



JWM (alias P) v Board of Management [particulars withheld] High School & 2 others (Petition 10 of 2019) [2019] KEHC 10897 (KLR) (Constitutional and Human Rights) (13 September 2019) (Judgment)

J W M (alias P) v Board of Management O High School & 2 others [2019] eKLR

Neutral citation: [2019] KEHC 10897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 10 OF 2019
EC MWITA, J
SEPTEMBER 13, 2019**

BETWEEN

JWM (ALIAS P) PETITIONER

AND

BOARD OF MANAGEMENT [PARTICULARS WITHHELD] HIGH SCHOOL 1ST RESPONDENT

MINISTRY OF EDUCATION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

Requiring Rastafarian children to shave their hair, against their faith and religious beliefs, before being allowed in school violates their right to religion.

The petitioner’s daughter (the minor) was a member of the Rastafarian religion whose religious beliefs did not allow her to shave her hair. The respondent, the High School that the minor attended, insisted that she shave her dreadlocks to study in the school. Aggrieved the petitioner filed the instant suit where it was contended that that the respondents’ action was not only discriminatory on grounds of religion but also a violation of the minor’s right to religion, education and fair administrative action. The court held that the rule demanding that she cuts her hair which manifested her religious beliefs was not a reasonable limitation. It was intrusive and invasive of her right to religion and to manifest that religion. It was therefore not justifiable in an open and democratic society based on human dignity, equality and freedom.

Reported by Kakai Toili

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms - right to religion and right to equality and freedom from discrimination – where a school demanded a Rastafarian child to shave her hair before being allowed to continue with school – where shaving of hair was against



Rastafarian faith and religious beliefs – whether demanding a Rastafarian child to shave her hair violated the child’s right to religion and was discriminatory – Constitution of Kenya, 2010, articles 19, 20(1), 21(1), 27, 32, 43 & 53; Basic Education Act, 2013 section 28.

Constitutional Law – *fundamental rights and freedoms – right to religion - what was the essence of the right to religion - what were the factors to be considered in determining existence of a religion - Constitution of Kenya, 2010, articles 19, 20(1), 21(1), 27, 32, 43 & 53; Basic Education Act, 2013 section 28.*

Constitutional Law – *fundamental rights and freedoms – limitation of fundamental rights and freedoms – right to education – school rules and regulations - where a school rule demanded that a Rastafarian child had to shave her hair before being allowed to continue with school – where shaving of hair was against Rastafarian faith and religious beliefs – whether a school rule demanding a Rastafarian student to shave her hair was a reasonable limitation of the right to education – what was the nature of school rules and regulations in light of the rights under the Constitution – Constitution of Kenya, 2010, articles 24, 32, 43(1)(f), 53(1)(b); Basic Education Act, 2013, section 28(1) & 30.*

Words and Phrases – *religion – definition – a system of faith and worship usually involving belief in a supreme being and usually containing a moral or ethical code; especially such a system recognized and practiced by a particular church, sect, or denomination - Black’s Law Dictionary, Ninth Edition.*

Brief facts

The petitioner’s daughter (the minor) was a member of the Rastafarian religion whose religious beliefs did not allow her to shave her hair. She was admitted to a particular high school (school) and indicated in her admission form that her religion was Rastafari. She reported to school, paid the required fees and was given an admission number and a class. Later, the school authorities noticed her *rastas* (dreadlocks) and sent her home to shave the *rastas* before she could be allowed back to the school. The petitioner tried to have the issue sorted out to no avail, with the school administration insisting that the minor had to shave the hair before rejoining the school. The petitioner claimed that the respondents’ action was not only discriminatory on grounds of religion but also a violation of the minor’s right to religion, education and fair administrative action. The petitioner argued that shaving hair was against her religious beliefs and that what the minor kept were *rastas* which manifested her faith and not dreadlocks which were a matter of choice or style. The respondents argued that school rules and regulations prohibited dreadlocks and applied to all students.

Issues

- i. Whether demanding a Rastafarian child to shave her hair, against her faith and religious beliefs, before being allowed in school violated her right to religion and was discriminatory.
- ii. What were the factors to be considered in determining existence of a religion?
- iii. What was the essence of the right to religion?
- iv. What was the nature of school rules and regulations in light of the rights under the Constitution?
- v. Whether a school rule demanding a Rastafarian student to shave her hair, which manifested her religious beliefs, was a reasonable limitation of the right to education.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 32 (1)

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.*

Article 43



1. *Every person has the right—
(f) to education.*

Article 53

(1) Every child has the right—

1. ...
2. *to free and compulsory basic education;*
1. *A child's best interests are of paramount importance in every matter concerning the child.*

Basic Education Act

Section 28

1. *The Cabinet Secretary shall implement the right of every child to free and compulsory basic education.*

Section 30

1. *Every parent whose child is-;*
1. *Kenyan, or*
2. *resides in Kenya;*

Shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of principal, mental, intellectual or social development of the child.

Held

1. The Constitution did not define the word religion. Religion encompassed aspects such as beliefs, faith and worship of a superior being which determined a person's moral or spiritual conduct. From what the petitioner averred in his pleadings, deposed in his affidavits and testified on oath in court, that they believed in the biblical teachings which forbade shaving of hair; that they kept the ten commandments given by a superior being and that they observed the Sabbath as their day of worship, Rastafari was a religion whose sincere adherents should be accorded full protection under article 32 of the Constitution just like those of other religions. Article 32 of the Constitution guaranteed the right to manifest, observe and practice religious beliefs and prohibited actions that compelled one to act in a manner that went against his or her religious beliefs.
2. A child had a constitutional right to have basic education as a matter of compulsion. Parents had a legal responsibility to take their children to school. Section 30(2) of the Basic Education Act made it an offence where a parent failed to take his or her child to school, it provided that a parent who failed to take his or her child to school as required under section 30 (1) committed an offence and on conviction, was liable to a fine of Kshs. 100,000/= or one year imprisonment or both. That signified the importance the State attached to education for the children. The petitioner discharged his statutory obligation when he took the minor to school
3. The fact that the petitioner and his family belonged to the Rastafarian religion was not in doubt and that was why they did not shave their hair as a manifestation of their religious beliefs. The minor indicated in her admission form that she was Rastafarian by religion. The petitioner was also emphatic that the minor had never shaved her hair since birth and that doing so was against their faith and religious beliefs. The stance taken by the respondents that the minor had to shave her hair before she was allowed back to school was clearly contrary to article 32 of the Constitution which guaranteed every person's right to religion and to manifest that religion through practice. Keeping *rastas* was the minor's outward manifestation of her religious beliefs and forcing her to cut the hair was contrary to those beliefs.
4. The respondents' demand that the minor had to cut her hair was constitutionally prohibited. Article 32 of the Constitution contained constitutional guarantees that should not be undermined in a way that violated one's religious beliefs. In that regard, article 32 underscored the breath and width of the



- right to religion and, therefore, guaranteed the minor's right to declare, express, practice and manifest her religious beliefs to the fullest extent.
5. The essence of the concept of freedom of religion was the right to entertain such religious beliefs as a person chose, the right to declare religious beliefs openly and without fear of hindrance or reprisal. Every individual was free to hold whatever religious beliefs his or her conscience dictated, provided, *inter alia*, only that such manifestation did not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.
 6. Article 19 of the Constitution unashamedly proclaimed that the purpose of recognising and protecting human rights and fundamental freedoms was to preserve the dignity of individuals, communities and to promote social justice and the realisation of the potential of all human beings. The article was also categorical that the rights and fundamental freedoms in the Bill of Rights belonged to each individual; were not granted by the State and were subject only to the limitations contemplated in the Constitution. Article 20(1) of the Constitution stated that every person was to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The article required courts when interpreting the Bill of Rights, to adopt an interpretation that most favored the enforcement of a right or fundamental freedom.
 7. Article 21(1) of the Constitution made it a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. All State organs and public officers had a duty to address the needs of vulnerable groups within society, including children and members of particular ethnic, religious or cultural communities.
 8. The right to compulsory basic education could not be compromised on the basis of one's religious beliefs or the way one manifested those beliefs. School rules and regulations stood in the way of the minor's right to religion and education because they did not allow one to wear dreadlocks. To the extent that the school rules and regulations had been applied in a manner that denied the minor the right to access the 1st respondent's school to receive education unless she cut her *rastas*, those rules violated the essence of articles 32 and 43 of the Constitution on the right to religion and education respectively. That was because although those rights were guaranteed by the Constitution, the respondents had applied school rules in a manner that negated the fundamental essence of those rights.
 9. The Constitution demanded that the Bill of Rights be interpreted in a manner that favored enforcement and enjoyment of rights and fundamental freedoms. The respondents were bound to uphold the minor's rights guaranteed under articles 32, 43(1) (f) and 53(1)(b) of the Constitution as well as section 28(1) of the Basic Education Act. That was because those fundamental rights and freedoms were enshrined in and protected by the Constitution.
 10. The respondents' decision to exclude the minor from school for reason of keeping *rastas* on religious grounds was not only discriminatory but also violated her right to religion and education. She did not keep the *rastas* out of choice but due to her strongly held religious beliefs. Her right to education could not, therefore, depend on violating her right to manifest those religious beliefs. The respondents were also acting in violation of the Constitution by not only excluding her from school but also forcing her to act in a manner that was contrary to her religion, beliefs and practices.
 11. Where the Constitution guaranteed the right to religion, the constitutional guarantee included the right to manifest that religion. It was, therefore, an invasion of that right when one was forced to act contrary to his beliefs. The school's decision to force the minor to shave her hair effectively punished the practice of her religion, degraded and devalued her and the other followers of that religion in the eyes of other members of society. The ultimate result was to force her to choose between adhering to her religious edicts thereby foregoing education, or sacrifice an important aspect of her religion in order to pursue education. That was a clear violation of the Constitution and the law both of which guaranteed her right to compulsory basic education as none of the rights could give way.



12. School rules and regulations, (including rule 7 of the school rules), though necessary for proper governing the conduct and discipline of students, should not be applied in a manner that infringed on rights guaranteed by the Constitution. School rules and regulations were intended to regulate and guide students' conduct and discipline for their well-being and proper management of the school but not to punish them. They should not therefore undermine substantive constitutional rights and being subordinate to the Constitution, they should not be applied so as to override constitutional provisions. Rather, they should augment those provisions. The fact that rule 7 did not allow keeping of dreadlocks, was not to say that the minor had to give up her religious beliefs and do away with *rastas* given that shaving hair was against her religious beliefs.
13. Rights under article 32 of the Constitution could not be limited given the way the article was couched. Even if they were to be limited, the limitation had to be one contemplated by the Constitution. That was why article 19 of the Constitution was clear that rights and fundamental freedoms in the Bill of Rights belonged to each individual, were not granted by the State and were subject only to the limitations contemplated in the Constitution.
14. The Constitution did not contemplate that school rules should force the minor to act contrary to her religious beliefs. There had to be a balance between school rules and rights and fundamental freedoms. Where genuinely held religious beliefs clashed with school rules, both sides had to strike a balance between religion and education for the good of the learner and the institution. School rules had to appreciate genuinely held religious beliefs and should not be applied as though they were superior to the text of the Constitution. They should not be a bar to full realization and enjoyment of rights and fundamental freedoms guaranteed by the Constitution.
15. The limitation that article 24(1) of the Constitution contemplated was to the extent only that it was reasonable and justifiable in an open and democratic society. The limitation should however take into the account the nature of the right so that enjoyment of one's right was not prejudicial to the rights of others. Limitation was acceptable if there was no less restrictive means of achieving the intended objective.
16. Looking at the totality of the minor's case, the rule demanding that she cuts her hair which manifested her religious beliefs was not a reasonable limitation. It was intrusive and invasive of her right to religion and to manifest that religion. It was therefore not justifiable in an open and democratic society based on human dignity, equality and freedom. The respondents had not shown that there was no less restrictive means to achieve the intended limitation other than coercing her to cut her hair. The respondent's argument that it was the 1st respondent's mandate to make rules for the management of the school, could not therefore pass the test in article 24 of the Constitution. It was not tenable in the constitutional scheme and its expanded Bill of Rights. It plainly violated the right to religion and to manifest that religion and the right to education guaranteed under articles 32, 43(1)(f) and 53(1)(b) of the Constitution respectively as well as section 28(1) of the Basic Education Act.

Petition allowed; respondents to pay costs of the petition.

Orders

- i. *A declaration was issued that the decision by the school administration of O High School to exclude MNW from school on the basis of her keeping rastas which manifested her religious beliefs was a violation of her rights guaranteed under articles 32, 43 and 53 of the Constitution and was therefore unconstitutional, null and void.*
- ii. *An order was issued directing the school administration of O High School to immediately recall MNW to resume and continue with her education unhindered.*
- iii. *A permanent injunction was issued restraining the school administration of O High School from negatively interfering with MNW's education based on her religious beliefs, particularly for keeping rastas.*



Citations

Cases

1. *Attorney General v Kituo Cha Sberia & 7 others* Civil Appeal 108 of 2014; [2017] KECA 773 (KLR) — Explained
2. *JK (Suing on behalf of CK) v Board of Directors of Rusinga School & another* Petition 450 of 2014; [2014] KEHC 7490 (KLR) — Mentioned
3. *Ndanu Mutambuki & 119 others v Minister for Education & 2 others* Petition 407 of 2007; [2007] KEHC 32 (KLR) — Mentioned
4. *Republic v Head Teacher Kenya High School & another Ex-parte SMY (a minor suing through her mother and next friend A B)* Judicial Review 318 of 2010; [2012] KEHC 2492 (KLR) — Mentioned
5. *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* Civil Appeal 172 of 2014; [2017] KECA 751 (KLR) — Followed
6. *Tinyefuze v Attorney General* Constitutional Petition 1 of 1996; [1997] UGCC 3 — Explained

South Africa

1. *Department of Correctional Services & another and Another v Police and Prisons Civil Rights Union (POPCRU) and Others* (107/12) [2013] ZASCA 40; (2013) 34 ILJ 1375 (SCA); 2013 (4) SA 176 (SCA); [2013] 7 BLLR 639 (SCA); 2013 (7) BCLR 809 (SCA); [2013] 3 All SA 1 (SCA) — Explained
2. *DZvova v Minister of Education, Sports and Culture and Others* (2007) A4RLR 189(SWSC 2007) — Explained
3. *In Re Chikweche* Case No CA 626/93; 1995 (4) SA 284 (ZC) — Explained

India

1. *R v Big M Drug Mart Ltd* (1985) 1 SCR 295; [1986] LRC (Const) 322) — Explained
2. *Reed v Faulkner* 842 F 2d 960 (7th Cir 1988) — Explained

Statutes

1. Basic Education Act (cap 211) sections 28 (1); 30; 59(1) — Interpreted
2. Children Act (cap 141) section 23(2)(ii) — Interpreted
3. Constitution of Kenya articles 19; 20(1); 21(1); 27; 28; 32; 33; 43; 44; 47; 53(1)(b) — Interpreted
4. Constitution of Zimbabwe sections 19(1); 23 — Interpreted

South Australia

Legal Practitioners Act, 1981 (Act No 15 of 1981) In general — Cited

Texts

1. Bacchini, S., (Ed) (2011), *Concise Oxford English Dictionary* (New York: Oxford University Press 12th Edn)
2. Chawane, MH., (2014), *The Rastafarian movement in South Africa: A religion or way of life?* (South Africa: Association for the Study of Religion in Southern Africa (ASRSA); Journal for the Study of Religion Vol. 27, No. 2 (2014), pp. 214-237)
3. Garner, BA., (Ed) (2009), *Black's Law Dictionary* (St Paul Minnesota: West Group 9th Edn)
4. Greil, AL., & Bromley, DG., (2003), *Defining Religion: Investigating the Boundaries between the Sacred and Secular (Religion and the Social Order, 10)* (Amsterdam: Emerald Publishing Limited)

Advocates None mentioned

JUDGMENT

1. This is the first ever case in this country brought on behalf of a Rastafarian child who has been denied the right to receive education because she wears rastas (dreadlocks) due to religious beliefs. JWM *alias*



P, the petitioner, is father to MNW a 15 years Rastafarian girl who was admitted to Form One at [particulars withheld] High School, a public secondary school, for her secondary school education in January 2019. She reported to school, paid the required fees and was dully issued with admission number, allocated a class and even attended lessons. However, it was soon discovered that keeps rastas which lead to her being sent home with a warning not to return to school until she had shaved the rastas.

2. The petitioner felt this was discrimination and a violation of MNW's right to education based on her religious beliefs. He filed this petition on behalf of the minor against the Board of Management of [particulars withheld] High School, the Ministry of Education and the Attorney General, the 1st, 2nd and 3rd respondents respectively, challenging the School's action.
3. The petitioner averred that his family is Rastafarian by faith and keeps rastas as a mark of their religious beliefs; that after MNW's Kenya Certificate of Primary Education Examination (KCPE) results, she applied for form 1 admission at the 1st respondent's school and indicated in the form that she was Rastafarian by religion; that she was admitted and reported to school on January 10, 2019; paid the required school fees; issued with admission number and attended classes. He further averred that MNW was later summoned by the school authorities, admonished for keeping rastas and sent home not to return until she shaves the hair.
4. The petitioner stated that he approached Head Teacher the following day, January 11, 2019, with a view to sorting out the issue in order to have MNW back in school but was turned away without being given a hearing. His attempt to have the Education Officer intervene bore no fruit. It is the petitioner's case that the Respondents' action was not only discriminatory on grounds of religion but also a violation of MNW's right to religion, education and fair administrative action, contrary to articles 27, 32, 43 and 47(1) of the Constitution. The petitioner therefore sought the following reliefs;
 - a) A declaration due hereby issue that the 1st respondent's decision and/or action of constructively suspending the minor herein namely MNW on the basis of her Rasta religious inclination and culture characterized by her sporting of dreadlocks is a violation of her right to be treated with dignity, freedom from discrimination, freedom of conscience, religion, belief and opinion, freedom of expression, right to culture and her right to fair administrative action that is lawful and reasonable under articles 27, 28, 32, 33, 44 and 47 of the Constitution.
 - b) An order do hereby issue permanently restraining the respondents by themselves, their servants and/or agents from in anyway interfering with MNW's secondary school education on the basis of her cultural beliefs and practices as a Rastafarian.
 - c) That consequently, an order do issue directing the respondent's Headmaster and the Deputy Headmistress herein to jointly or severely compensate the petitioner and/or Ms MNW for the inconvenience, embarrassment, waste of time and the violation of MNW's fundamental human rights and freedoms under articles 27, 28,32, 33, 44 and 47 of the Constitution.
 - d) The costs of this petition be provided for.
 - e) Any other order that this honourable court may deem just and fit in the circumstances.

Respondents' Response

5. The respondents filed grounds of opposition dated January 25, 2019 and a replying affidavit by Michael Kahora Waichinga, the Head Teacher and Secretary of the 1st respondent, sworn on the same day in response to the petition. In the grounds of opposition, the respondents contended that it is



the 1st respondent's mandate to make rules for the management the school; that the petitioner has not challenged the legality or constitutionality of the school rules; that MNW accepted to be bound by the school rules; that the petitioner has misconstrued and misapplied the import of enjoyment of rights and fundamental freedoms and the limitation thereof; that the school dress code is part and parcel of school management and that the petitioner has not shown how the right to religion is related to the right to education.

6. In the replying affidavit, Mr Waichinga deposed that as a public secondary school, the school is managed by a Board of Management; that the school admits students from all walks of life and from various religious backgrounds; that MNW's mother approached the school seeking a chance for her daughter and that after the school was satisfied with her KCPE performance, she was admitted but strictly in accordance with the school rules and regulations.
7. Mr Waichinga further deposed that a calling letter was issued to MNW with an admission form which she filled and thereafter reported for admission on January 10, 2019. According to the deponent, MNW was given admission No 4016 after the she signed to be bound by school rules and regulations. He stated that although NMW had indicated her religion as Rastafarian, she wore a *hijab* and she had informed teachers that she was Muslim which explained why she had a *hijab*.
8. He further stated that it was when she was being issued with school uniform that the hijab fell off revealing the rastas. He contended that it was at that point that MNW was reminded about the school rules but was allowed to attend classes for the day and advised to comply with school rules the following day.
9. According to the deponent, the following day, January 11, 2019, the petitioner went to school accompanied by MNW but they were told that she had to comply with school rules and that she would not be treated in a special way. He deposed that at that point the petitioner and MNW stormed out of the office and left. Mr Waichinga further deposed that he informed the Sub county Director of Education of the incident who ordered that a report be prepared; that a report was prepared and showed that MNW had violated rule 7 of the school rules and regulations which prohibits students from keeping dreadlocks. He contended that the Rastafarian Society has nothing to do with the right to Education and denied that they violated any of MNW's rights.

Oral Testimony

10. The petitioner offered to give oral testimony in support of the petition during the hearing. He testified that his family is Rastafarian by faith which they have espoused since birth; that they follow biblical teachings found in various books, including Numbers 6: 1-6, Leviticus 21: 5 – 6 among others which he said prohibit eating certain foods and cutting of the hair, as a sign of their dedication to God's teachings and that they, therefore, keep the hair as a manifestation of their faith. He stated that the command to keep the hair is biblical and that keeping the hair is a manifestation of their faith and as such his family never shaves their hair in keeping with their faith.
11. The petitioner further testified that MNW, now 15 years old, has never shaved her hair since birth due to their religious beliefs; that she attended public nursery and primary schools wearing rastas and attached photographs to show that MNW has always had Rastas. He added that MNW was admitted to the 1st respondent's school having clearly indicated in her admission form that her religion was Rastafarian; that she paid school fees, issued with uniforms, but was later sent away due to her hair style which she keeps by reason of her faith and nothing else. He told the court that his attempt to have the issue resolved amicably was not successful because the school leadership insisted that MNW had to shave her rastas which is against her faith.



12. In cross examination, the petitioner stated that they follow the Ten Commandments and keep the Sabbath as their day of worship. Regarding school rules, the petitioner argued that the rule that requires MNW to shave her hair violates her right to religion. He insisted that Rastafarians keep “Rastas” and not “dreadlock”; that rastas is a sign of faith as opposed to “dreadlocks” which is a matter of one’s choice or style.

Petitioner’s Submissions

13. Mr Ochiel, appearing with Mr Wambui for the petitioner, submitted that the petitioner’s case presents an element of discrimination on the basis of religion in that MNW has been compelled to choose between keeping her faith and education. According to counsel, section 23(2)(ii) of the *Children Act* requires parents to give children parental responsibility which includes religious and moral values. He argued that MNW is a member of the Rastafarian religion, a fact she fully disclosed in her admission form; that one of MNW’s genuinely held beliefs according to biblical teachings is that of keeping the hair. For those reasons, counsel contended, there is a genuine threat to MNW’s right to freedom of religion and education.
14. Relying on article 32 of the *Constitution*, Mr Ochiel submitted that the *Constitution* guarantees freedom of religion which includes the right to manifest religious beliefs through worship practices, teachings and observance, whether in public or private. He argued that MNW keeps her hair as a mark of expression and observance of her faith and relied on *Seventh Day Adventist Church v Ministry for Education* [2017] eKLR for the submissions that freedom of religion includes both the right to have religious belief and the right to express such belief in practice.
15. In counsel’s view, MNW was excluded from school for reason of keeping hair in accordance to her faith, an action that has limited her right to education on grounds of her religious beliefs. He contended that school rules and regulations cannot stand in the way of the *Constitution*. He submitted, referring to the Seventh Day Adventist case that the Court of Appeal had observed that article 27 of the *Constitution* enjoins both the state and individuals not to discriminate either directly or indirectly on, among other grounds, religion. In this regard, counsel argued that the application of school rules and regulations on MNW in the manner the school has done amounts to direct discrimination without considering reasonable accommodation of her religious beliefs and, therefore, violates the *Constitution*.

Respondents’ Submissions

16. Mr. Ogosso, learned counsel for the respondents submitted in opposition to the petition, that there cannot be a selective application of school rules in favour of a Rastafarian student. He contended that section 59(1) of the *Basic Education Act* mandates the Boards of School Management to formulate rules and regulations for the management of schools. With regard to the present petition, he argued that school rules were formulated and each student is required to abide by them; that MNW understood the school rules and signed the admission letter to that effect and, therefore, she cannot claim that they violate her rights. Counsel relied on *Republic v Head Teacher Kenya High School & another ex parte SMY* [2017] eKLR and *Ndanu Mutambuki & 119 others v Minister for Education & 2 others* [2007] eKLR.
17. He submitted that once the 1st respondent formulated the rules and regulations, it was the duty of the students to abide by those rules and there is a legitimate expectation that students admitted to the school will obey and adhere to the school rules.
18. Mr. Ogosso contended that the school is applying the rules as formulated and, therefore, it has not violated MNW’s rights; that the right to express her faith under articles 32(2) is not absolute; that there



is no evidence that she has been denied the right to worship or receive teachings of her faith or that she has been treated differently on account of her religious beliefs. In counsel's view, the right to manifest religious beliefs can be limited by requiring her to abide by school rules which is a justifiable limitation. He relied on *JK suing on behalf of Club Board of Directors v School & another* [2014] eKLR for the proposition that although the right to education is important, the court should not ordinarily interfere with school affairs except in exceptional cases.

Analysis and Determination

19. I have considered the petition, the response, submissions and the authorities relied on. The facts of this petition are straight forward. MNW is a member of the Rastafarian whose religious beliefs do not allow her to shave the hair. She was admitted to the school and she clearly indicated in her admission form that her religion was Rastafari. She reported to school, paid the required fees and was given admission number and a class, form 1A. Later the school authorities noticed her rastas, ("dreadlocks") and sent her home until she shaves the rastas.
20. The petitioner, MNW's father, tried to have the issue sorted out to no avail, with the school administration insisting that MNW has to shave the hair before rejoining the school. The petitioner argued that shaving hair is against their religious beliefs and that what MNW keeps are "rastas" which manifest their faith and not "dreadlocks" which are a matter of choice or style. The respondents on their part maintained that school rules and regulations prohibit dreadlocks and apply to all students and for that reason, MNW will not be accorded preferential treatment and will only be allowed back to school once she shaves the dreadlocks.
21. The single question that arises for determination in this petition is whether the decision to exclude MNW from school has violated her right to education on religious grounds. However, before I venture to answer this question, I find it necessary to address a preliminary issue, namely; whether Rastafari is a religion to warrant invocation of protection under article 32 of the *Constitution*. But, first, what is religion?
22. The *Constitution* does not define the word "religion." We must therefore turn elsewhere to find the meaning of this word. *Concise Oxford English Dictionary*, Twelfth Edition defines "religion" as;
 - (1) the belief in and worship of a superhuman controlling power, especially a personal God or gods, a particular system of faith and worship;
 - (2) a pursuit of or interest followed with great devotion."
23. *Black's Law Dictionary*, Ninth Edition defines "religion" as;

"A system of faith and worship usually involving belief in in a supreme being and usually containing a moral or ethical code; especially such a system recognized and practiced by a particular church, sect, or denomination."
24. On the other hand, Greil, AL & DG Bromley; *Defining Religion: Investigating the Boundaries between the Sacred and Secular*, 2003. Amsterdam: JAI, define religion as;

"a unified system of beliefs and practices relative to sacred things set apart and forbidden, beliefs and practices which unite into a single moral community called a church and all those who adhere to them"



25. It follows from the above definitions that religion encompasses aspects such as beliefs, faith and worship of a superior being which determine a person's moral or spiritual conduct. And from what the petitioner averred in his pleadings, deposed in his affidavits and testified on oath in court, that they believe in the biblical teachings which forbid shaving of hair; that they keep the Ten Commandments given by a superior being and that they observe the Sabbath as their day of worship, it is my holding that Rastafari is a religion whose sincere adherents should be accorded full protection under article 32 of the Constitution just like those of other religions.
26. This view finds support in an article by Midas H Chawane, *The Rastafarian movement in South Africa: A religion or way of life?* (Journal for the Study of Religion vol.27 n.2 Pretoria 2014) in which he opines that whether Rastafarians see their movement as religious or not will depend on their definition of religion. He argues that when other aspects of the definitions are applied such as
- “a unified system of beliefs and practices, Rastafarianism qualifies as a religion”.
27. Within Judicial circles, the issue of whether or not Rastafari is a religion was considered in *Reed v Faulkner* 842 F 2d 960 (7th Cir 1988), where the US Circuit Court held that Rastafarianism was a form of religion. The court observed that the Rastafarians are a religious sect that originated among black people in Jamaica though it has adherents among black American and that its tenets are derived by interpretation of passages in the Bible and, therefore, Rastafarian faith was a bona fide religion for purposes of the First Amendment.
28. And *In Re chikweche* 1995 (4) SA 284 (ZC), The Supreme Court of Zimbabwe held that the status of Rastafarianism as a religion, in the wide and non-technical sense, has to be accepted and wearing dreadlocks was a manifestation of this religion and fell within the protection afforded by s 19(1) of the Constitution of Zimbabwe.
29. It follows that it is no longer contestable that Rastafarian is a religion for purposes of constitutional protection. That done, I now turn to consider the core issue in this petition regarding MNW's rights.

Whether MNW's rights have been violate

30. Article 32(1) of the Constitution guarantees every person the right to freedom of conscience, religion, thought, belief and opinion. Sub article (2) provides that;
- “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.”
31. Sub article (3) further provides that, a person may not be denied access to any institution, employment or facility or enjoyment of any right because of the person's belief or religion. While sub article (4) states that a person should not be compelled to act or engage in any act that is contrary to the person's belief or religion. Article 32, therefore, guarantees the right to manifest, observe and practice religious beliefs and prohibits actions that compel one to act in a manner that goes against his or her religious beliefs.
32. Similarly, article 43(1)(f) guarantees every person the right to education. While article 53(1)(b) guarantees every child the right to compulsory basic education. Sub article (3) makes it clear that a child's interests are of paramount importance in every matter concerning the child. A child's right to compulsory education is replicated in section 28(1) of the Basic Education Act which requires the Cabinet Secretary to implement the right of every child to free and compulsory basic education. In that regard, a child has a constitutional right to have basic education as a matter of compulsion.



33. Parents have a legal responsibility to take their children to school. To that extent, section 30 of the [Basic Education Act](#) provides th us;
- 1 “Every parent whose child is-;
- (a) Kenyan, or
- (b) resides in Kenya;
- Shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of principal, mental, intellectual or social development of the child.
34. Sub section (2) makes it an offence where a parent fails to take his or her child to school providing that a parent who fails to take his or her child to school as required under sub section (1) commits an offence and on conviction, is liable to a fine of Kshs 100,000/= or one year imprisonment or both, signifying the importance the state attaches to education for the children. In this respect, the petitioner discharged his statutory obligation when he took the minor to school
34. The fact that the petitioner and his family belong to the Rastafarian religion is not in doubt and that is why they do not shave their hair as a manifestation of their religious beliefs. MNW indicated in her admission form that she is Rastafarian by religion. The petitioner was also emphatic that MNW has never shaved her hair since birth and that doing so is against their faith and religious beliefs. He maintained that MNW went through public nursery and primary schools without encountering the prospect of being forced to shave her hair against her religious beliefs and that the scenario she faces now has traumatized her.
35. The stance taken by the respondents that MNW must shave her hair before she is allowed back to school is clearly contrary to article 32 which guarantees every person’s right to religion and to manifest that religion through practice. Keeping rastas is the minor’s outward manifestation of her religious beliefs and forcing her to cut the hair is contrary to those beliefs. Article 32(3) is also clear that a person may not be denied access to an “institution” because of his or her religion while sub article (4) states that, no person should be compelled to act or engage in an act that is contrary to the his or her beliefs or religion.
36. It is therefore plain to me that the respondents’ demand that the minor must cut her hair is constitutionally prohibited. Article 32 contains constitutional guarantees that should not be undermined in a way that violates one’s religious beliefs. In that regard, article 32 underscores the breath and width of the right to religion and, therefore, guarantees MNW’s right to declare, express, practice and manifest her religious beliefs to the fullest extent.
37. As was observed by the Supreme Court of Canada in [R v Big M Drug Mart Ltd](#) (1985) 1 SCR 295; [1986] LRC (Const) 322);
- “The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal...[E]very individual [i]s free to hold whatever religious beliefs his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.”
38. Article 19 of our [Constitution](#) unashamedly proclaims that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals, communities and



- to promote social justice and the realisation of the potential of all human beings. The article is also categorical that the rights and fundamental freedoms in the Bill of Rights belong to each individual; are not granted by the State and are subject only to the limitations contemplated in the Constitution.
39. In the same vein, article 20(1) states that every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The article requires courts when interpreting the Bill of Rights, to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.
40. Regard must also be had to article 21(1) which makes it a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. All State organs and public officers have a duty to address the needs of vulnerable groups within society, including “children” and members of particular ethnic, “religious” or cultural communities.
41. As already stated, articles 43(1)(f) of the Constitution guarantees the right to education while article 53(1)(b) guarantees every child, including MNW, the right to compulsory basic education. This right cannot be compromised on the basis of one’s religious beliefs or the way one manifests those beliefs. These constitutional guarantees notwithstanding, the minor finds herself torn into choosing between the right to keep her rastas as a way of manifesting her religious beliefs and education. If she opts to keep her rastas, she must then forgo her right to education because of school rules. The opposite is that she shaves her rastas, thus surrenders her right to manifest her religious beliefs, and resumes school, despite this being a right guaranteed by the Constitution. School rules and regulations stand in the way of her right to religion and education because they do not allow one to wear “dreadlocks.”
42. To the extent that the school rules and regulations have been applied in a manner that denies MNW the right to access the 1st respondent’s school to receive education unless she cuts her rastas, violates the essence of articles 32 and 43 on the right to religion and education respectively. This is because although these rights are guaranteed by the Constitution, the respondents have applied school rules in a manner that negates the fundamental essence of these rights.
43. The Constitution demands that the Bill of Rights be interpreted in a manner that favours enforcement and enjoyment of rights and fundamental freedoms. In this regard, I find it appropriate refer to the Court of Appeal decision in Attorney General v Kituo Cha Sheria & 7 others [2017] eKLR, where it stated thus;

“Quite beyond argument then, the Bill of Rights in Kenya’s constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country’s democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”



44. The court then stated with regard to the application and interpretation of the Bill of Rights;

“...Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation... [C]ourts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and highest claims... [T]hey are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom. It is the duty of every judge, magistrate, member of a tribunal or other body invested with judicial functions to deliberately and unrelentingly pursue, encourage, entrench, protect, jealously guard, educate and propagate Project Freedom and aim to advance openness, democracy, and ensure that liberty rings loud and true in every place and sphere of Kenyan’s socio-political life. the *Constitution* demands that everything the Bill of Rights stands for in its text, its purport, its spirit, philosophy and intendment as a charter of liberty must be given full effect in a bold and unflinching manner. Judges must speak the language of rights and fundamental freedoms and do so with neither apology nor embarrassment. To fail to do so or to do otherwise would be to violate the express precepts of the *Constitution*.” (Emphasis)

45. The principle of maximization in interpreting constitutional provisions containing rights and fundamental freedoms was also advocated for in *Tinyefuze v Attorney General* [1997]UGCC3, thus;

“A constitutional provision containing a fundamental right is a permanent provision n intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico - cultural values so as to extend the benefit of the same to the maximum possible.”

46. Applying the principles in the above decisions, it follows that the respondents are bound to uphold the minor’s rights guaranteed under articles 32, 43(1)(f) and 53(1)(b) as well as section 28(1) of the *Basic Education Act*. This is because these fundamental rights and freedom are enshrined in and protected by the *Constitution*. I therefore find and hold that the respondents’ decision to exclude MNW from school for reason of keeping rastas on religious grounds is not only discriminatory but also violates her right to religion and education. She does not keep the rastas out of choice but due to her strongly held religious beliefs. Her right to education cannot, therefore, depend on violating her right to manifest those religious beliefs. The Respondents are also acting in violation of the *Constitution* by not only



excluding her from school but also forcing her to act in a manner that is contrary to her religion, beliefs and practices.

47. This holding is buttressed by persuasive foreign but important decisions on the issue. *In re chikweche* (*supra*), Chikweche, a citizen of Zimbabwe and a devout follower of the Rastafari movement, applied for registration as a legal practitioner in terms of the *Legal Practitioners Act*, 15 of 1981 of Zimbabwe, but despite possessing the necessary qualifications required by the appropriate regulations and satisfying the additional requirements laid down in the Act, the judge declined to hear his application when he appeared wearing dreadlocks. The judge considered him 'unkempt' and improperly 'dressed' and did not allow him to take the oath of loyalty and of office in terms of s 63 of the Act, as a preliminary to registration. Chikweche filed a reference in the Supreme Court under s 24(2) of the *Constitution of Zimbabwe*, arguing that wearing of dreadlocks was a symbolic expression of his religious outlook inspired by Rastafarianism.
48. The Supreme Court allowed the reference and held, *inter alia*, that the reference in s 19(1) of the *Constitution* to freedom of conscience was intended to encompass and protect systems of belief which were not centred on a deity or were not religiously motivated, but were founded on personal morality. Gubbay CJ, stated;

'It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.'... It is obvious to me that the refusal by the learned Judge to entertain the application placed the applicant in a dilemma. Its effect was to force him to choose between adhering to the precepts of his religion and thereby foregoing the right to practise his profession and appear before the courts of this country, or sacrifice an important edict of his religion in order to achieve that end."

49. In *DZvova v Minister of education, Sports and Culture and others* (2007) A4RLR 189 (SWSC 2007), a minor of Rastafarian faith was excluded from school for keeping dreadlocks. The matter was first filed at the High Court but was referred to the Supreme Court of Zimbabwe for determination of constitutional issues. The Supreme Court held that Rastafarian was not only a religion, but also that expulsion of the minor from school on the basis of her expression of his religious belief through his dreadlocks was a contravention of sections 19 and 23 of the *Constitution of Zimbabwe*. The court observed that the attempt by the school to bar the child from school contravened not only the *Constitution*, but also the provision of the *Education Act*.
50. And in *Department of Correctional Services and another v Police and Prison Civil Rights Union (POPC2V) and others* [2013] ZASCA 40, the Supreme Court of Appeal upheld the decision of the Employment and Labour Relation Court that dismissal from employment of officers who wore dreadlocks based on their religious or cultural beliefs was discriminatory and unconstitutional. The Supreme Court of Appeal stated;

"(22) Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. That impact here was devastating because the respondents' refusal



to yield to an instruction at odds with their sincerely held beliefs cost them their employment.”

51. Applying the jurisprudence emerging from the above persuasive decisions to the present case, it is plain that where the Constitution guarantees the right to religion, the constitutional guarantee includes the right to manifest that religion. It is, therefore, an invasion of that right when one is forced to act contrary to his beliefs.
52. The fact that MNW keeps rastas as a manifestation of her religious beliefs should not have been the basis for excluding her from school. The school’s decision to force her to shave the hair effectively punished the practice of her religion, degraded and devalued her and the other followers of that religion in the eyes of other members of society. The ultimate result was to force her to choose between adhering to her religious edicts thereby foregoing education, or sacrifice an important aspect of her religion in order to pursue education. This is a clear violation of the Constitution and the law both of which guarantee her right to compulsory basic education as none of the rights can give way.
53. In that regard, school rules and regulations, (including rule7), though necessary for proper governing the conduct and discipline of students, must not be applied in a manner that infringes on rights guaranteed by the Constitution. School rules and regulations are intended to ‘regulate and guide students’ conduct and discipline for their well-being and proper management of the school but not to punish them. They should not therefore undermine substantive constitutional rights and being subordinate to the Constitution, they should not be applied so as to overrides constitutional provisions. Rather, they should augment those provisions. The fact that rule 7 does not allow keeping of dreadlocks, is not to say MNW must give up her religious beliefs and do away with rastas given that shaving hair is against her religious beliefs.
54. The respondents argued that rights under article 32 are not absolute and that the right to manifest religious beliefs can be limited by school rules. I do not agree that rights under article 32 may be limited given the way the article is couched. Even if they were to be limited, the limitation must be one contemplated by the Constitution. That is why article 19 is clear that rights and fundamental freedoms in the Bill of Rights belong to each individual, are not granted by the State and are subject only to the limitations contemplated in the Constitution.
55. In that respect, I do not think the Constitution contemplates that school rules should force MNW to act contrary to her religious beliefs. There must be a balance between school rules and rights and fundamental freedoms. Where genuinely held religious beliefs clash with school rules, both sides must strike a balance between religion and education for the good of the learner and the institution. School rules must appreciate genuinely held religious beliefs and should not be applied as though they are superior to the text of the Constitution. They should not be a bar to full realization and enjoyment of rights and fundamental freedoms guaranteed by the Constitution.
56. As the Court of Appeal observed in Seventh Day Adventist church v Minister for Education (*supra*);

“Freedom of religion is a complex issue and requires delicate balance since it protects the rights to freedom of conscience both of believers and non-believers and those whose religious beliefs differ from the beliefs which are being observed in schools or by the majority. In other words a fair balance must be struck..., between the rights of the individual and the rights of others, between the right to believe and manifest a religion and the right to education...”



57. The court then stated;

”The right to freedom of conscience, religion, thought, beliefs and opinion...in its various facets is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others, privately or in public. The manifestation through observance includes observance of a day of worship, and a believer will not be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

58. For MNW, keeping rastas is not a matter of choice. It is about her religion and manifestation of what she genuinely believes to be aspects of that religion which she must not be forced to compromise. The limitation that article 24(1) contemplates is to the extent only that it is reasonable and justifiable in an open and democratic society. The limitation should however take into the account the nature of the right so that enjoyment of one’s right is not prejudicial to the rights of others. Most importantly, limitation is acceptable if there is no less restrictive means of achieving the intended limitation.

59. Looking at the totality of MNW’s case, I am not persuaded that the rule demanding that she cuts her hair which manifests her religious beliefs is a reasonable limitation. It is intrusive and invasive of her right to religion and to manifest that religion. It is therefore not justifiable in an open and democratic society based on human dignity, equality and freedom. The respondents have not shown that there is no less restrictive means to achieve the intended limitation other than coercing her to cut her hair. The respondent’s argument cannot therefore pass the test in article 24. It is not tenable in our constitutional scheme and its expanded Bill of Rights. It plainly violates the right to religion and to manifest that religion and the right to education guaranteed under articles 32, 43(1)(f) and 53(1)(b) of the Constitution respectively as well as section 28(1) of the Basic Education Act.

60. In the end, therefore, having considered the petition, submissions, the Constitution and the law, as well as both local and foreign decisions, I am satisfied that the petitioner has made out a case that the Respondents’ decision to exclude the minor from school for keeping rastas which symbolize her religious beliefs and the attempt to force her to act contrary to her religious beliefs, is a violation of her constitutional rights to religion and education guaranteed by the Constitution and is therefore null and void.

61. Consequently, the petition amended on January 29, 2019 is allowed and I make the following orders.

- a. A declaration is hereby issued that the decision by the School administration of O High School to exclude MNW from school on the basis of her keeping Rastas which manifests her religious beliefs is a violation of her rights guaranteed under articles 32, 43 and 53 of the Constitution and is therefore unconstitutional null and void.
- b. An order is hereby issued directing the School administration of [particulars withheld] High School to immediately recall MNW to resume and continue with her education unhindered.
- c. A permanent injunction is hereby issued restraining the School administration of [particulars withheld] High School from negatively interfering with MNW’s education based on her religious beliefs, particularly for keeping rastas.
- d. The respondents do pay costs of this petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF SEPTEMBER, 2019.

E C MWITA



JUDGE

