



**Methodist Church (Suing through its Registered Trustees) &  
another v Teachers Service Commission & 5 others (Petition  
30 of 2014) [2015] KEHC 5794 (KLR) (5 March 2015) (Judgment)**

*Methodist Church (Suing through its Registered Trustees”  
v Teachers Service Commission & 2 others [2015] eKLR*

Neutral citation: [2015] KEHC 5794 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
PETITION 30 OF 2014  
JA MAKAU, J  
MARCH 5, 2015**

**BETWEEN**

**METHODIST CHURCH (SUIING THROUGH ITS REGISTERED  
TRUSTEES) ..... 1<sup>ST</sup> PETITIONER  
METHODIST CHURCH (SUIING THROUGH ITS REGISTERED  
TRUSTEES ..... 2<sup>ND</sup> PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
TEACHERS SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
COUNTY DIRECTOR OF EDUCATION, ISIOLO COUNTY 3<sup>RD</sup> RESPONDENT  
COUNTY DIRECTOR OF EDUCATION, ISIOLO COUNTY 4<sup>TH</sup> RESPONDENT  
DISTRICT EDUCATION OFFICER ISIOLO SUB-COUNTY . 5<sup>TH</sup> RESPONDENT  
DISTRICT EDUCATION OFFICER ISIOLO SUB-COUNTY . 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**The Parties**

1. The petitioner is a Christian Organization duly registered as an association/Society under the Societies Act, Cap.108 of the Laws of Kenya and gave its address to be that of its advocates. The petitioner describes the 1<sup>st</sup> respondent as an independent commission duly established under Article 248(a)(i) of the Constitution of Kenya, 2010 and gave its registered offices to be in Nairobi. The 2<sup>nd</sup> respondent



is described as County Director of Education; Isiolo County within the Republic of Kenya, 3<sup>rd</sup> respondent is described as the District Education Officer, Isiolo sub-county with the Republic of Kenya. Lastly the interested party is a person with three students in Form 3 and 1 at the petitioner's school namely St. Paul's Kiwanjani Day Mixed Secondary School located within Isiolo County.

## **Background**

2. The facts of the case are that at all material times the petitioner was and is the sponsor of ST. Paul's Kiwanjani Day Mixed Secondary School . That the petitioner provided land measuring about 5 acres for the establishment of the said school and had the land parcel registered in the school's name which was founded in the year 2006 under the sponsorship of the petitioner. That the school has a population of 412 students from diverse religious backgrounds and it's the best performing school in Isiolo County in both public and private category.
3. That for the last 7 years the school has existed with the school uniform as prescribed in the admission letter and signed by the student/parent/ guardian upon admission. That the school uniform has never been contentious before and the students community have lived harmoniously until 22<sup>nd</sup> June, 2014 when at an Annual General meeting cum prize giving day, the Deputy Governor, Isiolo County made an informal request that all Muslim girls in the school be allowed to wear hijab and white trousers in addition to the prescribed uniform. That a week later some unknown people/persons bought hijabs and white trousers for Muslim girls.
4. That the Muslim girls subsequently reported to school wearing hijab and white trousers and open shoes in total disregard of school uniform whilst the non-Muslim students reported to school wearing the prescribed school uniform thus causing tension and disharmony in the school. The school administration requested the Muslim girls to remain in the prescribed school uniform as the attire they adored was contrary to the laid down rules and regulations especially on uniform. Consequently, the Muslim girls and boys went on rampage breaking window panes, threatening teachers and Christian students and later walked out of the school and went to the District Education Officer's Offices.
5. That on 22<sup>nd</sup> July, 2014 the District Education Officer, Isiolo, one Halima Mohammed together with other officials from the Ministry of Education and people from inter faith group visited the school, deliberated on the issue of wearing hijab/trousers by students and all unanimously agreed that the school uniform should remain as prescribed in the dress code. However, the District Education Officer, Isiolo categorically stated that unless hijab/trousers were allowed in the school, there would be bloodshed.
6. On 30<sup>th</sup> July, 2014 the Board of Management(B.O.M), Parent Teachers Association(PTA) and the sponsor of the school met and came up with a return to school formula where only 214 students reported back to school.
7. That on 27<sup>th</sup> August, 2014 the 2<sup>nd</sup> respondent met the school Principal and the members of the school Board of Management, the Parents
8. Teachers Association and the Principal felt that they were being hijacked and therefore wrote a letter dated 28<sup>th</sup> August, 2014 objecting to the directives. That on 28<sup>th</sup> August, 2014 in absence of the Board of Management, parents Teachers Association and the sponsor, the 2<sup>nd</sup> respondent went ahead and held a Parents meeting during school holidays in which meeting the particulars and number of those who attended could not be ascertained. That arising out of the said meeting the petitioner averred that the 2<sup>nd</sup> respondent wrote a letter to the Principal enclosing the resolution of the meeting where the 2<sup>nd</sup> respondent directed among other things that the PTA, BOM and the petitioner/sponsor meet



- before 11<sup>th</sup> September, 2014 and decide with finality whether hijab and white trousers for girls would be acceptable as part of school uniform.
9. On 9<sup>th</sup> September, 2014 the 2<sup>nd</sup> respondent directed that the school's BOM, PTA and the sponsor met at St. Paul's Kiwanjani, Day Mixed Secondary School at Isiolo County where the issue of hijab and trousers was exhaustively discussed. That out of 22 members who attended the meeting 18 voted for the status quo to remain; 3 voted in favour of hijabs and trousers and 1 recommended longer skirts for girls.
  10. That on 10<sup>th</sup> September, 2014, even before recovery of minutes of 9<sup>th</sup> September, 2014, the 2<sup>nd</sup> respondent together with a few officers at her ministry held a meeting in her office whereby they directed that the Muslim girls should wear hijab/trousers and the principal be transferred in total disregard of the decision of the BOM, PTA and the sponsor of 9<sup>th</sup> September, 2014 resulting into the confusion and stalemate at the school and that was notwithstanding that on 9<sup>th</sup> September, 2014 the Chairperson of BOM, one Joseph Ibrahim Ithali had announced to the students the outcome of the BOM, PTA and sponsor meeting that students should continue wearing the prescribed school uniform.
  11. That by a letter dated 12<sup>th</sup> September, 2014, the 1<sup>st</sup> respondent issued a letter of transfer transferring one GEORGE M. MBIJIWE from ST. Paul's Kiwanjani Day Mixed Secondary School simply because he had resisted the interference of smooth running of the school and opposed wearing of hijab/trousers contrary to the school rules and regulations. The sponsor/petitioner contend the said school principal had been the best performing head of the school in the entire Isiolo County for the last 5 years consecutively and terms his transfer as malicious, irrational and punitive in view of his performance and stand on the issue in dispute.
  12. That by a letter dated 11<sup>th</sup> September, 2014 by the petitioner's presiding Bishop addressed to the respondent and other relevant authorities, he raised the issues complained thereof and requested that the school rules and regulations be adhered to and the principal be retained, the BOM and PTA be allowed to complete their term of appointment without interference and that the sponsor be respected and allowed to execute its rightful role in the school's affairs.

### **The Petition**

13. The petitioner was aggrieved by actions, recommendations and actions taken by the respondents and therefore filed this petition. The petitioner has set out its complaints at paragraph 32, 33, 34, 35 and 35 of the petition in the following terms.
  - i. The Christian students at the school have felt that the school has accorded Muslim students special or preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya, 2010.
  - ii. The petitioner avers that the respondents' actions are unreasonable, and tantamount to disrupting school program because the exams will be conducted on 17<sup>th</sup> October, 2014.
  - iii. The respondents have erred in failing to play a key role in standardization of school uniforms thus creating economic disparities on religious backgrounds. The respondents' actions have given an impression that the Muslim students have been accorded special or preferential treatment, a fact that is tantamount to discrimination of the other students.
  - iv. The respondents decision and action complained hereof is unconstitutional, unjustified, unlawful, capricious, unreasonable, irrational, malicious, against core values, in bad faith, unilateral, biased, tantamount to discrimination and the rules of natural justice and the rule of law.



14. The petitioner is seeking 9 reliefs on the face of the petition as follows:-
- a. A declaration that the respondents' decision to allow Muslim students to wear hijab/trousers is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School thereof
  - b. An injunction preventing the respondents from allowing Muslim students from wearing hijab/trousers contrary to the school rules and regulations at St. Paul's Kiwanjani Day Mixed Secondary School .
  - c. An order to remove and quash the 3<sup>rd</sup> respondent's decision of 12<sup>th</sup> September, 2014 purporting to transfer the said principal, George M. Mbijiwe from St. Paul's Kiwanjani Mixed Day Secondary School to Ngaremara Secondary School.
  - d. An injunction restraining the respondents from interfering with the petitioner in executing rightful role as a sponsor in respect of the affairs of St. Paul's Kiwanjani Day Mixed Secondary School
  - e. A 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
  - f. An injunction preventing the respondents from dissolving or purporting to the current Board of Management and Parents Teachers Association of St. Paul's Kiwanjani Day Mixed Secondary School
  - g. General damages
  - h. Any other or further reliefs that this Honourable Court may deem fit to grant
  - i. Costs and interest

### **The Respondents Response**

15. The 1<sup>st</sup> respondent filed a replying affidavit to the petition sworn by Mary Rotich, a Senior Deputy Director in charge of Teacher Management of Post Primary Teachers at the Teacher's Service Commission Headquarter. In brief the 1<sup>st</sup> respondent contend that the 1<sup>st</sup> respondent's is established under Article 237(1), of the Constitution of Kenya, 2010 with primary functions under Article 237(3) of the Constitution which includes assigning teachers in its service to teach in various public schools, promote and transfer teachers and exercise disciplinary control over teachers amongst other functions. That in exercise of its constitution further it may administratively and in compliance with Article 6 of the Constitution act either directly or effect such transfer and/or deployment at instance of/or through its offices and the local administrative level. The 1<sup>st</sup> respondent further contend that in transferring the principal they acted within the law and in the best interest of the principal and the school and after taking into account all circumstances of the matter. The 1<sup>st</sup> respondent further contend that if the petitioner is aggrieved by the transfer of the school principal they should not have filed the petition without exhausting the dispute resolution mechanism available to all employees of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent further contends that the petitioner in this matter has no locus standi to file the suit. The 1<sup>st</sup> respondent further contend that the petition is incompetent and fatally defective by failure to cite with precision the relevant provisions of the Constitution alleged to have been violated and the manner in which the commission has violated the same to warrant the attention of this Constitutional Court. The 1<sup>st</sup> respondent contend the demands put forth by the petitioner are unreasonable, unlawful



and grossly offends the provisions of the Constitution, employment Act, and the TSC Act. The 1<sup>st</sup> respondent prayed for the petition to be struck out as against the 1<sup>st</sup> respondent since it raises no cause of action against the 1<sup>st</sup> respondent.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Response**

16. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit dated 17<sup>th</sup> October, 2014 sworn by Murerwa S.K(Mrs.) County Director of Education Isiolo County. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents contend that their intervention was only meant to mitigate the animosity to allow students settle down and prepare for National Examinations and other tests. That in the meetings it was resolved that Muslim students be allowed to adorn hijab and that the transfer of the Principal was necessitated after it had become apparent that he would be adamant in effecting the resolutions of the meetings. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents contend that there was no resolution to dissolve the BOM, and PTA and such allegation is outrageous and misleading. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent pray the petition be dismissed.

### **The Interested Party Response**

17. The interested party was enjoined in this petition upon court's order dated 15/10/2014. The interested party filed a replying affidavit dated 3<sup>rd</sup> November, 2014. The gist of the replying affidavit is that he is a parent at the petitioner's school and a member of the Board of Management of St. Paul's Kiwanjani Day Mixed Secondary School . That the petition in a non-starter as petitioner has no capacity to file any petition and that it has no locus standi. That hijab is an Arabic word literally meaning to cover or a curtain to identify Muslim females and which allows them to guard their modesty and decency. That it is of extreme importance to every practicing Muslim female including his daughters and other female students at a petitioner's school. That the denial of hijab, it is contended is indirect discrimination against his daughters and other Muslim female students at St. Paul's Kiwanjani Day Mixed Secondary School on their right to education on the basis of their religion.
18. The interested party further contend that Article 32 of the Constitution of Kenya, grants any person the right to freedom of conscience, religion, thought, belief and opinion and no one should be compelled to act or engage in any act contrary to the persons beliefs or religion and by denying the students to put on hijab would be forcing them to engage in an act contrary to Muslim religion and belief which freedom is protected under the Bill of Rights. The interested party in paragraph 34 of his Replying Affidavit depones that he cross petition that Muslim students be allowed to wear a limited form of hijab as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit under Article 27(5) of the Constitution of Kenya, 2010.

### **The Pre-trial Process**

19. In a pre-trial conference held on 21<sup>st</sup> October, 2014 the parties agreed that this petition be determined by way of written submissions. The petitioner was to file its submissions within 10 days and serve the same and the respondents and interested party were to file their response within 10 days from the date of service.

### **The Petitioner's Case**

20. The petitioner's case is based on the petition dated 18<sup>th</sup> September, 2014 filed in Nairobi at the Constitutional and Human Rights Division Petition No. 462 of 2014 which was on 18<sup>th</sup> September, 2014 transferred to Meru High Court and registered as a petition No. 30 of 2014.



21. The petition is supported by verifying affidavit of Kimaita John Machuguma sworn on 18<sup>th</sup> September, 2014 and his further affidavit dated 21<sup>st</sup> November, 2014 together with several annexures thereto.
22. Mr. Kimaita John Machuguma in his affidavits has deponed that the petitioner is the sponsor of the St. Paul's Kiwanjani Day Mixed Secondary School and it provided land for the school comprising of 5 acres and it had it registered in the school's name. That the school was founded in 2006 and has a population of 412 students from diverse religious backgrounds.
23. That for the last 7 years the school has existed it has school uniform prescribed in the admission letter and signed by the students' parents/guardians upon admission and which school uniform has never been in contention until 22/6/2014 when in Annual General meeting the Deputy Governor Isiolo County made an informal request that all Muslim girls in the school be allowed to wear hijab and white trousers in addition to prescribed uniform.
24. Mr. K. J. Machuguma in his affidavit avers that before the request could be considered and accepted the Muslim girl students reported to school wearing hijabs, white trousers and open shoes in total regard of the school uniform and on school administration requesting them to adorn the school uniform, the Muslim girls and boys went on rampage and destroyed school property as well as threatening school teachers and Christian students.
25. That education officers within, Isiolo with other officials from the Ministry of Education visited the school, held a meeting with the BOM, PTA and sponsor and came up with return formula but during August holidays the 2<sup>nd</sup> respondent met principal, BOM, and PTA in a general meeting which recorded that status quo be maintained and that hijab and white trousers were rejected which resolution the 2<sup>nd</sup> respondent overruled and directed that Muslim girl students should wear hijab and white trousers and that the principal of the school be transferred.
26. That the Bishop of the petitioner raised the issue with relevant authorities but his request was rejected.
27. Mr. K. J. Machuguma depones that the Christian students at the school felt that special or preferential treatment was being given to Muslim girls and that they were on their part being discriminated against them contrary to Article 27 of the Constitution of Kenya, 2010 that the petitioner averred that the respondents actions are unreasonable and tantamount to disrupting school program and that they erred in failing to play a key role in standardization of school uniform thus creating economic disparity on religious background.
28. It is further deponed that the respondents' decision and action complained of is unconstitutional, unjustified, unlawful, capricious, unreasonable, irrational, in bad faith, unilateral, biased, and tantamount to discrimination and is against the rules of natural justice and the rule of law.
29. The petitioner in the further affidavit has deponed that the 1<sup>st</sup> respondent though legally mandated to transfer any teacher to any part of the country the transfer must be done within the law and or compliance with Article 10 of the Constitution of Kenya, in good faith and in the interest of all the parties concerned including students.
30. The petitioner in response to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents replying affidavit has deponed that adopting hijab and white trousers in schools for Muslim girls has adversely affected schools which adopted such dress code and have declined academically due to interference by parents who adore wearing of hijab and not the school prescribed uniform.
31. The petitioner in response to interested party's affidavit has deponed that the issue in this matter is of school uniform however the interested party intends to make it appear like a religious issue urging the



sponsor is a Christian institution and has never discriminated against any student on religious basis or background, though majority of the students are muslims, they are treated equally with other students notwithstanding their religious faith.

32. The petitioner further deponed that Supkem, Isiolo Branch and Muslim patriots Youth Association Isiolo wrote letters to the Chairman, County Education Board asking for hijab to be worn by Muslim students and contend if these letters are not carefully handled they can bring turmoil in Isiolo County, attaching the letters marked KJM 5(a) and dated 30<sup>th</sup> July, 2014.
33. The petitioner further depones that it is the responsibility of the BOM, PTA in consultation with the Ministry of Education to decide on the school uniform, rules and regulations.
34. It is the petitioner's case and is as deponed by Mr. K. J. Machuguma that the interested party's children were admitted to petitioner's school after the parents/ guardian signed admission letter and agreed to comply with school rules and regulations as provided in annexure in support marked KJM6. It is further deponed though interested party is a PTA and BOM member he has not been supporting the school and is indebted to the school in form of school fees.

### **The 1<sup>st</sup> Respondent's Case**

35. The 1<sup>st</sup> respondent's case is as per the replying affidavit sworn by Mary Rotich, Senior Deputy Director in charge of Teaching Management of Post Primary Teachers at Teachers Service Commission. The respondent's case briefly is that it is legally mandated to transfer any teacher to any part of the country in exercise of its primary function including disciplining teachers. That the action they took in transferring the principal from the school was influenced by a number of factors such as security, management of the school, student's interest amongst many others.
36. That the principal having not contested, objected or appealed to the commission against the transfer the petitioner has filed the petition prematurely and without exhausting the dispute resolution mechanism available to all employees of the commission.
37. The respondent contends that the petitioner in this matter has no locus standi to file the suit herein and that the petition as such is incompetent and fatally defective and that if prayers sought are granted it will amount to usurpation of the commission's constitutional statutory and administrative mandate which shall uproot the philosophical concept behind chapter 15 of the commission. The respondent further contend the demands by the petitioner are unreasonable, unlawful, and grossly offends the provisions of the constitution namely Article 27, 237 and 249 (2), (b) of the Constitution, the employment Act, the TSC Act on equal treatment of all employees.
38. The 1<sup>st</sup> respondent contends that the petition ought to be struck out as against it since it raises no cause of action against the 1<sup>st</sup> respondent.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Case.**

39. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents case is that they only intervened to mitigate the animosity with the petitioner's school so as to allow students settle down and prepare for national examination and other tests. That in the deliberations, the meeting resolved that it was fair and just that Muslim students be allowed to adore the hijab and that they resolved the principal be transferred after it had become apparent that he was adamant in affecting the resolution. The respondents contend that the petitioner has no locus standi or authority to petition the honourable court on behalf of the Board of Management (BOM) which is a body corporate capable of suing and being sued on behalf of the school.



## **The Interested Party's Case**

40. The interested party's case is that he is a serving member of BOM of the petitioner's school and a parent at the said school with 3 children at the said school. That the Muslim girls at the petitioner's school should not be denied to wear a limited form of hijab as by denying them wearing of hijab would be forcing them to make a painful choice between their religion and education.
41. The interested party contends denying Muslim girls to wear hijab is discriminatory against his daughters and other Muslim female students on their right to education on the basis of their religion contrary to Article 27(5) of the Constitution of Kenya, 2010 and this interferes with the right of freedom of conscience, religion, belief and opinion as enshrined under Article 32 of the Constitution of Kenya, 2010.
42. The interested party contends that the petitioner lacks locus standi in respect of orders (b) and (f) sought to stop the transfer of the head teacher of petitioner's school as the same are not a constitutional issue nor a breach of the bill of rights that require enforcement by a non-party under Article 258 and 22 of the Constitution of Kenya.
43. The interested party contends that he is cross petitioning through his affidavit for Muslim students to be allowed to wear a limited form of hijab as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya, 2010 and as their right to equal protection and equal benefit of the law under Article 27(5) of the Constitution of Kenya, 2010.

## **Submissions**

### **(a) Petitioner's Submissions**

44. Mr. Kibe, learned advocate and Mr. Kurauka, learned Advocate jointly represented the petitioner and made their written and oral submissions on its behalf. Mr. Kibe Mungai and Mr. Kurauka highlighted on their submissions dated 1<sup>st</sup> December, 2014. The counsel contended that the sponsor of the subject school had done several things for the school including providing 5 acres to establish the school, put in necessary educational infrastructure and that the school has 412 students from diverse religious backgrounds.
45. M/S Kibe Mungai urged that the school has a prescribed dress code which states how students are supposed to be dressed in their capacity as pupils which is to ensure the students are facilitated with education which will enable them acquire a KCSE certificate. He submitted that since the start of the school in 2005 the standards have been having that school uniform has per annexure II.
46. Mr. K. Mungai submitted that the petition arose as sometimes in June, 2014 a request was made by some students and the Deputy Governor, Isiolo County that Muslim girls students be allowed to wear hijab and white trousers and open shoes. The matter was discussed and when it was not resolved in favour of wearing the hijab one morning the Muslim girl/students went to school without uniform wearing hijab. This resulted in 2<sup>nd</sup> and 3<sup>rd</sup> respondents passing a resolution that Muslim girl students must be dressed in hijab accompanied by white trouser and open shoes. That the 2<sup>nd</sup> and 3<sup>rd</sup> respondents resolved that the headmaster of the school has to be transferred. The 1<sup>st</sup> respondent then transferred the principal to another school and within one week retransferred him to another school.
47. Counsel submitted that the issue as to the function of the Board of Management is not contested, that it determines the school uniform and makes rules and regulations to run the school. That the existing rules do not allow wearing of the contested dress by the Muslim girl students. That the wearing of the



hijab and white trouser he submitted was managed through the action of 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents and interested party being aided and abated by the 1<sup>st</sup> respondent through coercion, intimidation and abuse of power to regularize or create a defacto where the wearing of the contested dress code has been rectified for 4 or so months despite the school rules and regulation not permitting so, urging this petition is basically intended to maintain the rule of law which requires all students admitted to the school to be governed by the applicable rules.

48. Mr. Kibe Mungai submitted further that going to the school is voluntarily and any rules can be changed but in a laid down procedure but not by use of coercion or force or any illegal means as that would create anarchy. He urged that as long as there are rules and regulations they must be followed and respected by all.
49. Mr. Kibe urged that the school principal enforces the rules and those who are opposed to them they should not be allowed to remove the principal when he is enforcing the rules as that should not be permitted in a civilized society. He urged the Deputy Governor, interested party and other parties aggrieved by the rules should have challenged the rules on grounds as set out by institution or before court urging the way things were done was ignoring discipline and that it was not the role of the Deputy Governor to interfere. The 2<sup>nd</sup> respondent he urged should similarly have not done so. He urged the petitioner is seeking protection from illegality. He submitted the respondent's should not have audience in court. He submitted that parties should revert to status quo that prevailed before the illegality; so that people can have civilized decision and revert to democracy,.
50. Mr. Kibe Mungai submitted on prayers (a),(d) and(e) of the petition together. He contended that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent resolutions are illegal urging protection of law can be based on decisions which are made by bodies with power to make such decisions. In support of this proposition he relied on Article 27 of the Constitution of Kenya, 2010.
51. Mr. Kibe Mungai on right to freedom from discrimination urged that even assuming the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had powers to prescribe the dress code within the schools in Isiolo County, it would be discriminatory of them to urge the rights of girls of Muslims alone urging the likes of Akorinos or Ndini ya Musambwe and others would be discriminated. He urged by purporting to regulate the dress code for Muslim girls alone is discriminatory as public officials cannot pick one group and support it, while overlooking the other.
52. Mr. Kibe Mungai contended that petitioner is a Christian institution which decided to have a school on their plot that they could have sold. He contended the respondent cannot be permitted without consulting the petitioner, in defiance and contempt of existing rules to impose on Islamic dress for Muslim girls in Methodist sponsored institution to project the Muslim dress. He urged that the petitioner is seriously discriminated while the existing rules are not discriminatory. He contended that the officials are discriminatory by applying one religion.
53. Mr. Kibe Mungai contended that the Kenya is a secular state as per Article 8 of the Constitution of Kenya, 2010. in support of his proposition Mr. Kibe Mungai relied on the case of Seventh Day Adventist Church(East Africa Ltd) V the Minister for Education & 2 others Pet. No. 431 of 212(Nrb). Under paragraph 51, 72, 73 and 75.
54. Mr. Kibe Mungai contested the subject school has not infringed the freedom of exercise Islam by restricting the uniform. In support of that proposition he relied on the case of R V the Head Teacher Kenya High School & Another Judicial Review No.318 of 2010(Nrb) page 66-67.



55. On prayer (b) of the petition Mr. Kibe Mungai contended that the decision by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent is unconstitutional as it is discriminatory and illegal. He contended the court is under Article 23 of the Constitution entitled to issue injunction.
56. On prayer (c) of the petition Mr. Kibe Mungai contend that a teacher can be transferred anywhere in Kenya, however the contention in this petition is that the respondents in order to impose the Islamic dress code cannot be allowed to transfer the principal. He urged the illegal decision should be quashed as the transfer was out of malice in support of his submissions he referred to paragraph 33 of the supportive affidavit.
57. On prayer (e) and (f) Mr. Kibe Mungai contended that the submissions by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on page 1 recognized that Board of Management is better placed to resolve the issues of dress code. He submitted until the issues of dress code is resolved in a civilized manner an order of injunction should issue to enable sanity prevail. He urged the respondents and interested party had a right to file a cross-petition to pursue their grievances. He pointed out that one cannot set up an affidavit without raising the issue in a pleading. He submitted that no case was pleaded by the respondent's or interested party to be entitled to the orders.
58. Mr. Kibe Mungai on the issue of locus standi contended that under Article 22(1) and (2) of the Constitution of Kenya, 2010, any person aggrieved or threatened of his fundamental freedom has a right to institute proceedings in a court of law. He also referred to Article 258 in support of his proposition that every person has a right to institute court proceedings claiming the constitution has been contravened or is threatened with contravention.
59. He submitted the said Article gives the petitioner herein locus standi as the petitioner is the sponsor of the school as the issue affects Article 8 of the Constitution as the petitioner do not profess its religion in the school.
60. On Teachers Service Commission Mr. Kibe Mungai contended that the role of the commission is an important one. He contended as per Article 249 of the Constitution of Kenya, 2010 the Commission was misled on transfer of the principal sought by 2<sup>nd</sup> and 3<sup>rd</sup> respondents when it was told the principal was swapping with another headmaster, yet facts show that the teacher was being punished for upholding dress code as per school rules. He submitted in such situations TSC can be indifferent in such relations and let the matter be dealt by the court. He submitted that it is not fair for TSC to come and say they can transfer teachers anywhere within the country arbitrary.
61. Mr. Kibe Mungai contended that the interested party is trying to protect the purported right of Muslim girls to wear hijab at the school. He urged that right to religion does not include the right to wear hijab for educational purposes. He urged if the Muslim girls are aggrieved by the school rules they should have followed the rules of procedure by putting up a cross-petition. He urged that the interested party is an Islamic agitator who do not obey school rules though a member of BOM.

#### **(b)1<sup>st</sup> Respondent's Submissions**

62. MR. Anyour, learned Advocate represented the 1<sup>st</sup> respondent and made the submissions on its behalf. Mr. Anyour highlighted on his submissions dated 4<sup>th</sup> December, 2014. He submitted that the constitutional mandates of TSC are well spelt out under Article 237 of the Constitution of Kenya, 2010. He contended that it does not matter how the principal's transfer came about as it is the mandate of the 1<sup>st</sup> respondent to transfer teachers. He urged the teachers have terms and conditions of service. That they have code of regulations to govern the conduct of teachers in this country. The counsel therefore submitted the petition as regards the 1<sup>st</sup> respondent is premature as the



dispute resolution mechanism that exists has not been exhausted and further more teachers are under employment contract. In support of that proposition he relied on regulation 28(4),(b) of the Code of Regulation for teachers.

63. Mr. Anyour, learned advocate contended that the teachers aggrieved by decision of TSC are allowed to appeal to the commission over the matter in issue. In support of this proposition he relied on Section 46 of TSC Act. He added in the instant matter the principal has not contested the transfer nor has he appealed against the transfer or questioned the same.
64. Mr. Anyour contended that the issue of transfer is a constitutional issue regulated by the Employment Act. He submitted that the constitution of Kenya should not be reduced to a tool of litigation of any dispute. The counsel in support of this proposition relied on the case of Uhuru Kenyatta V Star Publication Ltd Petition No. 187 Of 2012, Joseph Muturi & Another V Counsel Of Jkuat(2013) Eklr And Rebecca Anne Maina & 7 Others V Jkuat Industrial Court Case No. 1789 Of 2013. The counsel submitted therefore myriads of the authorities relied upon did support that the issue of transfer do not raise a constitutional issue especially where there is a remedy under statute. He added further the right allegedly violated has not been particularized and the manner of violation nor has the violated Article been stated. In support of that proportion counsel relied on the case of Anarita Karimi Njeru V Republic No.1(1976-80) 1KLR 1272.
65. Mr. Anyour contended that the demand by the sponsor that the Headmaster must be retained at the school is illegal and unlawful. In support of this proposition he relied on Section 27 of the Basic Education Act which sets out the role of a sponsor in a school which role he submitted has nothing to do with the transfer of the teacher submitting that demand is against public policy.
66. Mr. Anyour contended on the issue of school uniform that it is BOM which should decide whether hijab should be worn or not but the principal took sides and as such it is contended by the 1<sup>st</sup> respondent as the principal got involved there were justification and justifiable reasons for principal to be transferred in the best interest of the principal and the school.

#### **(c) Th 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Submissions**

67. Mr. Kieti, learned litigation counsel for the State represented, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this petition. The counsel submissions are dated 5<sup>th</sup> December, 2014. The counsel highlighted on the submissions contending that the respondent's intervention was merely aimed at solving the dispute but was not to impose any prescribed uniform. He submitted the respondents were aware that BOM was better placed to resolve the issues that were raised at the school at the time the decision was made. He urged the BOM had the expertise and knowledge and background of the area, hence better placed to accommodate diversity reasonably.
68. Mr. Kieti, contends that there are no dominating members of the BOM as Section 56 of the Basic Education Act 2013 spells out the composition which is diverse and preserving the interest of other members. He submitted that there was no decision by the BOM.
69. Mr. Kieti, prayed that the petition be dismissed and the issue in contention be referred to the Board of Management of the said school for proper recommendation.

#### **(d)the Interested Party Submissions**

70. M/S Musa Advocate jointly with Mr. Ali Advocate represented the interested party in this petition. M/S Musa relied on submissions filed on 4<sup>th</sup> December, 2014 and highlighted on the same on 15<sup>th</sup> January, 2015.



71. Mr. Musa on prayer (a) of the petition and the alleged cross-petition under paragraph 34 of the interested party's affidavit contended under Rule 10(3) of Practice and Procedure Rules of the Constitution Rules (Mutunga Rules) (as she referred to them) the rules allows any party to make oral submissions or rely on a letter or document where he is alleging denial or violation of fundamental freedoms. She contended the interested party has surpassed the informality mentioned by Rule 10(3).
72. M/S Musa contended on prayer (a) of the petition in the replying affidavit of the interested party's he has attached a letter from the Chief Kadhi of Kenya dated 3/11/2014 alluding to the importance of hijab to Muslim females including the interested party's daughter and in her submissions explained hijab is a dress for Muslim females which covers the whole body from the face and hands but the girls are seeking half hijab being scarf and a trouser; urging the questioned dress by Muslim meets the requirements of the hijab.
73. M/S Musa contended that the petitioner has failed to adduce evidence to show that in allowing the Muslim girls students to wear the hijab that could be discriminating against Christian students urging that no Christian student has sworn any affidavit on her own or through their parents or guardian to demonstrate discrimination.
74. M/S Musa urges that on jurisprudence the petitioner has totally misunderstood the doctrine of discrimination. The principle of equality or equal protection before the law or non-discrimination does not mean absolute equality but means relative equality treating equally what are equal and unequally what are unequal. In supporting that proportion counsel referred to the case of Federation Of Women Lawyers Kenya (fida-k) & Others V Attorney General & Others Pet. No. 102 Of 2011(NRB) At Page 19-24.
75. M/S Musa contended that the respondents decision to allow Muslim students to wear hijab was based on two things (a) to allow peace at the school as evidenced by 2<sup>nd</sup> respondent's affidavit and annexures, after girls were denied hijab (b) to accommodate Muslim girls to wear hijab. The counsel contends the request to wear hijab were just made by Muslim students before the Deputy Governor put up a similar request. The counsel urges the respondents made the accommodation because the Basic Education Act identifies the promotion, of peace, integration, cohesion, tolerance, and inclusion of values and principles in the promotion of Basic Education in the country. The counsel referred to Section 4(1) of the Basic Education Act; 2013.
76. M/S Musa urged that Article 10 of the Constitution of Kenya, 2010 instructs every person including public officers to observe the value of social justice, inclusiveness and non-discrimination terming the respondents decision as accommodation or adjustment or modification. In support of that proposition the counsel relied on the case of constitutional court of South Africa MEC for Education: Kwazulu-Natal and Others V Pillay (CCT 51/06(2007) ZACC 21 at paragraph 72.
77. M/S Musa contended that the petitioner failed to tell the court whether the alleged direction is direct or indirect urging that the constitution of Kenya, 2010 is alive to such situation as discrimination can either be direct or indirect. She submitted that in direct discrimination means that the assailant intentionally treats another less favourably as he treats others because of that other person protected ground or characteristics.
78. In support of that proposition counsel relied on Article 27(4) and (5) of the Constitution of Kenya, 2010 which deals with the issue of indirect and direct discrimination.
79. The Counsel further urged that indirect discrimination occurs when the assailant though has no intention to treat another disfavouredly nonetheless puts some people to disadvantage because of that other person protected ground. In support of that proposition counsel relied on the case of



- U.S. Supreme Court *Griggs V Duke Power CO*; 401 VS 424(1971) Paragraph 3. Counsel concluded her submissions on that point by submitting the burden of proving direct discrimination claim lies with the petitioner or claimant. She referred to US Supreme Court Of *Griggs V Duke Power Co. Case(supra)* at paragraph 2 in support of her proposition.
80. The interested party's counsel contended that the petitioner has failed to show on what grounds were Christian students at the school discriminated against by the respondent's decision. The counsel urged if the ground is assumed to be a religion it is imaginable the respondents made a decision because Christians were Christians urging further an intention must be shown.
  81. M/S Musa contended that in an individual claim though there may be no intention something neutral can disadvantage another person because of that other strong protected ground. The law applicable the counsel submitted was laid down in the case of *The Queen On Application Of Sarika Angel Watking-singh( A Child Acting By Janita Kumari Singh , Her Mother And Litigation Friend V The Governing Body Of Aberdare Girls High School & Another(2008) EWHC 1865(Admin)* on paragraph 38.
  82. M/S Musa on assertion that the Muslim students are enjoying special treatment submitted that the respondents decisions does not disadvantage Christian students as the Christianity does not require Christian students to wear hijab nor do Christian students hold wearing of hijab as a matter of special importance to them. The counsel submitted the law of establishing personal disadvantage was established in the case of *The Queen On Application Of Sarika Angel Watkins-singh( A Child Acting By Sanita Kumari Singh, Her Mother And Litigating Friend(Supra)Paragraph 56(B)*.
  83. M/S Musa contended that the respondents made the decision to continue peaceful manner in the school to accommodate Muslim students urging the constitution and Education Act are relevant and decision of the respondents was legitimate and proportionate. In support of that proposition counsel relied on the case of *MEC For Education; Kwa Zulu Natal And Others V Pillay(supra)* at paragraph 86.
  84. M/S Musa contended that the respondents decision was not discriminatory nor was it unconstitutional or unlawful. The counsel urged that the decision may have violated the school rules and regulations but submitted that it is school rules and regulations which are unconstitutional and discriminatory.
  85. M/S Musa contended that the existing school uniform policy indirectly discriminates against the interested party's daughters and other Muslim female students. In support of that proposition counsel relied on the case of *Sarika Angel Case(Supra)* at paragraph 58.
  86. The counsel contended that the problem is the school uniform and Christian students are people of comparison with the Muslim students. She urged the interested party has shown how important hijab are to his daughters and that the Chief Kadhi attaches importance of wearing hijab for Muslim female. The counsel further urges that the school rules can be sustained if justified. She referred to Presiding Bishop supportive affidavit who identified the goal of the school as an academic excellence stating the reason for disallowing wearing of hijab is informed by the Kenya High School decision and the school identified objects.
  87. M/S Musa contended that no imaginable way it can be stated that wearing headscarf and a pair of trousers amounts to disrespect to teaching by teachers nor disrespect of intelligence or communication with teachers and students urging that there is no linkage between refusal to allow Muslim students, to wear hijab at school and academic excellency; nor do hijab introduce aspect of indiscipline on wearers by merely wearing them. Counsel relied on the case of *Sarika Angel Case Supra* at paragraph 78.
  88. M/S Musa submitted that what is before this constitutional court is not the constitutionality of the school uniform but refusal to make an exception to existing school uniform. She urged that by allowing



exception to existing uniform it won't allow a floodgate of many cases as submitted by the petitioner. Shereferred to MEC for Education Kwa Zulu-Natal and others V Pillay Supra at paragraph 7.

89. The Counsel contended that the school uniform violates the interested party's daughter's freedom to religion. The counsel referred to Article 32 of the Constitution of Kenya, 2010 which allows manifestation of ones beliefs through dress and other things urging Article 24 of the Constitution deals with the limits to Article 32 of the constitution of Kenya, 2010. The counsel urged the limitation must be according to the existing law and principles of a democratic society referring to Article 24(2) and 24(5) of the Constitution of Kenya, 2010. The law she submitted must be statutory and not policy. That the school policy the counsel argued is not a statute and therefore it fails to meet the criteria to limit the Article.
90. M/S Musa submitted that the interested party's daughters should be allowed to wear a limited form of hijab. Counsel conceded that Kenya is a secular state but freedom of religion is also a principle in just and democratic society. The counsel prayed the petition be dismissed with costs and the interested party cross-petition be allowed with costs.

#### **(e) Petitioner's Response To Submissions By 1<sup>st</sup>Respondent**

91. Mr. Kurauka rose to respond to the 1<sup>st</sup>respondent's counsel submissions. He contended that it is true that the 1<sup>st</sup> respondent has mandate to transfer teachers. However, the same must not be applied arbitrary or in bad faith. The counsel contended that in their supportive affidavits and annexures they have demonstrated that the 1<sup>st</sup> respondent's intention to the principal was malicious and in bad faith submitting such decisions are subject of intervention by courts.
92. Mr. Kurauka contended that the timings of transfer was not proper as students were awaiting form IV examination and transfer was based on unfounded allegations against the principals by the 1<sup>st</sup> respondent.
93. On court's jurisdiction Mr. Kurauka contended that the dispute is not only between the principal and the 1<sup>st</sup> respondent to warrant the matter referred to industrial court. He submitted that there may be more parties affected by the decision of the 1<sup>st</sup> respondent including the petitioner, parents, students and the community which benefits from the school. He urged the issue is not primarily on industrial matter but a constitutional. He added that the principal is not a party in this matter but has filed an affidavit in support of the petition on matters that are well within his knowledge.
94. Mr. Kurauka further contends that there has been no warning letter against the principal nor notice to show cause why disciplinary action can't be taken against him and as such an employee of the 1<sup>st</sup> respondent he should be safe whenever he may be and threats should not be a base of transfer.
95. Mr. Kurauka contended that it is on record the school uniform at the petitioner's school has been applicable for 7 years and that at all material times there has been Muslim girls in the school who had been the majority and the issue of uniform did not arise until the Deputy Governor of Isiolo County made a request that Muslim girls be allowed to wear hijab. He submitted that the mandate to choose school uniform has squarely been on the board of management and that the PTA may be consulted and that none of the respondents or Deputy Governor should determine the type of school uniform for the students. He urged that the petitioner's role as a sponsor should not be overlooked on the issue of management of the school. He urged that the intention of the 1<sup>st</sup> respondent is to remove the Board of Management irregularly.
96. Mr. Kurauka on the issue of discrimination as raised by the respondents and the interested party he submitted that there are good reasons as to why students should be subjected to some rules and



regulations. He submitted that it is not only Muslims who have a unique dress code. He urged court to apply liberal interpretation and find that all students should be subjected to same rules and regulations in support of this proposition he relied on Kenya High School Case(Supra) and urged court to adopt that decision of the court on dress code.

**(f) response on 2<sup>nd</sup> and 3<sup>rd</sup> Respondents Submissions.**

97. Mr. Kibe Mungai for petitioner jointly with Mr. Kurauka opted to deal with the rest of respondents and interested party submissions in reply.
98. Mr. Kibe Mungai in response to submissions by 2<sup>nd</sup> and 3<sup>rd</sup> respondent submitted that it is undoubtedly the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents case that the local community wishes that Muslim girls should wear hijab hence the 2<sup>nd</sup> and 3<sup>rd</sup> respondents recognizes that should be the case and as such proceed to overturn the direction of BOM on refusal to allowing of hijabs.
99. He submitted that in order to achieve their objection they decided to remove the principal whom they considered an obstacle in achieving their objectives. He submitted that is why in their affidavits and submissions they requested the court to refer the matter to the Board of Management for their decision, referring to paragraph 6 and 7 of affidavit sworn by M/S Murerwa S.K on 19/10/2014.
100. Mr. Kibe Mungai on the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents submissions and replying affidavits submitted that the respondents did not defend the legality of their decision to allow hijab contrary to the decision made by the Board of Management which BOM they admit is vested with mandatory power to decide on dress code under Section 59 of the Basic Education Act 2013. He contended that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents made unlawful decision and as such urged the petition to be allowed.
101. The counsel contended that if the court finds and holds that the respondents decision was unlawful that the interested party has nothing he can do to regularize the unlawful decision.
102. Mr. Kibe Mungai conceded that where diversity of opinion arise that should be respected but the law provides for mechanism as to how diversity should be realized and respected. He submitted that can be achieved through the composition of the Board of Management. That once a Board makes a decision the same should be respected and are binding. He averred that in such a situation and in a society which respects diversity no single group can enforce its decision on others in the name of enforcing diversity. He urged the society is governed by rule of law and as such they are enjoined to argue their case before Board of Management or proceed to court.
103. Mr. Kibe Mungai on the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submission that the petitioner had no locus standi to file the petition has contended in view of its role as a sponsor, under Section 27 of the Basic Education Act, 2013, the petitioner is a major stakeholder in the school and has a direct management in the affairs of the school. He urged that the Board of Management made a decision that was expected to settle the matter but 2<sup>nd</sup> and 3<sup>rd</sup> respondents proposed to overturn the decision.
104. Mr. Kibe Mungai further in response referred to Article 22(1) of the Constitution of Kenya, 2010 and pointed out that the petitioner had right to institute this petition to protect the fundamental freedom of all stakeholders in the school it sponsors and defend the constitution in accordance with Article 258 of the Constitution of Kenya, 2010.

**(g) Response On The interested Party's Submissions**

105. Mr. Kibe Mungai in response to the interested party's submissions he referred to interested party replying affidavit dated 5/11/2014 under paragraph 34 and submitted that the interested party is attempting to link the issues of religious rights to the right of Education. Under Article 32 of the



constitution of Kenya, 2010 he submitted the rights are enjoyable subject to limitations set out in the constitution. That such rights are limited in Kenya to ensure consistency with Article 8 of the Constitution of Kenya, 2010 which states there shall be no state religion.

106. The counsel submitted that there is no allegation that the uniform denies Muslim students religious rights adding under the constitution it is compulsory for every child to be in school and that under Article 27 of the Constitution, 2010 the right to equality to education allows access to school. He urged there was no allegation of denial of education on ground of religion. He urged on Article 24 of the Constitution of Kenya, 2010 religious rights can be limited urging if interested party wants hijabs he can have the matter taken to parliament and/or constitutional court.
107. On FIDA-K Case (Supra) Mr. Kibe Mungai submitted the case is not applicable as the Board of Management had made a decision which is not challenged here and was decided on constitutionality of a statute in a manner envisaged under Article 24 of the Constitution of Kenya, 2010.
108. Mr. Kibe responded by stating that even if the students had made a request the situation came out of control when the Deputy Governor intervened. He urged under the County Government Act the Deputy Governor's powers are set out under Section 32 which powers do not include taking the religious causes of sections of his constituency on management of schools and discipline. He urged his actions were illegal.
109. Under Section 4(1) of the Basic Education Act, 2013 and Article 10 of the Constitution of Kenya, 2010, Mr. Kibe Mungai stated that the interested party is not seeking accommodation but is seeking a special status above anybody else. He submitted if that special status is to be granted it has to be based on the decision of the Board of Management. He submitted that law has accommodated Muslim even in schools sponsored by the petitioners as Methodist schools are required or admit people from all religions and subject to equal rules.
110. Mr. Kibe Mungai referring to interested party's authority in the case of MEC For Education Kwazulu-natal & 2 Others V Pillay (supra) stated in Kenya what is relevant is the Basic Education Act which requires diversity to be applied. He submitted the authority is not applicable.
111. Mr. Kibe Mungai quoting M/S Musa Advocate in her submissions as follows:-

“An Act is not discriminating unless it violates a protected ground” submitted contrary to her submissions the act on decision of the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents requiring wearing of hijab by Muslim students indeed violates the law and the rights of the petitioner in the following ways:-

- 1) Judicial power:- he pointed out that Judicial power vests with Judiciary however, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent purported to overturn the lawful decision of the Board of management alleging it was unconstitutional.
- 2) Under Article 10 of the Constitution of Kenya 2010 diversity is properly catered for by creating a diversity composition of the Board of Management.
- 3) That if the court is to condone illegal acts of 2<sup>nd</sup> and 3<sup>rd</sup> respondents Article 8 of the Constitutional would be offended.
- 4) Under Basic Education Act the petitioner needs a sponsor of the school which can do as laid requires. He submitted the acts which are not done within the law to be offensive to the petitioner.



112. Mr. Kibe Mungai responded on the interested party's submission that the decision of the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent may have violated the school rules and regulations but if these rules are unconstitutional the petitioner's prayer(a) must fail as herein below"
113. Mr. Kibe Mungai submitted that we have to go back to the issue of Judicial powers and submitted prayer (a) would fail if there was a declaration by court of competent jurisdiction and regulations concerning school uniform is unconstitutional.
114. On cross-petition under paragraph 34 of the interested party's replying affidavit Mr. Kibe Mungai submitted that under Legal Notice No.117 of 2014, the Chief Justice made the Constitution of Kenya (Protection of Rights and Fundamental (Freedoms) Practice and Procedure Rules, 2013.
115. Mr. Kibe Mungai therefore submitted that paragraph 34 of the interested party's replying affidavit do not constitute a cross-petition in any shape or substance. He submitted that Rule 10(2) has not been complied with and as such they have not filed a reply.
116. On submissions that the wearing of hijab does not affect teaching; comprehension, of the students or communication between teachers and students. It was further submitted that there is no connection of academic excellence and wearing of hijab. The petitioner counsel did not agree with such submissions.
117. Mr. Kibe Mungai responded that there is no connection for Muslim girls wearing hijab and the right to Muslim girls to secure compulsory education. He submitted that under Basic Education nothing turns on the hijab. He pointed out that interested party's point is in the case of being educated the Muslim girls should enjoy special status by wearing Islamic code. He submitted that has nothing to do with education but is a religious claim for specific status. He submitted such claim is discriminatory and offends Article 27 of the Constitution. In support of this proposition he referred to Kenya High Schoolcase(Supra). He submitted the decision is relevant when it comes to the value of our Constitution and the necessity of the uniform. He averred that the decision is persuasive and is correct interpretation of the constitution of Kenya.
118. Mr. Kibe Mungai responded that under paragraph 34 of the interested party's replying affidavit he was trying to make out a case that school uniform violated the interested party's right to religion. He urged Article 32 of the Constitution has to be placed in context of school. He submitted that there is admission of muslims in school and the religious beliefs are respected and are not violated.
119. On Kenya being a secular State and the religion also being a principle of a just and democratic society, Mr. Kibe Mungai contended that this issue is not only Kenyan but remains relevant issue in the world. He pointed out that the State therefore should not be committed to religion but should respect individual religious beliefs.

### **Issues For Determination**

120. Having carefully considered each parties' pleadings, their submissions and their suggested issues I am after careful perusal of the pleadings, and submissions of the view that the issues for determination can be summarized as follows:-
  - i. Whether the petitioner has locus standi to file this petition?
  - ii. Whether the petition as against 1<sup>st</sup> respondent is premature; whether it has properly invoked the constitutional jurisdiction and whether it has met the required standards in a constitutional petition and whether court can interfere with the constitutional, statutory and administrative mandate to performing teacher management functions of 1<sup>st</sup> respondent and lastly whether



court has jurisdiction to entertain the matter herein as to the alleged dispute between the employee and employer?

- iii. Whether the respondents decision to allow Muslims students to wear Hijab/Trouser is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School thereof?
- iv. Whether an injunction preventing the respondents from allowing muslims students from wearing hijab/trousers contrary to the rules and regulations at St. Paul's Kiwanjani Day Mixed Secondary School can issue?
- v. Whether prayer(d),(e), (f),(g),(h) and (i) in the petition can issue?
- vi. Whether the school uniform policy indirectly discriminates against interested party's daughters and other Muslim female students?
- vii. whether the interested party cross-petition is defective?

### **Whether The Peitioner Has Locus Standi To File This Petition?**

121. The 2<sup>nd</sup> and the 3<sup>rd</sup> respondents position is that the petitioner has no locus standi to bring up this petition as the school has a Board of Management which can file suit on behalf of the school but not the petitioner, who is the school sponsor.
122. The interested party contends that the petitioner is a corporate entity and though one Kimaita John Machuguma depones as having authority from the petitioner to swear the verifying affidavit thereto, no such evidence is attached to attest to that fact. The interested party argues that Mr. Machuguma is thus a stranger to these proceedings and for those reasons the petition should fail for lack of proper verifying affidavit. The interested party pleaded with the court to disregard the petition and instead hear his cross-petition as averred in paragraph 34 of his replying affidavit.
123. The interested party further stated the petitioner lacks locus standi to seek prayer (b) to (f) inclusive in its petition as they do not touch on the contravention of any constitutional provisions or the Bill of Rights urging the rightful party that ought to have sought the prayers would have been the school BOM under Section 56 of the Basic Education Act, 2013. The interested party contends that any valid prayer would be prayer (a) of the petition.
124. The High Court is a creature of the constitution. Under Article 165(2),(d),(i),(ii),(iii) of the Constitution of Kenya, 2010, the High Court is vested with jurisdiction to hear and determine any question respecting the interpretation of the constitution including determination of inter alia;-

- “(i) the question whether any law is inconsistent with or in contravention of this Constitution;
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and.....”



125. Article 22 of the Constitution, 2010 gives every person right to institute court proceedings claiming a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened. Article 22(2) (a),(c) and (d) provides:-

- “(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by--
- (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.”

126. Further to the above the constitution under Article 258 provides as follows:-

“258.

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.”

Article 23(3) of the Constitution of Kenya, 2010 spells out the reliefs which court can grant in any proceedings brought pursuant to Article 22 and it provides:-

- “(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including--
- (a) a declaration of rights;
  - (b) an injunction;
  - (c) a conservatory order;
  - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;



- (e) an order for compensation; and
- (f) An order of judicial review.”

127. The petitioner is a sponsor of the St. Paul’s Kiwanjani Day Mixed Secondary School and has an important role to play in the aforesaid school as set out under Section 27 of the Basic Education Act, 2013. The petitioner is a major Stakeholder. The Basic Education Act places a major task on a school sponsor including providing supervisory and advisory services in matters regarding spiritual developments in the school.
128. The constitution gives right to every person to institute court proceedings claiming a right or fundamental freedom in the Bill of rights has been denied, violated, or infringed in their own interest or in acting on behalf of others or a member of or in the interest of group or class or in public interest or association acting in the interest of group or class or in public interest or association of one or more of its members.
129. I find contrary to the respondents and interested party submissions that the petitioner has locus standi to file this petition as given by the Supreme law of the land. There is no requirement that one should have authority from a corporate entity or from the one on whose behalf the matter is being filed. The verifying affidavit by Mr. Kimaita John Machuguma, who also has right to bring the petition on his behalf or on behalf of a group or on public interest is properly before court and in support of the petition. On prayers(b) to (f) in the petition they fall under reliefs which the petitioner can seek in a constitutional court. I find the prayers touch on contravention of constitution and are properly before the court.
130. I therefore find and hold that the petitioner has locus standi to file this petition. The objection raised by the 2<sup>nd</sup>the 3<sup>rd</sup> respondents and interested party must fail.

**(ii) WHETHER PETITION AS AGAINST 1<sup>ST</sup> RESPONDENT IS PREMATURE, WHETHER IT HAD INVOKED THE CONSTITUTIONAL JURISDICTION AND WHETHER IT HAD MET THE REQUIRED STANDARD IN A CONSTITUTIONAL PETITION AND WHETHER COURT CAN INTERFERE WITH THE CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE MANDATE FUNCTIONS OF 1<sup>ST</sup> RESPONDENT AND LASTLY WHETHER COURT HAS JURISDICTION TO ENTERTAIN THE MATTER HEREIN BETWEEN EMPLOYEE AND EMPLOYER?**

131. The 1<sup>st</sup> respondent contend that the petitioners petition as regards transfer of the principal from St. Paul’s Kiwanjani Day Mixed Secondary School is premature as the teacher has not exhausted the dispute resolution mechanism existing between him and the employer.
132. Mr. Anyour, learned Advocate for the 1<sup>st</sup> respondent cited Regulation 28(4),(b) of the code of regulations for teachers which gives teachers who are dissatisfied with any decision affecting their right to appeal to the commission Section 46 of TSC Act which gives a dissatisfied teacher with a decision right to apply to the commission for review of that decision.
133. The 1<sup>st</sup> respondent contended that while Article 22 of the constitution gives party right to approach court that does not apply in employment contracts where the doctrine of privity of contract is deeply noted.
134. Mr. Anyour cited petition No.187 of 2012 Uhuru Kenyatta V Star Publishers Ltd where Justice Lenaola held:-

“I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse



may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

He further cited the case of *Joseph Mutwiri Mbera & Another V Council Of JKUAT 2013 eKLR* where Justice Mbaru held:-

“Direct reliance on fundamental rights as contained in the constitution is impermissible when the right in issue is regulated by legislation, as is actually the case with the employment act which directly regulates fair labour practices, which includes suspension, termination and dismissal. When a legislation is enacted to give effect to a constitutional right, a litigant cannot by pass the legislation and rely directly on the constitution without challenging that legislation as falling short of the constitutional standard.”

135. The 1<sup>st</sup> respondent contended that the petition as against 1<sup>st</sup> respondent in favour of the principal of St. Paul’s Kiwanjani mixed day Secondary School do disclose with the precision the exact right that is alleged to have been violated and/or in what manner in which the violation has been infringed. That the petitioner failed to demonstrate the required standard how a simple transfer and horizontal transfer amounts to violation of a constitutional right.

136. Mr. Anyour cited the case of *Anarita Karimi Njeru V Republic(No.1)(1976-1980)1KLR 1272* where Court of Appeal held:-

“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”

137. The 1<sup>st</sup> respondent contended that the commission has constitutional, statutory and administrative mandate to perform teacher management functions. In the premises he submitted it would be against public policy and interest for BOM or sponsor to direct it on who to transfer. He submitted that in doing so would violate Article 249 of the Constitution and provoke a trend where sponsor would select teachers to be transferred to or from their schools contrary to their mandate under the Basic Education Act.

138. The 1<sup>st</sup> respondent submitted therefore the demands put forth by the petitioner are unreasonable, unlawful and grossly offends the principle of equal treatment of all employees as envisaged under the employment Act.

139. Mr. Anyour cited Regulation 27(4) of the Code of regulations for teachers which provides:-

“The commission shall have the discretion to transfer a teacher at any time even when such a teacher has not applied for a transfer”

140. The 1<sup>st</sup> respondent further contend pursuant to Article (2) and 165(f) of the Constitution, this honourable court has no jurisdiction to entertain the matter herein as the alleged dispute is between an employer(commission) and an employee and is therefore purely an industrial matter.

141. The petitioner on its part contended that whereas it is true the 1<sup>st</sup> respondent has mandate to transfer teachers the same must not be applied arbitrary or in bad faith urging the transfer should not be allowed



- to take place as it was malicious and a punishment for the principal insisting on use of the school dress code by all students.
142. The petitioner contends that the timing of transfer was untimely as students were awaiting form IV examination and that the principal performance was excellent and was being transferred on unfounded allegations.
  143. On the issue of court's jurisdiction the petitioner averred that the dispute is not only between the principal and the 1<sup>st</sup> respondent to warrant referral of the matter to industrial court but is between many parties who were affected by the 1<sup>st</sup> respondent who include the petitioner, parents, students and community. The petitioner contend that this is a matter for constitutional court.
  144. The petitioner contended that the principal is not a party in this petition but only filed an affidavit in support of the petition urging the TSC had not consulted him or asked him to show why disciplinary action could not be taken against him nor did he receive any warning letter. He submitted as an employee of 1<sup>st</sup> respondent the principal should be safe whenever he is working and threats should not be basis of transfer.
  145. In the instant petition there is no dispute the principal is a teacher under TSC and attached to St. Paul's Kiwanjani mixed day Secondary School. That the principal is not a party in this petition and has not challenged or appealed against this transfer by the 1<sup>st</sup> respondent nor has he sought a review of his transfer.
  146. I find that the petitioner however is within his rights as enshrined in the constitution of Kenya, 2010 under Article 22 of the Constitution in his own interest or in public interest to have filed this petition.
  147. On the issue concerning the principal it conceded by the petitioner that the 1<sup>st</sup> respondent has a right to transfer the principal however the petitioner is alleging the transfer was actuated by malice and was in bad faith and done arbitrary.
  148. While the 1<sup>st</sup> respondent in exercising its constitutional, statutory and administrative mandate to perform teacher management functions, and especially in transferring teachers it is not supposed to consult teachers, however in doing so its action should demonstrate fair administrative action as every person under Article 47 of the Constitution of Kenya, 2010 has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reason for the action, otherwise such administrative action can be subjected to constitutional reference if the body concerned has acted unconstitutionally or illegally or in breach of Bill of rights but such reference need not be filed after the aggrieved party has exhausted the laid down dispute resolution mechanism existing between the parties if such a procedure may result in further breach of the individual bill of rights or fundamental freedom or if the procedure as laid down is less convenient or untimely.
  149. In the instant matter there is a well laid down procedure in statute on how an aggrieved teacher can challenge a transfer. He can either appeal or seek a review instead of rushing to a Constitutional court as not every complaint should attract a constitutional sanction.
  150. The principal has a contractual relationship with the 1<sup>st</sup> respondent, the TSC, within the preview of employment law which in my view does not extend to the realm of the Constitutional issue.
  151. I have perused the petition as drawn. The principal is not a party in the petition. The petition does not state the precise right that is alleged to have been violated and/or the manner in which the violation has affected the principal. The petitioner has not in his petition averred that the 1<sup>st</sup> respondent's



administrative action in transferring the principal was not a fair administrative action and was in violation or in breach of Article 47 of the Constitution of Kenya, 2010. It has further not been shown that the 1<sup>st</sup> respondent's decision is tainted with illegality, irrationality, and procedural impropriety for the petitioner to succeed in this reference. The petitioner made general sweeping statements to the effect that the transfer was malicious, irrational, and punitive. The precise right allegedly violated and the manner of the violation that affected the principal has not been disclosed in the petition. The petitioner has not cited any Article in respect of breach of rights of the principal. In my view the petition has failed to meet the required standard in respect of violation of any constitutional rights of the school principal.

152. The dispute if any between the 1<sup>st</sup> respondent and the principal is partly a dispute between an employee and employer. Article 162(2),(a) of the Constitution of Kenya, 2010 provides:-

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) employment and labour relations; and.....”

153. Having considered all issues raised by the 1<sup>st</sup> respondent against petition as regards the school principal I am satisfied that the petition as regards the principal by the petitioner herein is premature as the principal has not exhausted the dispute resolution mechanism as provided in the statute. That the petition as against the 1<sup>st</sup> respondent on behalf of the principal by the petitioner is defective. That it would be unconstitutional to interfere with the 1<sup>st</sup> respondent in exercise of its constitutional, statutory and administrative mandate in absence of any violation of the constitutional rights of the principal on application by the sponsor. Whereas I agree that an industrial court has jurisdiction to deal with a matter relating to an employee and an employer dispute in a case where other issues are raised concerning breach or violation or threat to a right or fundamental freedom in the Bill of Rights, though the matter may be of an industrial court as regards the relationship between an employee and an employer that does not mean High Court does not have jurisdiction as an industrial court in such Constitutional issues do not have exclusive jurisdiction. In my view it would be perfectly correct for High Court to deal with the issue touching on Article 22 of the Constitution of Kenya, 2010 in exercise of it has jurisdiction to as per Article 165 of the Constitution of Kenya, 2010. I find no merits in prayer (c) of the petitioner's petition.

154. The petitioner contend that St. Paul's Kiwanjani Day Mixed Secondary School has since 2005 been having school uniform which has never been contentious before and the students community lived harmoniously till 22<sup>nd</sup> June, 2014 when the Deputy Governor, Isiolo County made an informal request that Muslim girls in the school be allowed to wear hijab and white trousers in addition to the prescribed uniform. The respondents and interested party do not deny the facts as submitted by the petitioner.

155. The request by Muslim students and Deputy Governor, Isiolo County to wear hijab and white trouser for Muslim girls was discussed by the BOM and when it was not resolved in favour of wearing hijab, the Muslim girls on one morning reported to school without adorning the prescribed uniform but in hijab. That culminated in the 2<sup>nd</sup> and 3<sup>rd</sup> respondents passing a resolution to the effect that Muslim girls must be dressed in hijab, white trousers and open shoes.

156. The uncontested issue is that under Section 59 of the Basic Education Act, 2013 it is the function of the Board of Management which is mandated to determine the school uniform and the making of the rules of how the schools are run but not the students or Deputy Governor of any County nor the respondents or the interested party in this petition.



157. The existing rules and regulations of St. Paul's Kiwanjani Day Mixed Secondary School do not allow the wearing of other uniform other than the prescribed uniform which do not include the wearing of hijab and white trouser by Muslim girl students.
158. That through the resolution and/or action taken by the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents which was aided and abated by the 1<sup>st</sup> respondent those agitating for hijab and white trousers managed through unlawful means through coercion, demonstration, threat and abuse of power to regularize wearing of the contested Muslim girls dress code.
159. That the school rules and regulations require that when students are admitted to the school to be governed by the rules applicable in the institution. The rules and regulations in any institution can be changed or amended or done away with but such challenge of the rules and regulations can only be affected through lawful means following a laid down procedure but not using the law of the jungle or force to achieve the change. That as long as the rules and regulations are there they have to be followed, honored and obeyed in a civilized society.
160. The Muslim girl students, the Deputy Governor, the interested party and the respondents if they felt aggrieved by the Board of Management's refusal to allow them adorning hijab, white trouser and open shoes, they should have taken the right steps to challenge the rules and regulations as set out by the establishment or institution or before court. The change affected by the respondents was contrary to the law and was illegal.
161. Any resolution that is binding must be made by a body with power to make such a resolution or decision. Section 59 of the Basic Education Act, 2013 recognizes the Board of Management of school as the body that could have made a decision on changing the school dress code. The 2<sup>nd</sup> and the 3<sup>rd</sup> respondent acted beyond their powers and without authority hence their decision was and is illegal as the Basic Education Act, 2013 has not donated any powers to the respondents to do what they purported to have done.
162. That even if it is assumed that the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents had powers to prescribe the dress code with the St. Paul's Kiwanjani Day Mixed Secondary School, Isiolo County, urging the rights of only Muslim girl students, it would be in my view discriminatory for them to argue the rights for girls of Muslims alone. The students in the same school who say for example are Akorinos, and others who are not Muslims, would be discriminated by the respondents actions which would be agitating for Muslim girls to adorn their religious attire and deny other students from other religion to do so. In my view the respondents as public officials would be discriminating students from other religious background by picking one religious group and support it. The respondents actions offends Article 27(1),(2),(4) (5) of the Constitution, 2010 which provides:-

“ 27.

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.



- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

163. The respondent’s did not take into account that the institution in question is a Christian institution, did not consult with the institution, did not cause or have school rules and regulations changed yet they arbitrary proceeded to have school dress code changed in complete disregard of the prescribed school uniform, school regulations and rules. I find that the respondents cannot be permitted to impose Islamic dress code for Muslim girl students in a manner that is not only contrary to the laid down school rules and regulations and also in a discriminatory manner against students who are non-muslims. There is no suggestion nor evidence that was tendered to the effect that the existing rules and regulations are discriminatory against Muslim girl students or any student.
164. That the respondents in their resolution favoured Muslim girl students and did not consider other religions. In doing so, I am of the view that the officials were discriminatory against non-Muslim students by supporting one religion, that is Islamic Religion.
165. Kenya is a secular state as per Article 8 of the Constitution of Kenya, 2010 which provides:-

“ 8. There shall be no State religion.”

166. The subject school in this petition I find has not imposed any religious conditions to its students nor preferred one religion over another. The subject school has students from diverse religious beliefs and has not infringed the freedom of worship by restricting school uniform infact the school action is non-discriminatory against any religion.
167. In the case of Republic V the Head teacher Kenya High School & Another(Supra) Hon. Lady Justice C. W. Githua stated:-

“ The significant and critical role played by standardized dress codes and observance of rules in controlled environments which one would expect to find in any national secondary school in Kenya or say for example in the Armed Forces cannot be overemphasized. It is not disputed that school uniforms assist in the identification of students and gives them a sense of belonging to one community of students. It promotes discipline, unity and harmonious co-existence among students. It instills a sense of inclusivity and unity of purpose. In my view, the most important role played by a standardized school uniform is that it creates uniformity and visual equality that obscures the economic disparities and religious backgrounds of students who hail from all walks of life.

If the court were to allow the applicant’s quest to wear hijab in school, the 48 Muslim girls in the school would look different from the others and this might give the impression that the applicants were being accorded special or preferential treatment. This may in all probability lead to agitation by students who profess different faiths to demand the right to adorn their different and perhaps multi-coloured religious attires of all shapes and sizes which the school administrators will not be in a position to resist if the Muslim students are allowed to wear a hijab. The result of these turn of events would be that students will be turning up in school dressed in a mosaic of colours and consequently, the concept of equality and harmonization brought about by the school uniform would come to an abrupt end. It goes without saying that this kind of scenario would invite disorder, indiscipline, social disintegration and disharmony in our learning institutions. Such an eventuality should be avoided at all costs since it is in the public interest to have order and harmonious co-existence



in schools. It is also in the public interest to have well managed and disciplined schools in a democratic society.

It is important to bear in mind that the Republic of Kenya is a secular State. This has been pronounced boldly and in no uncertain terms by Article 8 of the Constitution. This in effect means that no religion is superior than the other in the eyes of the law. Considering that the Kenya High School, just like any other national school is a secular public school admitting students of all faiths and religious inclinations, allowing the applicant's prayer in this motion would in my opinion be tantamount to elevating the applicant and their religion to a different category from the other students who belong to other religions.. This would infact amount to discrimination of the other students who would be required to continue wearing the prescribed school uniform.”

168. The above authority is persuasive and I agree with it as a good law and as stating the correct position. I therefore adopt the findings of the learned Judge and find the same to be their applicable in this case.
169. I further hold and find that there should be no exception of Muslim girl students from wearing the prescribed uniform as by not doing so would give an impression that they are accorded preferential treatment over other students who profess different faiths and which may result in demand by other students from different faiths from demanding for the right to adorn their different religious attires of all shapes, sizes and colours and the school BOM won't be able to resist their requests. I find it would be discriminatory to allow Muslim girl students to adorn hijab white trouser and open shoes.
170. I have carefully considered the 2<sup>nd</sup> and the 3<sup>rd</sup> respondents supportive affidavit and their submissions and it is evidently clear that they do not defend the legality of their decision to allow Muslim girls students to wear hijab, white trouser and open shoes contrary to the decision made by the Board of Management of the school. They have also conceded that it is statutory power of the Board of Management to decide on the dress code, under Section 59 of the Basic Education Act, 2013. My view and finding is that the respondents having made unlawful decision the same could not become lawful because the Muslim girl students now adorn a hijab, white trouser and opens shoes. The dress code as recommended by the respondents remains unlawful and illegal as it is in breach of Section 59 of the Basic Education Act, 2013.
171. That being the case I find and hold that the interested party has nothing that he can do to regularize and legalize the respondents illegal decision at this stage. The unlawful decision by the respondents remains unlawful for all purposes and intentions.
172. The interested party and the respondents urged that diversity should be respected. Under the Basic Education Act, 2013 the law provides for mechanism as to how diversity should be realized and respected and this can be achieved through the composition of the Board of Management of schools.
173. That once the Board of Management makes a decision it comprises of a decision of all diversities and such a decision is binding and should be respected by a society that respects diversity and no single group should be permitted to enforce its decision on others in the name of diversity.
174. It is therefore my view that in such situation a society is governed by rule of law and as such the aggrieved parties should proceed to argue their case before the relevant authority, in this case the Board of Management of the school or pursue the matter before a court of law.
175. The respondents acts, and those of the Muslim girl students and the Deputy Governor, Isiolo County being illegal, I find the respondents are wrong to plead with court for this matter to go back to the Board of Management as the respondents in the first instance had no power to usurp the power of the Board of Management.



176. In view of my findings herein above I am satisfied that the petitioner has on balance of probability proved that the respondents' decision to allow Muslim students to wear hijab/ white trouser and open shoes is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations of St.Pau's Kiwanjani Day Mixed Secondary School.

**(iii) Whether an Injunction preventing the respondent from allowing Muslim Students From Wearing Hijab/trousers contrary to the school rules and regulations at ST.Paul's Kiwanjani Day Mixed Secondary School can issue?**

177. Under Article 23(3) of the Constitution of Kenya, 2010 in proceedings brought under Article 22 of the Constitution of Kenya, 2010 court may grant appropriate relief including:-

- a. A declaration of rights
- b. An injunction
- c. A conservatory order
- d. ....
- e. An order for compensation
- f. ....

178. The relief of injunction sought by the petitioner herein is one of the reliefs that the Constitution of Kenya, 2010 allows court to grant a party who has brought proceedings under Article 22 of the Constitution of Kenya, 2010 and as such this court has jurisdiction to grant an injunction in a Constitutional reference referred before it.

179. Having considered the petitioner's case and having come to the conclusion that the respondents decision was discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations of St. Paul's Kiwanjani Day Mixed Day Secondary School I am satisfied that orders of injunction can issue preventing the respondents from allowing Muslim girl students from wearing hijab/ white trousers and open shoes contrary to the school rules and regulations at St.Pauls Kiwanjani Day Mixed Secondary School.

**(iv) Whether prayers (d),(e),(f),(g) (h) and (i) in petition can issue?**

180. The success of prayers (d) being a prayer for injunction to restrain the respondents from interfering with petitioner in executing its rightful role as a sponsor in respect of affairs of St. Paul's Kiwanjani Day Mixed Secondary School , prayer(e) seeking a mandatory injunction compelling the respondents to comply and ensure full compliance with the school rules and regulations that are executed by the students and parents during the reporting at St. Paul's Kiwanjani Day Mixed Secondary School and prayer(f) seeking an injunction preventing the respondent's from dissolving or purporting to dissolve the current Board of Management and Parents Teachers Association of St. Paul's Kiwanjani Day Mixed Secondary School until their term expires, prayer (f) for general damages, (h) any other or further relief that this Honourable court may deem fit to grant and costs and interests shall be determined by the decision that this court reaches.

181. I am of the view that prayers(d) and (f) should be granted in view of my finding and holding that the respondents had no mandate in interfering with issues regarding the school uniform and that they acted unlawful and without jurisdiction.



182. As regards prayers Nos.(d),(e) and (f) I find the same have not been challenged by the respondents. On prayer (g) before damages can be granted in any suit. The applicant must however, prove that he or she has suffered damages and is entitled to a compensation. This has not been proved in this petition. On prayers (d), (e) and (f) I find the same have been proved on balance of probabilities. I also hold that the interested party contended under paragraph 34 of his replying affidavit that the school uniform rule indirectly discriminates against his daughters and the Muslim female students at the school. Interested party contended though school uniform is neutral it places Muslim female students at a disadvantage compared to other students at the school because of the Muslim student's religion.
183. The interested party further contend that whereas the uniform requirements are similar to all female students at the school, they nonetheless discriminate against Muslim female students on the ground of that religion. In support of the proposition counsel relied on the case of Griggs(Supra) where Burger,CJ, pronounced discrimination law:-
- “prescribes not only over discrimination but also practices that are fair in form, but operation.”
184. The interested party further contends that “hijab” is a matter of extreme and exceptional importance to his daughters because they are practicing Muslims and that hijab is mandated by the Quran and that it is a sin not to wear it.
185. The interested party under paragraph 34 of his replying affidavit with all due respect is attempting to link the issues of religious rights with the right to education. Under Article 32 of the constitution of Kenya, 2010 the rights to religion are enjoyable subject to and manner set out in the constitution; that such rights are limited in Kenya by provisions of Article 24 of the Constitution of Kenya of Kenya,2010 and Section 8 of the Constitution, 2010 o which clearly states there shall be no state religion.
186. The interested party concedes that that the school uniform is neutral and is adorned by all students without any discrimination on the ground of religion. There is no allegation or averment that the school uniform denies the interested party's daughters or Muslim female students their religious rights.
187. Under our constitution it is compulsory for every child to be in school under Article 53(1),(b) of the Constitution of Kenya, 2010,it is provided for free and basic education The interested party has not shown that his daughters have been denied education on the ground of the religion. In equal treatment for all students all students should be treated equally advocates for equality and freedom from discrimination.
188. The interested party has not alleged that the Christian students are enjoying special preferential treatment over Muslim students. It is my view that by allowing Muslim girl students to adorn the religious attire would amount to discrimination against Christian students and other students at St.Paul's Kiwanjani Mixed Day Secondary School. In addition to the above it had not been demonstrated that the school uniform is offence to Muslim girl students to warrant court interference.
189. The interested party in this matter is not seeking accommodation on wearing school uniform but in my view is seeking a special status for his daughters and Muslim female students above anybody else and if the special status has been made or granted, the same should be sought before the Board of Management which made the decision refusing wearing of hijab/trouser, white trouser and open shoes for Muslim girls students and which body is mandated by the Basic Education Act, 2013 to regulate the issue of school uniform.
190. In view of the school uniform prescribed by the Board of Management of the questioned school being non-discriminatory against the interested party's daughters and other Muslim female students it is my



view that students fosters equality in all students, ensures cohesion, order, eliminates favourism, and discrimination, and creates a serene environment of learning where all students irrespective of their cultural social or religious background feel equal amongst equals.

191. I am of the view that wearing of hijab or any religious attire by students would fit students against each other on religious basis as students from different faithseek to extend the rights of their religion. This would negate the provisions of Article 8 of the Constitution in which state uphold equality by being blind to religion.

**(vi) Whether The Interested Party's Cross-petition Is Defective?**

192. The interested party's cross petition is said to be brought under paragraph 34 of his replying affidavit dated 5/11/2014 in which the interested party stated:-

That I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs and that I am also cross petitioning that the Muslim Students be allowed to wear a limited form of hijab(a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya and their right to equal protection and equal benefit of the Law under Article 27(5) of the Constitution."

193. Article 22 of the Constitution of Kenya, provides for enforcement of Bill of Rights and requires a strict interpretation of the Article. Article 22(3) of the Constitution, 2010 provides that the Chief Justice shall make rules providing for court proceedings referred to in that Article which satisfy the criteria, set out thereunder.
194. Pursuant to the provisions of Article 22(3) of the Constitution, 2010. The Honourable the Chief Justice gazetted the Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedures Practice Rules 2013 vide Legal Notice No. 117 of 2013 on 28<sup>th</sup> June, 2014.
195. Rule 4(1) of the said Rules provides that where any rights or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened a person so affected or likely to be affected; may make an application to the High Court in accordance to the rules.
196. Rule 10(2), of the said Rules states that a petition shall contain:
- i. The petitioner's name and address
  - ii. The facts relied upon
  - iii. constitutional powers violated the nature of the injury caused or likely to be caused to the petitioner or person in whose name the petitioner has instituted the suit or in a public interest case to the public, class of persons or community.
  - iv. Defaults regarding any civil or criminal case involving petitioner or any petitioners which is related to the matters in issue in the petition.
  - v. Petition be signed by the petitioner or his advocate.
  - vi. The relief sought in the petition."
197. A quick perusal of the alleged cross- petition by the interested party reveals that the same has not complied with Rules 10 (2) and 15(3) which requires a cross-petition to disclose the matters as stated under Rule 10(2) of the Rules.



198. I am in my view of the opinion that the interested party's cross- petition do not constitute a cross- petition in any shape or substance to be infringed and has not stated the manner which the alleged rights they are alleged to be infringed.
199. In the case of Anarita Karimi Njeru V Ag. No. (1) (1979) KLR 159 it was held that:-
- “we would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the Constitution, it is important(if any to ensure that Justice is done to his cases that he should set out with reasonable degree of precision that which he complains the provision said to be infringed and the manner in which they are likely to be infringed.”
200. The interested party has not set out what he considers to have been infringed in relation to him and the manner in which he believes the breach occurred and by whom. In the alleged cross-petition the interested party has not stated whom he is directing his complaints to and who infringed his rights.This court cannot in such a defective matter make orders against anyone as such orders would be orders in vain.
201. Having come to the conclusion that I have, on all issues raised in the petition, I find as follows:-
- 1) The petitioner has locus standi to file this petition.
  - 2) The petition against the 1st Respondent is premature, having not properly invoked the Constitution, having not met the required standard in a Constitutional petition and court cannot interfere with Constitutional, Statutory and administrative mandate to performing teacher management functions of the 1<sup>st</sup> respondent, that court lacks jurisdiction to entertain the matter herein as alleged dispute is between an employee and employer however where an issue is not exclusively reserved for an industrial court and especially where an issue in addition to being an issue of an employee and an employer touches on an issue that is a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened . the High Court has jurisdiction to deal with the Constitutional issue in exercise of its jurisdiction under Article 165 of the Constitution of Kenya, 2010.
  - 3) An order to remove and quash the 3rd respondent's decision of the 12th September 2014, purporting to transfer the Principal , George M'Mbijiwe from St. Paul Kiwanjani Day Mixed Secondary School to Ngaremara Secondary School cannot issue as the Principal has not appealed or sought review, or exhausted Dispute Resolution Mechanism provided under the relevant statutes.
  - 4) 4 An order that the Respondents decision to allow Muslim Students to wear hijab/trousers is discriminatory, unlawful, unconstitutional and contrary to the school rules and regulations at St. Paul's Kiwanjani Day Mixed Secondary School be and is hereby issued.
  - 5) An order of injunction preventing the Respondents from allowing muslims students from wearing Hijab contrary to the School Rules and Regulations of St Paul's, Kiwanjani Day Mixed Secondary School be and is hereby issued.
  - 6) An order of injunction restraining the Respondents from interfering with the petitioner in executing its rightful role as a sponsor in respect of the affairs of St. Paul's Kiwanjani Mixed Secondary School be and is hereby issued.



- 7) A 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 Kiwanjani Day Mixed Secondary School be and is hereby issued.
- 8) An order of injunction preventing the respondents from dissolving or purporting to dissolve the current Board of Management and parents Teachers Association of St.Paul's Kiwanjani Day Mixed Secondary School be and is hereby granted until their term of office expires.
- 9) General damages – Nil
- 10) An order that the school uniform policy do not indirectly discriminate against interested party's daughters and other Muslim female students.
- 11) The interested party's cross petition is defective and is struck out.
- 12) Costs of the petition to the petitioner.

**DATED, SIGNED AND DELIVERED AT MERU THIS 5<sup>TH</sup> DAY OF MARCH, 2015.**

**J. A. MAKAU**

**JUDGE**

Delivered in open Court in the presence of:-

1. Mr. Kibe Mungai for the petitioner
2. Mr. Kurauka for the petitioner
3. Mr. Anyaur for the 1<sup>st</sup> respondent
4. Mr. Kieti for 2<sup>nd</sup> and 3<sup>rd</sup> respondents
5. Mr. Ali Jointly with M/S Musa for interested party.
6. C/clerk Penina/Mwenda

**J. A. MAKAU**

**JUDGE**

