of right to basic free and compulsory education to children in Kenyan schools.

60. The petitioners also failed to demonstrate that the issuance of the said circular was done unilaterally without consultation.

61. **FINAL ORDERS**

**1) Petition is hereby dismissed**

**2) costs to the respondents.**

**Judgment dated, signed and delivered via zoom at Nakuru This 7<sup>th</sup> day of May, 2020**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Schola - Court Assistant

Mwangi Advocates Counsel for petitioner

Mr. Ondieki Counsel for state