



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

JUDICIAL REVIEW NO. 1 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE SECRETARY BOARD OF MANAGEMENT

ST. JG SECONDARY SCHOOL.....1STRESPONDENT

THE PRINCIPLE ST. JG SECONDARY SCHOOL.....2NDRESPONDENT

SAMIA SUB COUNTY PARENTS ASSOCIATION.....1ST INTERESTED PARTY

MESSAGE OF THE HOUR ASSEMBLIES.....2ND INTERESTED PARTY

AND

1. R J

2. RA

3. JN

4. PS

5. JGA.....EX-PARTE APPLICANTS

RULING

1. The ex-parte applicants moved the court by Chamber Summons dated 5th February, 2019. They are seeking the following orders:

a) That this application be and is hereby certified as urgent and heard on priority basis. (Spent)

b) That the honourable court be pleased to grant leave to apply for Judicial Review in the following nature. (spent)

i) That an order of certiorari be and is hereby issued to remove from the honourable court to quash a policy decision by 1st and 2nd respondent requiring ex-parte applicants to keep short hair or bald head which infringes on their faith and beliefs as enshrined in the constitution and whose noncompliance with as communicated to them in end year newsletter dated 25.10.2018 has led to them being suspended from school indefinitely.

c) That the leave granted in (2) above to operate as stay of implementation of the 1st and 2nd respondents policy on keeping of hair by ex-parte applicants and others as communicated in the school newsletter dated 25.10.2018.

d) That costs for this application and Judicial Review proper be settled by the respondents jointly.

2. The application was premised on the following grounds:

a) That ex-parte applicants are minor/students at St. Joseph's Ganjala Secondary School in various forms varying from 2nd form to 4th form of academic years and have their admission numbers and classes as follows:-

i. 1st applicant, RJ, Admission No.[xxxx] in form 4.

ii. 2nd ex-parte, applicant RA, [xxxx], inform 2.

iii. JN, [xxxx], Form 2.

iv. PS, [xxxx], Form 3.

v. GN, [xxxx], Form 3

vi. Joygrace Awino, 2645, Form 3.

b) That the ex-parte applicants are all of Christian faith being members of **Message of the Hour Assemblies**, a duly registered society subscribing to biblical teachings and tenets that female or girl child hair should not be shaved.

c) That by the copy of newsletter communicating change of policy on students hair keeping dated 25.10.2018 from the 1st and 2nd respondents to ex-parte applicants, it was made mandatory that students at St. Joseph's Ganjala Secondary school be shaved to be allowed in school.

d) That subsequent to such decision made unilaterally and without consultation as communicated in the Newsletter dated 25.10.2018 the ex-parte applicants have been suspended indefinitely from school, and are viewed as indiscipline for practicing their faith.

e) That the ex-parte applicants were not heard on changing of policies on keeping of hair as decided by the 1st and 2nd respondents respectively, and have been adversely affected by the change of policy going against their constitutionally protected held faith on hair keeping.

f) That the ex-parte applicants are now at home having been suspended for not honouring a policy made without consultation and which goes against their held belief and faith, and re viewed and termed as indiscipline.

g) That other than observing their faith and practicing their belief's as in the Bible, the ex-parte applicants have not been cited for any specified indiscipline case for which a suspension from school is called for.

h) That the ex-parte applicants are aggrieved by the unilateral decision by the 1st and 2nd respondent who also acted in excess of their jurisdiction in exercise of fair Administrative Action on policy making and offended rules of natural justice as well as constitutional mandate on freedom of worship.

i) That it is in the interest of justice that leave to file for orders of certiorari to quash the decision by the 1st and 2nd respondents as communicated to them by Newsletter of 25.10.2018, which none compliance with has led to suspension of the ex-parte applicants from school be quashed.

j) That leave granted should operate as stay on the implementation of the policy on keeping of hair at St. Joseph's Ganjala secondary school until Judicial Review proper proceedings is heard and determined.

k) That one of the ex-parte applicants is a candidate for 2019 Kenya Certificate of Secondary Education and registration for such is on 14.2.2019, being 1st ex-parte applicant, Rebecca Juma.

3. The application is supported by an affidavit sworn by Rebecca Juma, the 1st ex-parte applicant on 5th February 2019.

4. The respondents and the interested party opposed the application. Their grounds of opposition can be summarized as follows:

a) That the application is not within the parameters of judicial review.

b) That the respondents had jurisdiction to formulate rules and regulations on short hair for girls.

c) That the respondents did not breach rules of natural justice.

5. By a newsletter for the end of the year 2018, the respondents through the principal of the School Domitila Nageri, advised the students as follows:

All students should keep short hair or keep bald head. Students will not be allowed to keep long or plaited hair.

6. The ex-parte applicants have argued that following this directive, they were suspended from school for keeping long hair which according to them is a religious requirement.
7. It has been contended by the respondents that through an academic meeting held on 5th August 2016, it was agreed that all students should have well maintained short hair. This position was ratified by the School Board of Management (BOM) and the Parents Teachers Association (PTA) as well as parents' class representative towards the end of 2017. A copy of these rules was attached to the affidavit sworn by Domitila Nageri.
8. When the ex-parte applicants contend that the decision to keep short hair was unilateral and without consultation, this is not factually correct. Under the Basic Education Act, 2013, the Boards of Management are mandated to run the affairs of schools. The involvement of PTA and parents is to ensure public participation. Public participation need not necessarily involve the entire public at large which may not be possible or the entire affected population. When such decisions involve representatives, in my opinion it amounts to sufficient public participation.
9. The ex-parte applicants relied on **Methodist Church in Kenya vs. Mohamed Fugicha & 3 others [2019] eKLR** among other authorities and Statutes. In **Mohamed Fugicha**, the Supreme Court set aside the following orders by the Court of appeal:

The High Court's order that the decision to allow Muslim students to wear hijab/trousers is discriminatory, unlawful and unconstitutional is set aside.

a. The order of injunction preventing the respondents from allowing Muslim students to wear hijab contrary to school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby quashed and set aside.

b. The mandatory injunction compelling the respondents to comply and ensure full compliance with the current school rules and regulations that were executed by the students and parents during the reporting in respect of St. Paul's Kiwanjani Day Mixed Secondary School is set aside to the extent that it prohibits Muslim female students from wearing the hijab/trousers in addition to the school uniform.

c. The order that the school uniform policy does not indirectly discriminate against the interested parties Fugicha's daughters or other Muslim female students is set aside and substituted with an order that the said uniform policy indirectly discriminates against the interested parties' daughters and other Muslim female students in so far as it prohibits and prevents them from manifesting their religion through the practice and observance of wearing the hijab.

d. The order striking out the interested parties' cross-petition as defective is set aside and substituted with an order allowing the said cross petition.

e. The order granting the costs of the petition to the petitioner is set aside and substituted with an order that each party do bear its own costs.

The orders were substituted as follows:

We in addition direct as follows:

1. That the Board of Management of St. Paul's Kiwanjani Day mixed Secondary School do immediately initiate, after due consultation with its stakeholders in particular the parents and students a process of amendment of the relevant school rules touching on the school uniform so as to provide for exemptions to be granted to accommodate those students whose religious beliefs require them to wear particular items of clothing in addition to the school uniform.

2. This judgment be immediately served upon the Cabinet Secretary for Education for his perusal and consideration with a view to formulating and putting in place rules, regulations and/or directions after due consultations for the better protection of the fundamental right to freedom of religion and belief under Article 32 of the Constitution and equality and freedom from discrimination under Article 27 of the Constitution for all pupils and students in Kenya's educational system.

10. Article 32 of the Constitution of Kenya provides:

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

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

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

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

It was argued for the applicants that their rights under this Article were violated. This Article has been a subject of several decisions involving students and learning institutions and their religious practices. One such a case is the **Seventh Day Adventist Church (East Africa) Limited vs. Minister for Education & 3 others [2014] eKLR**. Briefly the dispute in this case was that several public schools [which were named] in a variety of ways had sought to restrict and in some instances, curtail the opportunities available for Adventist students to worship and fellowship during the Sabbath hours. As a result, this amounted to the violation of the Adventists students' rights under Article 32 of the Constitution, while protecting and respecting the rights of the students professing other faiths. When dismissing the petition Isaac Lenaola J. [as he then was] said:

I am in agreement and back to the instant case, I am convinced by the explanation given by the Interested Party that there has been no violation of the Adventists students' rights and that the limitations to that right are reasonable.

In the instant case the ex-parte applicants have argued that their religious belief does not allow women to cut their hair. During submission Mr. Gathara, learned counsel for the **Message of The Hour Assemblies** the 2nd interested party cited 1 Corinthians 11 verse 6 which states:

For if a woman does not cover her head, she might as well have her hair cut off; but if it is a disgrace for a woman to have her hair cut off or her head shaved, then she should cover her head. [NIV]

Even without the benefit of theological education, this verse is very clear; it does not advocate for women to have long hair. It offers alternatives for covering the head or shaving hair. It is apparent therefore that the ex-parte applicants have either misinterpreted the verse out of ignorance or are deliberately being cheeky.

11. The common thread running in all the authorities cited is that Article 32 is not absolute and more so, where educational institutions appear to be in conflict with religious belief. Had the parties herein read the decision in **Nyakamba Gekara vs. Attorney General & 2 others [2013] eKLR** and headed to the advice the learned Isaac Lenaola J. (as he then was) proffered, this matter may not have come to court. This is what he advised:

I would encourage the school to have a mechanism to resolve those disputes that can be resolved without recourse to Court and focus on the business of imparting knowledge and not "trade blows" with parents and students in the corridors of justice.

In the instant case it would appear what was missing from the impugned regulations is the definition of what is meant by "short hair". The size of the hair need not rob the ex-parte applicants their valuable study time. This is a matter that could have been settled amicably.

12. It was contended that this is not a judicial review issue but a constitutional one. The counsel for the ex-parte applicants admitted as much. He urged the court not to look at the form but decide the dispute on merits. This is what I have done in the interest of justice.

13. My parting shot to the ex-parte applicants is that they should be like the Bereans in the Bible. If their motivation was truly religious, they should interrogate the basis of the belief so that it does not rob them their right to education and sound religious belief.

14. I may not have commented on each authority cited by both parties but I certainly address my mind to them.

15. The consequence of the above analysis is that I make a finding that the application lacks merit and is dismissed. Each party will bear own costs.

DELIVERED and SIGNED at BUSIA this 13th day of June, 2019

KIARIE WAWERU KIARIE

JUDGE