



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 536 OF 2013**

**BETWEEN**

**AGNES WANJIRU KIRAITHE.....1<sup>ST</sup> PETITIONER**

**SOILA MAASAI GIRLS CENTRE.....2<sup>ND</sup> PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**DISTRICT CHILDREN OFFICER KAJIADO CENTRAL....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> petitioner is the chief administrator of Soila Maasai Girls Centre (“the Centre”) which is established with the objective of rescuing girls facing the risk of female genital mutilation (FGM). The Centre is supported by a charitable foundation based in the United Kingdom. The only criterion for accepting girls at the Centre is that they do not undergo FGM.

2. In April 2013, the Centre allowed the girls to re-integrate with their families. The girls were allowed to leave for their homes and upon return to the Centre one of the girls fell sick. It was discovered that she had contracted hepatitis as a result of undergoing FGM. The Centre then decided to screen the other girls and it was discovered that 49 girls had undergone FGM and were in various stages of healing. The girls were unwilling to disclose the information on the perpetrators.

3. As a result of these events the Centre expelled the 49 girls who had undergone FGM. Naturally, the Children’s Department was alarmed by these events. It applied to the Children’s court vide ***Children’s Case No. 13 of 2013*** to compel the Centre to accept the girls back to the school. The learned magistrate hearing the matter granted interim relief directing the children to go back to the Centre pending hearing of the suit. As the same time, the administrator was charged with violating the rights of the children contrary to **section 19** as read with **section 20** of the ***Children Act, 2001*** by causing the private parts of the children to be examined without their consent or that of their guardians.

4. The petitioner filed the petition dated 11<sup>th</sup> November 2013 in which she applied for various orders to quash ***Kajiado Children’s Case No. 13 of 2013*** and to prohibit her prosecution in ***Criminal Case No. 3272 of 2013*** and a stay of ***Milimani PC No. 204 of 2013***.

5. At the hearing of this petition, it transpired that the 49 girls who had been expelled could not attend school for the reason that the charitable foundation in the UK did not remit any funds to support the girls who had undergone FGM as this was contrary to its charitable objects. On the other hand, the Government of Kenya did not provide any support to enable the girls continue their studies at the Centre. I therefore directed that pending further proceedings and determination of the matter, the parties must agree on arrangements to secure school attendance for all the girls as it was in the best interests of the girls to continue attending school.

6. On 10<sup>th</sup> March 2014, the parties agreed on settlement on the following terms;

1. *The Director of Public Prosecutions hereby undertakes to withdraw Kibera Criminal Case No. 3272 of 2013.*
2. *All the girls subject to the proceeding shall be re-united with their families to the end of the school term save those who are in Standard 8 will remain in the school until they complete their examination at the end of the year in 2014.*
3. *Kajiado Children's Case No. 13 of 2013 is marked as settled.*
4. *Soila Massai Girls Rescue Centre shall establish a facility manned by a qualified practitioner to ascertain the status of girls and whether they have undergone Female Genital Mutilation.*
5. *The School Management and the Kajiado Children's Officer shall come up with a protocol to deal with girls who undergo FGM while in school and related matter. Such a protocol will be filed in court on or before 24<sup>th</sup> March 2014 for the courts approval.*
6. *Mention on 24<sup>th</sup> March 2014.*

7. In line with Order No. 5 of the consent, the Centre proposed a protocol on the following terms;

#### **MONITORING PROCEDURE**

1. *The meaning of FGM will be interpreted as defined both in the Children Act No. 8 of 2001 and the Prohibition of Female Genital Mutilation Act No. 32 of 2011.*
2. *Girls who meet the criteria for admission must undergo a full medical examination to ascertain their health and FGM status before they are admitted into the 2<sup>nd</sup> Petitioner.*
3. *The medical examination will be conducted by a medically qualified person appointed by SMGC. It will be conducted in privacy with prior explanation and counselling of the child according to her level of understanding.*
4. *Parents/Guardians will sign a well translated informed consent form to that effect and female guardian may accompany the child during the first examination.*
5. *The findings will be communicated to the guardian without delay and those qualifying will be admitted into the centre from where medical treatment will be administered for treatable illnesses discovered during the medical examination.*
6. *All parents/guardians with girls at SMGC, will be enlightened about the effects of FGM and the value of education for girls on an ongoing basis.*
7. *The girls at the centre will also be enlightened about the effects of FGM and will undergo the Christian alternative rite of passage in lieu of FGM before joining primary class 6.*

8. *Matters of FGM will be high on the agenda of the centre's education to ensure that girls are fully converted against FGM and are enlightened on what to do should they suspect any danger of FGM to them when they are with their families during school holidays.*

9. *During the duration of stay in SMGC girls will be required to undergo a full medical examination to ascertain their general health and FGM status immediately they return from any school holiday if there is reason to believe that they may have contracted a contagious disease or FGM has been performed during the holiday.*

10. *The parents/guardians will sign an informed consent form authorizing random medical examinations in line with 9 above but once a girl reaches the age of 15 years, she will sign her own consent form.*

11. *Where it is established that a girl has undergone any form of FGM, the girl and the parent/guardian will be informed in a humane manner. The report will be communicated in writing to the reporting Office of the Children's department / the Law Enforcement Officer.*

12. *The parent/guardian will be required to organize for transfer of the child from SMGC immediately the FGM is discovered but on exceptional grounds, special consideration to sit the National primary examination for those already registered will be recorded.*

8. The Kajiado District Children Officer, in a letter addressed to the court dated 8<sup>th</sup> May 2014, confirmed monitoring procedure has been agreed upon after consultations with the parents and guardians of the girls at the Centre and would be in the best interests of the children.

9. I have considered the protocol and accordingly, I approve it for use by the Centre. However, I would urge the FGM Council to consult with stakeholders to ensure that such a situation does not recur.

10. This matter is therefore marked as settled on terms agreed by the parties on 10<sup>th</sup> March 2014 and an order shall issue accordingly.

11. The names of the parties shall not be published in the media.

**SIGNED BY**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 9<sup>th</sup> June 2014.**

**MUMBI NGUGI**

**JUDGE**