REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

PETITION NO. 08 OF 2019

RAKESH D. MADAVIA.....PETITIONER

AND

KENYA UNIVERSITIES AND COLLEGES

CENTRAL PLACEMENT SERVICES.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petitioner's case

1. The Petitioner complains that the 1st Respondent, a public body established in accordance with Section 55 of the Universities Act No. 42 of 2012 has declined to place his son under Government Sponsorship on the ground that he is not undertaking the 8-4-4 system of education.

2. The Petitioner asserts that the 1st Respondent's Placement Policy of August, 2014 which provides for placement of students undertaking the 8-4-4 system of education as government sponsored students to universities and colleges violates Articles 10 and 43 (1)(f) of the Constitution of Kenya.

3. In support of his claim that the placement policy is discriminatory, the Petitioner placed reliance on Article 27 which guarantees equality and freedom from discrimination; Article 43(1)(f) which guarantees the right to education and Article 21 (1) of the Constitution and Article 13(1) of the International Convention on Economic Social and Cultural Rights which underscore the respect for human rights and fundamental freedoms.

4. Additionally, Petitioner relies on **Andrews v. Law Society of British Columbia [1989] 1 SCR 143** which defined Discrimination as

> **"……distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."**

5. In addition, Petitioner relies on **RM (suing through next friend JK) v Attorney General (2008) 1 KLR (G & F) 574** where the court in dealing with the rights of a child born out of wedlock stated thus;

The equal protection provisions do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed, the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different.

6. The Court further stated that:

"The law does all that is needed when it does all that it can indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as fast as its means allow."

7. The Court additional stated that:

We further hold that the principle of equality and non- discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:

1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and

2) Are reasonable in the light of their legitimate aim.

8. Flowing from the foregoing, the Petitioner seeks the following orders:

1) A declaration that the 1st Respondent's policy for placement of students undertaking 8-4-4 system of education as government sponsored students to universities and colleges to the exclusion of Kenyan Citizens undertaking IGCSE of education is discriminatory and a violation of the Petitioner's constitutional rights as provided under Articles 10 and 43 (1)(f) of the Constitution of Kenya

2) An order of certiorari to remove into this Honourable Court to be quashed the 1st Respondent's Placement Policy of August, 2014

3) An order of mandamus directing the 1st Respondent to forthwith constitute a committee to immediately come up with an inclusive policy that takes into consideration placement of students undertaking the 8-4-4 and IGGSCE system of education as government sponsored students to universities and colleges

4) Costs be paid by the Respondents

5) Any other relief

<u>Respondent's Case</u>

9. In response, the 1st Respondent through its Chief Executive Officer, **JOHN MURAGURI,** the 1st Respondent on 26.09.19 filed a replying affidavit sworn on 24.09.19.

10. The 1st Respondent asserts that:

i. Section 56 of the Universities Act bestows on it a statutory duty to co-ordinate the placement of the government sponsored students to universities and colleges

ii. One of the conditions to students' eligibility to placement under the Placement Policy of August, 2014 is that a student must have undergone the Kenyan Government regulated education system and examination in this case the 8-4-4 system of education and Kenya Certificate of Secondary Education Examinations administered by Kenya National Examination Council (KNEC)

iii. That 1st Respondent's duty is limited to compliance within the Government of Kenya policy as well as budgetary allocations

iv. Neither the Universities Act nor the admission criteria for government sponsored students permits the 1st Respondent to place students who were not subjected to Government Regulated examinations by KNEC

v. The students under the 8-4-4 system of education cannot be placed in the same category as students under IGCSE system as the systems are inherently different on the subjects, qualifications and grading

vi. Petitioner's son has a right to education system of his choice and is at liberty to apply for admission to any of the programmes offered by universities and colleges, without the involvement of the 1st Respondent, if he meets the admission requirements

11. In support of its contention, 1st Respondent holds the view that the dispute herein raises a political question and that this court does not have jurisdiction to adjudicate upon questions which are in their nature fundamentally political. Reliance was placed on:

i. Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374 5 U.S. 137 (1803)

ii. Baker v Carr 369 U.S. 186

iii. In **Marbury v. Madison – 5 US. 137**

12. The 1st Respondent also relied on **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR** where the Court of Appeal cited **Marbury -vs- Madison – 5 US. 137** with approval where and stated that:

> **"The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive officers perform duties in which they have discretion."**

13. Additionally, the 1st Respondent relied on **Ndoria Stephen v Minister for Education & 2 others [2015] eKLR**, where Mumbi Ngugi, J. observed that the

> **"Formulation of policy and implementation are questions which are in their nature exclusively political within the province of executive and should never be adjudicated upon by court."**

14. In **Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR** the court stated that:

> **It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justifiability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-giver**

15. Further to the foregoing, the 1st Respondent submitted that the Petitioner had not satisfied the condition precedent for a constitutional petition. In support of this assertion, reliance was placed on the case of **Anarita Karimi Njeru *V* R (No 1) 1979 KLR 154** where the court stated that:

> **"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision**

that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed."

16. On the assertion that a petition may fail for lack of precision, the 1st Respondent relied on **Mumo Matemu Vs Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR** where the Court of Appeal emphasized the importance of precise pleadings in Constitutional Petitions and stated:

> **"We cannot but emphasise the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims."**

17. Concerning the question of whether the Placement Policy is discriminatory, the 1st Respondent relied on **James Nyasora Nyarangi & 3 Others V Attorney General [2008] eKLR** where the court relied on Black's Law Dictionary, Wikipedia, the free encyclopaedia and The Bill of Rights Handbook, Fourth Edition 2001 on the definition of discrimination and stated that:

> **The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which a smaller proportion of those with the attribute are able to comply with, without reasonable justification.**

18. Further on the question of discrimination, reliance was placed on **John Kabui Mwai & 3 Others V Kenya National Examination Council & 2 Others [2011] eKLR** where the Court cited with approval the observation in **President of the Republic of South Africa & Another –Vs-John Phillip Hugo 1997 (4) SAICC Para 41** as follows:

> **"We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context."**

19. On whether the Placement Policy of August, 2014, denies the Petitioner's son their right to education, the 1st Respondent stated that the right is not denied and relied on Section 57 of the Universities Act No. 42 of

2012 which deals with independent admissions and provides that:

> **Notwithstanding any other provisions of this Part, a university or college may independently admit students to its programmes in accordance with its approved admissions criteria**

20. Further to the foregoing, the 1st Respondent placed reliance on **H O O (a child suing through his father and next friend) P O O v Board of Management N School & 2 others [2018] eKLR** where the court in reference to Article 43 and 53 stated that:

> **The Constitution of Kenya 2010 expressly recognizes education as a right for all. Article**

43(1)(f) provides that every person has the right to education while Article 53 provides for a wide array of rights of the children including the right to free and compulsory education and further, that a child's best interests are of paramount importance in every matter concerning the child. Article 53(1) (b) stipulates that *"Every child has the right to free and compulsory basic education."*

21. The court further stated that:

It is also trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution.

ANALYSIS AND DETERMATION

22. After careful consideration of the pleadings filed herein, the submissions made by the parties' respective advocates and the authorities that they cited, I note that the issues for determination are as follows:

a) Whether the petitioner's son's fundamental rights under the Constitution were violated by the respondents.

b) Whether the petitioner is entitled to the orders sought in the petition.

23. In the instant case, the 1st respondent's case was that Section 56 of the Universities Act bestows on it a statutory duty to co-ordinate the placement of the government sponsored students to universities and colleges and that one of the conditions for students' eligibility to placement under the said Policy is that a student must have undergone the Kenyan Government regulated education system and examination in this case the 8-4-4 system of education and Kenya Certificate of Secondary Education Examinations administered by Kenya National Examination Council (KNEC).

24. The Petitioner's son has not undergone the Kenyan Government regulated education system and examination in this case the 8-4-4 system of education and Kenya Certificate of Secondary Education Examinations administered by Kenya National Examination Council (KNEC) and does therefore not meet the conditions for students' eligibility to placement under the said Policy. I also find that although the Petitioner's son is a Kenyan citizen, the 1st Respondent's Policy is justified and reasonable in the light of its legitimate aim. Moreover, the 1st Respondent has a moral obligation to uphold the guidelines concerning the placement of students to universities and colleges for the reason that the under the 8-4-4 system and the IGCSE system under which the Petitioner's son has been schooled are inherently different on the subjects, qualifications and grading.

25. I further find the Petitioner's son has not been denied his right to education for the reason that Section 57 of the Universities Act No. 42 of 2012 provides that any university or college, may, independent of the 1st Respondent, admit students to its programmes in accordance with its approved admissions criteria. In any case, it is trite law that the right to education is not absolute, but is subject to the rules and regulations governing studies/education in a given institution**.**

26. The petitioner's main prayer is for an order that a declaration that the 1st Respondent's policy for placement of students undertaking 8-4-4 system of education as government sponsored students to universities and colleges to the exclusion of Kenyan Citizens undertaking IGCSE of education is discriminatory. The concept of unfair discrimination does not envisage a society which affords each human being identical treatment in all circumstances. Each case requires a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.

27. My humble view is that, in the circumstances of this case, the degree of difference in treatment is from what is stated hereinabove justified since it does not have the effect of withholding or limiting the

Petitioner's son's access to education.

28. Further, the formulation of the 1st Respondent's policy for placement of students and its implementation are questions which are in their nature exclusively political within the province of executive.

29. From the foregoing therefore, this court declines the invitation to act as an advise-giver concerning what ought to have been included or excluded from the 1st Respondent's Placement Policy.

31. From the foregoing analysis, I find that this petition has no merit and it is consequently dismissed.

32. The Petitioner's agitation for placement to universities and colleges of students not undertaking the 8-4-4 system of education is laudable and I shall therefore not penalise him with costs.

33. In the circumstances, I direct that each party bears its own costs of the petition.

DATED AND DELIVERED IN KISUMU THIS *10th* DAY OF *December* 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant

For the Petitioner-

For the 1st Respondent-

For the 2nd Respondent-