



Nyabola v Attorney General & another; Kenya Private School Association Nakuru Branch (Interested Party) (Petition 72 of 2012) [2014] KEHC 2599 (KLR) (Constitutional and Human Rights) (10 October 2014) (Judgment)

Gabriel Nyabola v Attorney General & 2 others [2014] eKLR

Neutral citation: [2014] KEHC 2599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 72 OF 2012

DAS MAJANJA, J

OCTOBER 10, 2014

BETWEEN

GABRIEL NYABOLA PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

PERMANENT SECRETARY MINISTRY OF EDUCATION ... 2ND RESPONDENT

AND

**KENYA PRIVATE SCHOOL ASSOCIATION NAKURU
BRANCH INTERESTED PARTY**

Failure by the State to provide financial and in-kind assistance to private schools is not discriminatory

The petition sought among other orders; a declaration that the respondents' policy to provide free secondary education from January, 2008 and subsequent years to students attending Government and local authorities' schools exclusive the students attending private secondary schools was discriminatory. The court held that every person under the age of eighteen years was entitled to primary and secondary education in Kenya that was free and compulsory. The court further held that progressive realisation of the right to education did not mean mere paper policies but deliberate and concrete steps taken to achieve free basic education for all on a non-discriminative basis, deployment of maximum available resources to ensure realization, avoid retrogressive measures and monitor enjoyment of the right. The court finally held that the failure by the State to provide financial and in-kind assistance to private schools was not discriminatory.

Reported by Kakai Toili



Constitutional Law – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to equality and freedom from discrimination - whether the failure by the State to provide financial and in-kind assistance to private schools was discriminatory.*

Constitutional Law – *fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to education – right to free and compulsory primary and secondary education - progressive realisation of the right to education - whether every person under the age of eighteen years was entitled to primary and secondary education in Kenya that was free and compulsory - what did the progressive realisation of the right to education entail - Basic Education Act, No 14 of 2013, section 29 and 29.*

Brief facts

The petition sought among other orders; a declaration that the respondents' policy to provide free secondary education from January, 2008 and subsequent years to students attending Government and local authorities' schools exclusive the students attending private secondary schools was discriminatory. The petitioner submitted that the right to basic education included secondary education which ought to be enjoyed by every Kenyan child irrespective of whether he or she was attending public or private secondary school.

The petitioner contended that the Ministry of Education had acknowledged that it did not have sufficient secondary schools to accommodate all students graduating from primary school and had encouraged the private sector to invest and participate in the development of secondary schools. It was the petitioner's case that the policy to offer education benefits to students in public and municipal secondary school only discriminated against students in private secondary schools. The petitioner claimed that a child had a right to choose where to be educated without discrimination in accordance with the policy of the State to provide free and compulsory primary and secondary education without distinguishing between a child attending Government and private schools.

Issues

- i. Whether every person under the age of eighteen years was entitled to primary and secondary education in Kenya that was free and compulsory.
- ii. What did the progressive realisation of the right to education entail?
- iii. Whether the failure by the State to provide financial and in-kind assistance to private schools was discriminatory.

Held

1. An analysis of the provisions of the Constitution, the Children Act, Basic Education Act and the international law imposed on the State an obligation to provide free and compulsory basic education. The State, through the Basic Education Act, 2013, had taken a much broader approach to the definition of basic education than that obtaining in international instruments and the Children Act. Under section 28 of the Basic Education Act, every child had the right to free and compulsory basic education. A child under the Act and under the Children Act was any person who had not attained the age of eighteen years. Those provisions taken together meant that every person under the age of eighteen years was entitled to primary and secondary education in Kenya that was free and compulsory.
2. Article 21(2) of the Constitution obliged the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43 of the Constitution. The right to education, being a right protected under article 43, was subject to article 21(2).
3. Progressive realisation of the right to education did not mean mere paper policies but deliberate and concrete steps taken to achieve free basic education for all on a non-discriminative basis, deployment of maximum available resources to ensure realization, avoid retrogressive measures and monitor enjoyment of the right. It called for more than just election campaign declarations and subsequent setting up of unsustainable projects in order to be seen to have fulfilled campaign pledges.



4. The Government had recognised the gap existing in the provision of funding of private schools. The Basic Education Act, 2013 had attempted to address many of the problems plaguing the education sector by providing a legislative framework for implementation of the constitutional guarantee to education. It provided a foundation upon which the progressive realisation of the right to education would be judged in future.
5. Section 28(1) of the Basic Education Act was clear and required no more than a literal interpretation. It imposed on the Cabinet Secretary for Education the responsibility of implementing the State's obligation to provide free and compulsory basic education for children. The manner in which the Cabinet Secretary discharged that obligation, within the parameters set by the Constitution and the statute, were matters within the policy discretion of the National Government and the court could not interfere in such policies unless it was shown that the Cabinet Secretary had in violation of the Constitution. Section 29(1) of the Basic Education Act was clear and unambiguous. That public schools shall not charge any fee on behalf of a pupil in the school was a logical consequence of the State own undertaking to provide free and compulsory basic education. There was therefore no contradiction or ambiguity.
6. Discrimination referred to any distinction, exclusion, limitation or preference based on the grounds enumerated which had the purpose of nullifying or impairing equality of treatment in education. Inequality treatment was not per se prohibited. Whether a discrimination was fair or unfair hence illegal was to be weighed against the rationality test. That was to say that the aim of the inequality should be aimed to achieve a certain legitimate governmental objective.
7. The State had limited funding for education. The limited funding was one of the reasons why the State had invited private institutions to invest in the education sector. Encouraging investments from the private sector would be crucial for sustained sector expansion and would require a new policy frame work within which to promote and regulate private investment, private school registration as well as quality assurance and supervision.
8. In order to progressively realize the free secondary school education, the Government must give priority to public schools which serve the majority of students across Kenya. Under article 43(3) of the Constitution, the State also had the obligation to give priority to the most vulnerable and marginalized in the society. That meant the funding of children in private schools while a goal to be progressively realized, its application immediately would undermine affirmative action which was also permitted under article 27(6) of the Constitution.
9. The failure by the State to provide financial and in-kind assistance to private schools was not discriminatory. The distinction between children in private and public school was intended to achieve the overall goal of progressively providing free education to all children in the future.

Petition dismissed with no order as to costs.

Orders

- i. *The right to education protected under article 43(1)(f) of the Constitution was to be realized progressively in accordance with article 21(3) of the Constitution.*
- ii. *Free and compulsory basic education guaranteed to every child under article 53(1)(b) of the Constitution included both primary and secondary education as provided by the Basic Education Act, 2013.*
- iii. *The Government's policy for funding and in kind support for public secondary schools to the exclusion of private secondary schools did not discriminate between children in public or private school.*
- iv. *Section 29(1) of the Basic Education Act, 2013 did not contradict section 28 of the Act.*

Citations

Cases

Kenya



1. *Community Advocacy and Awareness Trust & 8 others v Attorney General* NRB Petition 243 of 2011; [2012] eKLR - (Explained)
2. *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* Petition 102 of 2011; [2011] KEHC 2099 (KLR) - (Explained)
3. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] eKLR; [2012] 3 KLR 718 - (Explained)
4. *Makokha, Timothy Wafula & 7 others v Council for Legal Education & 4 others* Petition 12 of 2012; [2012] KEHC 4684 (KLR) - (Mentioned)
5. *Mwai, John Kabui & 3 others v Kenya National Examination Council* Petition 15 of 2011; [2011] KEHC 1696 (KLR) - (Explained)
6. *Political Parties Coalition Forum Coalition & 3 others v Office of the Registrar of Political Parties & 2 others* Civil Appeal 80 of 2014; [2014] KECA 313 (KLR) - (Mentioned)
7. *RM & another v Attorney General* Civil Case 1351 of 2002; [2006] eKLR; [2008] 1 KLR (G & F) 574 - (Explained)

South Africa

1. *Government of the Republic of South Africa v Grootboom* 2000(11) BCLR 1169 - (Explained)

Canada

1. *Andrews v Law Society of British Columbia* [1989] 1 SCR 321 - (Explained)

Texts

1. Kanyonge, (Ed) (2013), *Promoting Education as a Human Right in Kenya* Hilde Back Education Fund, p 11
2. Republic of Kenya (1968), *Report of the Commission on the Law of Succession* Nairobi: Government Printer
3. Republic of Kenya, Ministry of Education, Science and Technology (2005), *A Policy Framework for Education, Training and Research: Meeting the Challenges of Education, Training and Research in Kenya in the 21st Century* Nairobi: Sessional Paper No 1 of 2005

Statutes

Kenya

1. Basic Education Act, 2013 (Act No 14 of 2013) section 29(1) - (Interpreted)
2. Children Act, 2001 (Act No 8 of 2001) sections 5, 7(1)(2) - (Interpreted)
3. Constitution of Kenya articles 2(6); 21(1); 27; 53(1); 259(4)(b) - (Interpreted)

International Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 In general
2. African Charter on the Rights and Welfare of the Child (ACRWC), 1990 In general
3. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 article 13(1);
4. United Nations Convention on the Rights of the Child (UNCRC), 1989 article 28
5. Universal Declaration of Human Rights (UNDHR), 1948 In general

Advocates

1. *Mr Ndolo instructed by Musembi Ndolo and Company Advocates* for the Petitioner
2. *Mr Konosi instructed by Konosi and Company Advocates* for the Interested Party
3. *Mr Ojwang, Litigation Counsel, instructed by the Officer of the Attorney-General* for the Respondents



JUDGMENT

Introduction and Background

1. Before i proceed to consider the matter, i must apologise to the parties because this matter has taken an inordinate time to finalise. When the petition was filed the [Basic Education Act, 2013](#) had not been enacted. It was enacted after the parties had completed their oral arguments and the matter reserved for judgment. Due to the changes in the law, i notified the parties that the matter would have to be re-heard. The petitioner thereafter amended his petition and the parties filed further depositions. In the intervening period the High Court had to deal with the election petitions and the matter fell into abeyance. It is only early this year that I called for the matter and it was finalised. The delay was further aggravated by the fact that I was transferred to Homa Bay High Court as the resident judge.
2. The petitioner brings this suit on his own and on behalf of his child and also parents and children in private schools in Kenya. His child attends a private boarding secondary school in Nakuru County.
3. The petitioner challenges the Government policy of funding public secondary schools to the exclusion of private ones. He avers that this policy is discriminatory and a violation of the [Constitution](#), the [Children Act](#) (Act No 8 of 2001) and various international instruments to which Kenya is a party. He contends that as a result education has become unaffordable, inaccessible, and inequitable. He urges that the students in private secondary schools should benefit to the same extent as students in private schools. The petitioner contends that his daughter is being discriminated against by the State on the ground that she is pursuing secondary education in a private institution.
4. Since independence the Government has sought to address challenges facing the education sector through various Commissions, Committees and Taskforces beginning with the [Report of the Education Commission, 1964](#) (the Ominde Report) to recent policy initiatives the most recent being the Task Force on Re-alignment of the Education Sector to the New Constitution (“the Task Force”) established in January 2011 and whose terms of reference included analysing the implication of the new [Constitution](#) on education, training and research for national development and generally reviewing various dimensions of the education system in Kenya. These initiatives culminated in the enactment of the [Basic Education Act](#), Act No 14 of 2013.
5. The policy of free primary and secondary school education predates the [Constitution](#) and the [Basic Education Act, 2013](#). The policy offered various benefits to students in government and municipal schools including free teaching and support staff, annual subsidising for tuition and activity fees, free learning material including exercise books, text books, and laboratory materials and other benefits. In a circular dated January 9, 2008, the Permanent Secretary, Ministry of Education addressed to all Provincial Directors of Education, All District Education Officers, All Municipal Education officers and head teachers of public secondary schools, issued interim policy guidelines for the implementation of free secondary education. These policy guidelines excluded private secondary schools.
6. Private schools have always been an integral part of the education system in Kenya from colonial times when most private schools were run by religious organisations and charities to the present where there some schools are run on purely commercial basis. In Sessional Paper No 1 of 2005 titled ‘[A Policy Framework for Education, Training and Research: Meeting the Challenges of Education, Training and Research in Kenya in the 21st Century](#),’ the government recognized the participation of private sector in the expansion of education, particularly at secondary, Technical, Industrial, Vocational and Entrepreneurship Training (TIVET and university level. Paragraph 4:14 noted that, “One of



the factors constraining growth in secondary school enrolment is lack of adequate secondary school schools to match that of primary schools. In 2003, there were 3,661 public secondary schools and 641 registered private secondary schools, compared to 18,081 public primary schools. The imbalance is expected to worsen following implementation of the FPE and the projected increase in demand for secondary education...”

7. The Vision 2030, which is the national long-term development blue print recognises education and training as part of the social pillar that will drive Kenya into a middle-income economy.

The Petitioner’s Case

8. In an amended petition amended on August 12, 2013, the petitioner moved this court seeking the following orders:
 - a. A declaration that the respondents policy to provide Free Secondary Education from January, 2008 and subsequent years to students attending government and local authorities schools exclusive the students attending private secondary schools is discriminatory and a violation of the petitioner’s constitutional rights as provided under Constitution of Kenya section 53(1)(b) of Children Act, section 5, 7(1) and 7(2) of the Children Act 2010, article 28 of the United Nations Convention on the Right of the Child.
 - b. A declaration that section 29(1) of the Basic Education Act 2013 is discriminatory and violation of the constitutional rights to free basic education to children attending private institutions as provided under the Constitution article 53(1)(b), section 5, 7(1) and 7(2) of the Children Act 2013, article 28 of the United Nations Convention on the right of the children and section 28(1) of the new Basic Education Act 2013 and preamble to the same Act.
 - c. A declaration that section 29(1) of the Basic Education Act, 2013 is limiting and contradictory to section 28(1) of the same Act.
 - d. A declaration that provision of teaching staff by the respondent through its agents Teacher Service Commission (TSC) and other teaching staff as per the 1st respondents policy is discriminatory and a violation of the petitioners rights as provided under the Constitution, sections 53(1)(b) the Constitution of Kenya, sections 5, 7(1) and 7(2) of the Children Act 2010, article 28 of the United Nations Convention on the Rights of the Child.
 - e. A declaration that the rights or fundamental rights of the petition to free and the compulsory education has been denied, violated and the 1st respondent continue to infringe on the said right.
 - f. An order restraining the respondents from further violation of the petitioners right and fundamental rights to free and compulsory basic education.
 - g. An order upholding and enforcing the petitioner’s fundamental right to basic education.
 - h. A prohibitory order do issue against Cabinet Secretary for Basic Education from promulgating and/or issuing any policy guideline in respect of the right to free basic education which is in breach and violation of article 53(1)(b) of the Constitution.
 - i. An order directing the Attorney General of the Republic of Kenya to amend section 29(1) of the Basic Education Act 2013 within a period to be specified by the court to harmonize the same within the ambits of articles 53(1)(b) of the Constitution, the preamble to the Basic Education Act 2013, section 28(1) of the New Education Act, 2013, section 7(1) and 7(2) of



the *Children's Act* 2011, article 28 of the *United Nations Convention on the Rights of the Child* and sessional paper No 14 of 2012-A policy framework for education and training.

- j. Costs of this petition
 - k. Any other order or relief that this honourable court deems fit and just to grant in the circumstances of the petition.
9. The petitioner submits that secondary education is part of basic education and therefore the right to secondary education is underpinned by article 53(1)(b) of the *Constitution* which provides that every child has the right 'to free and compulsory basic education.' The petitioner further submits that the right to basic education includes secondary education which ought to be enjoyed by every Kenyan child irrespective of whether he or she is attending public or private secondary school.
10. The petitioner contends that the Ministry of Education has acknowledged that it does not have sufficient secondary schools to accommodate all students graduating from primary school and has encouraged the private sector to invest and participate in the development of secondary schools. It is the petitioner's case that the policy to offer education benefits to students in public and municipal secondary school only discriminates against students in private secondary schools.
11. The petitioner submits that the state has an immediate obligation to ensure free and compulsory basic education and the prohibition of discrimination in education. Accordingly, he claims that a child has a right to choose where to be educated without discrimination in accordance with the stated policy of the state to provide free and compulsory primary and secondary education without distinguishing between a child attending government and private school.
12. The petitioner avers that section 29(1) of the *Basic Education Act, 2013* is inconsistent with article 53(1)(b) of the *Constitution* and section 28(1) of the same Act. Section 28 provides as follows;
- 28 (1) The Cabinet Secretary shall implement the right of every child to free and compulsory basic education
- (2) The Cabinet Secretary shall in consultation with the National Education Board and the relevant County Education Board provide for the establishment of—
- (a) pre-primary, primary and secondary schools, mobile schools, and adult and continuing education centers, within a reasonably accessible distance within a county;
 - (b) appropriate boarding primary schools in arid and semi-arid areas, hard to reach and vulnerable groups as appropriate; and
 - (c) academic centers, or relevant educational institutions to cater for gifted and talented learners;
 - (d) special and integrated schools for learners with disability.

Section 29(1) of the Act provides that,

“No public school shall charge or cause any parent or, guardian to pay tuition fees for or on behalf of any pupil in the school.”

13. The petitioner contends that because section 29(1) of the Act limits the application of free basic education to public schools thus taking away the benefit of children attending private schools to free basic education as provided for under article 53 of the *Constitution*, section 7(1),(2) of the *Children Act*



and section 28(1) of the [Basic Education Act, 2013](#). The petitioner urges the court to find that section 29(1) of the [Basic Education Act, 2013](#) is discriminatory and unconstitutional.

14. The petitioner avers that part vii of the Education Act, 2013 recognises the establishment of private primary and secondary schools and under section 49 and 50 a child has a right to attend any private school of their choice. That these private schools are co-partners in the provision of basic education in Kenya and are not solely established as business ventures since some of them are established by faith based organizations, NGO's, community based organizations and private sector to meet the educational needs where there is inadequacy.
15. The petitioner depones that his daughter, who completed her primary education in the year 2009, was unable to secure admission vacancy in a government secondary school and he opted to take her to form one in one of the private schools in Nakuru in the year 2010. That during this period, the Ministry had introduced free secondary education since 2008 but this confined only to public secondary schools.
16. The petitioner avers that the 'discrimination' continues to be executed and applied to the petitioner despite the acknowledgement by the Minister for Education that the government policy on education is geared to enhancing access, equity and quality education to all which policy is enshrined in the [Constitution](#) to provide for free and compulsory basic education as fundamental human right. He argues that the government policy to make education affordable to all can only make sense if all the children are treated equally and without any form of discrimination as is the current practice.
17. The petitioner's case was supported by the interested party. Mr Konosi, counsel for the interested party, concurred with the petitioner that the government's guidelines for free secondary school education are discriminatory and urged that economic discrimination is not permitted and that if the state wished to offer free education, it should do in a non-discriminatory manner. Counsel made reference to various international instruments in support of his argument on the state's obligation to fulfil the right to education.

Respondents' Case

18. The respondents oppose the petition through the replying affidavit of Professor James Ole Kiyiapi, the Permanent Secretary in the Ministry of Education sworn the August 29, 2011 and the further replying affidavit of Dr Belio Kipsang, the Principal Secretary, State Department of Education in the Ministry of Education, Science and Technology sworn on June 4, 2014. In the written submissions dated August 30, 2011, the 1st respondent ("respondent") submits that social and economic rights are achieved progressively by appropriate means through legislation and that the legislation in the education sector was under review by the task force.
19. The respondents aver that the right to education is to be achieved progressively with the most vulnerable in society taking precedence, in this case the vulnerable children who can barely afford to pay tuition and other fees and are therefore forced to attend public schools.
20. The respondents reject the petitioner's claim that the state's funding of public secondary schools amount to discrimination arguing that the funding of free secondary education in public schools is based on the principle of provision of public services in public institutions and that any person who wished to benefit from these services could do so from these public institutions. It was the respondents' contention that private institutions are business ventures whose main objective is profit realization and that the State should not fund such ventures.
21. The Attorney General opposes the petition on grounds that the right to basic education is not an absolute right under domestic and international law. Through a statement of grounds of opposition



filed on September 1, 2012, the Attorney General also averred that article 21(2) of the Constitution directs the state to take legislative, policy and other measures to achieve the progressive realisation of social and economic rights guaranteed under article 43. The Attorney General submits that the state's position is buttressed by various treaties that Kenya has ratified and which provide for the progressive realisation of the right to basic education to the maximum available resources of the state.

Analysis and Determination

22. From the pleadings, dispositions and submissions, I have framed the following issues for my determination:
 - a. The nature and extent of the right to education and the state obligations under the Constitution, local and international law.
 - b. Whether section 29(1) of Basic Education Act, 2013 contradicts section 28(1) of the same Act.
 - c. The principle of equality and whether government's policy confining funding and in kind support only to public secondary schools is discriminatory.
 - d. Whether there has been a breach of the petitioner's right to education as alleged or at all.

Right To Education And Extent of a State's Obligation

23. The right to education is one of the new generation of fundamental rights protected under the Constitution. Under the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights (ICESCR), the right is recognised as directed to the full development of the human personality and the sense of its dignity. The article 13(1) of the ICESCR at provides that, "The states parties to the present covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms..." (See also Timothy Wafula Makokha & others v Council for Legal Education & others, Nairobi petition No 12 of 2012[2012]eKLR).
24. The ICESCR Committee General Comment 13 (21st Session, 1999 on "The right to education article 13") at para. 1 recognised the centrality of the right to education in the following terms, "Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."
25. Likewise the importance of education is captured in the ICESCR general comment No 11 on "Plans of action for primary education" (1999) at para 2 as follows;

"The right to education, recognized in articles 13 and 14 of the covenant, as well as in a variety of other international treaties ... is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of



those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.”

26. The *Universal Declaration on Human Rights* embraces education as a basic human right. Other key international instruments ratified by Kenya recognising and protecting the right to education include the *UN Convention on the Rights of the Child* (UNCRC), *African Charter on Human and People’s Rights* (ACHPR) and the *African Charter on Rights and Welfare of the Child* (ACRWC). These instruments now constitute part of the law of Kenya by virtue of article 2(6) of the *Constitution*.
27. The right to education, like all human rights, imposes on states parties the obligations to respect, protect and fulfil. Article 21(1) of the *Constitution* provides that, “It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights.” The obligation to respect requires states parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide while the obligation to protect requires states parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil or facilitate requires states to take positive measures that enable and assist individuals and communities to enjoy the right to education (See ICESCR General Comment No 13 at paras 46, 47).
28. Turning to the local situation, article 43(1)(f) of the *Constitution* enshrines the right to education as part of the economic and social rights. It provides that, “every person has the right to education.” This provision is one amongst the other provision in the *Constitution* that deal with education. Under article 53(1)(b) of the *Constitution*, children have the right, ‘to free and compulsory basic education.’ Under article 55, the State is obliged to take measures including affirmative action to ensure that the youth have, “access relevant education, training and employment.” Article 56(b) provides that the minority and marginalised groups are to be provided with, “special opportunities in educational and economic fields.” The rights of persons with disabilities to access educational institutions and facilities are secured by article 54 which requires that persons with disabilities be integrated into the society to the extent that is compatible with their interests.
29. Although the *Children Act* was enacted before the promulgation of the *Constitution*, it domesticates Kenya’s treaty obligation regarding the rights of the child. It is intended, “to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.” Section 7 of the Children Act provides for every child’s entitlement to education as follows;
 1. Every child shall be entitled to education the provision of which shall be the responsibility of the government and the parents.
 2. Every child shall be entitled to free basic education which shall be compulsory in accordance with article 28 of the United Nations Convention on the Rights of the Child. [emphasis mine]
30. Article 28 of the *United Nations Convention on the Rights of the Child*, which is incorporated in the *Children Act*, provides as follows;
 1. States parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child,



and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present convention.

3. States parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

31. The obligation to provide free and compulsory primary education is also to be found in article 13(2) of [ICESCR](#) which states;

13(2) The states parties to the present covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education. [Emphasis mine]

32. While article 43 of the [Constitution](#) refers to the right to education generally, article 53(1)(b) which elaborates the right in relation to children imposes on the State to provide free and compulsory basic education. an obligation that is also imposed by the [Children act](#). Section 28(1) of the [Basic Education act, 2013](#) imposes on the State the duty to implement free and compulsory basic education. An analysis of the provisions of the [Constitution](#), the [Children Act](#), [Basic Education Act](#) and the international law imposes on the state an obligation to provide free and compulsory basic education. Although the term “basic education” is not defined in the [Constitution](#) or the [Children Act](#), various international instruments give an indication as to the meaning of basic education. ICESCR General Comment No 13 at para 9 notes that,

“The committee obtains guidance on the proper interpretation of the term “primary education” from the [World Declaration on Education for All](#) which states, “The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community. While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the committee endorses the position taken by UNICEF: “Primary education is the most important component of basic education.”



33. the *United Nations Convention on the Rights of the Child* and ICESCR makes a distinction between primary and secondary education, the *Basic Education Act, 2013* does not make this distinction. Section 2 of thereof defines “basic education” as “the educational programmes offered and imparted to a person in an institution of basic education and includes adult basic education and education offered in pre-primary educational institutions and centres.”
34. It is therefore clear that the state, through the *Basic Education Act, 2013*, has taken a much broader approach to the definition of basic education than that obtaining in international instruments and the *Children Act*. Under section 28 of the Act, every child has the right to free and compulsory basic education. A child under the Act and under the *Children Act* is any person who has not attained the age of eighteen years. These provisions taken together means that every person under the age of eighteen years is entitled to primary and secondary education in Kenya that is free and compulsory.
35. The next question for consideration is whether the obligation to provide free and compulsory basic education to be realised immediately or progressively? On the international front, article 28 of the Convention on the Rights of the Child, which was adopted by United Nations General Assembly in 1989, provides that “state parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular,
- a. Make primary education compulsory and available free to all,
 - b. Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - c. Make higher education accessible to all on the basis of capacity by every appropriate means;
 - d. Make educational and vocational information and guidance available and accessible to all children;
 - e. Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
36. General comment No 11 of the Committee on the Rights of the Child, adopted at the Fiftieth Session Geneva, in January 2009 notes at para 59,
- “Article 28 of the *Convention* sets out that states parties shall ensure that primary education is compulsory and available to all children on the basis of equal opportunity. States parties are encouraged to make secondary and vocational education available and accessible to every child.”
37. Article 21(2) of the *Constitution* obliges the state to
- “take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43.”
- The right to education, being a right protected under article 43, is subject to article 21(2). The term “progressive realisation” was the subject of consideration by the Supreme Court In *the Matter of the Principal of Gender Representation in the National Assembly and the Senate* advisory opinion No 2 of 2012 [2012]eKLR. The court observed that as follows;
- (53) We believe that the expression “progressive realization” is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal



which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action.

- (54) Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.
38. The progressive realisation of free and compulsory basic education the government to, ‘take deliberate, concrete and targeted steps towards the full realisation of the right and within a reasonably short period.’ (See ICESCR Committee General Comment No 3, para 1). The realization of the right to education over time, that is “progressively”, should not be interpreted as depriving states parties’ obligations of all meaningful content. progressive realization means that states parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of the right. The state is therefore obliged to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights.
39. In the case of *Government of the Republic of South Africa v Grootboom* 2000(11) BCLR 1169, the South Africa Constitutional Court stated that reasonable steps means that they are based on coherent policies and programs that are reasonable both in conception and implementation. In the words of court:
- “[42] A court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met.”
40. As concerns the right to education, progressive realisation does not mean mere paper policies but deliberate and concrete steps taken to achieve free basic education for all on a non-discriminative basis, deployment of maximum available resources to ensure realization, avoid retrogressive measures and



monitor enjoyment of the right. As Bemih Kanyonge notes in *Promoting Education as a Human Right in Kenya* (Hilde Back Education Fund, 2013), p 11,

“It calls for more than just election campaign declarations and subsequent setting up of unsustainable projects in order to be seen to have fulfilled campaign pledge ..”

41. The issue in this case is whether the failure by the State to provide free education to children in private schools is discriminatory, in the circumstances it is unnecessary to decide whether the State has complied with its obligation to ensure that the right to free and compulsory education for children is realised progressively. That may be an inquiry for another case. I will mention though that Task force on the Re-alignment of the Education Sector to the Constitution which culminated in the passing of the *Basic Education Act, 2013* recognised that development of secondary education was hampered by lack of infrastructure and resources. The Task Force recommended that, “(a) Adequate funding and resources should be availed to enable standards and quality assurance officers to reach as many schools as possible in the country.”
42. The Task Force also stated, at para. 16.3.3 on ‘Issues and Gaps in Private Institutions Operations.’, that there was a
- ‘(f) Lack of adequate incentives to private investors in education.’ and that ‘Children in Private Institutions do not benefit from free education grants.’

It recommended that the government do

‘provide adequate incentives to private investors in education so that they are able to effectively contribute to improving access, quality, equality and relevance”

and that

‘[t]he government to provide capitation grants to learners in private institutions on agreed terms and conditions.’

43. It is therefore clear that the government has recognised the gap existing in the provision of funding of private schools. The *Basic Education Act, 2013* has attempted to address many of the problems plaguing the education sector by providing a legislative framework for implementation of the constitutional guarantee to education. It provides a foundation upon which the progressive realisation of the right to education will be judged in future.

Whether section 29(1) of Basic Education Act contradicts section 28(1) of the same Act

44. The petitioner contends that section 29(1) of the *Basic Education Act, 2013* contradicts section 28 of the same Act as it has taken away the right of every child to free basic education regardless of whether they are in private or public school.
45. Section 28(1) of the Act is clear and requires no more than a literal interpretation. It imposes on the Cabinet Secretary for Education the responsibility of implementing the State’s obligation to provide free and compulsory basic education for children. The manner in which the Cabinet Secretary discharges that obligation, within the parameters set by the *Constitution* and the statute, are matters within the policy discretion of the national government and this court cannot interfere in such policies unless it is shown that the Cabinet Secretary has in violation of the *Constitution*.
46. Section 29(1) of the Act is also clear and unambiguous. That public schools shall not charge any fee on behalf of a pupil in the school is a logical consequence of the State own undertaking to provide



free and compulsory basic education. There is therefore no contradiction or ambiguity as contended by the petitioner.

Equality and Discrimination

47. I now turn to the issue that is the heart of this matter. The issue is whether the funding or other in kind assistance by the Government to public secondary schools to the exclusion of private schools is discriminatory and in breach of the principle of equality. The petitioner contends that the government policy to offer financial and other in kind support including provision of teachers through the Teachers Service Commission only to public school students excluding other students in private secondary schools is discriminatory.

48. While the realization of the right to basic education may be progressively realized, the right to non-discrimination is immediate. As observed by the ICESCR at para 31:

“The prohibition against discrimination enshrined in article 2 (2) of the covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination...”

49. Article 27 of the [Constitution](#) which deals with equality and freedom from discrimination provides as follows;

- (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.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (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).
- (6) To give full effect to the realisation of the rights guaranteed under this article, the state shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
- (8) In addition to the measures contemplated in clause (6), the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

50. Wilson J., in [Andrews v Law Society of British Columbia](#) [1989] I SCR 321, defined discrimination as a

“distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group [which] has an effect which imposes disadvantages not



imposed upon others or which withholds or limits access to advantages available to other members of society.”

Article 27 guarantees equality for all persons and prohibits discrimination and the term “discrimination” implies any distinction, exclusion, restriction or preference which is based 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.

51. For the purpose of this case, it refers to any distinction, exclusion, limitation or preference based on the grounds enumerated which has the purpose of nullifying or impairing equality of treatment in education. According to article 1 of the 1960 UNESCO Convention against Discrimination in Education such distinction, exclusion, limitation or preference may be manifested in depriving any person or group of persons of access to education of any type or at any level; of limiting any person or group of persons to education of inferior standard; or of establishing or maintaining separate education systems or institutions for persons or groups of persons.
52. The issue whether children in private schools may be the subject of discrimination was dealt with in the case of *John Kabui Mwai & 3 others v Kenya National Examination Council* Nairobi Petition No 15 of 2011 [2011]eKLR. In that case the High Court held that from a reading of article 27(4) considered in light of article 259(4)(b) of the *Constitution*, the framers of the *Constitution* did not intend to declare the categories of discrimination mentioned in article 27(4) to be closed and that children in private schools could therefore be the subject of discrimination.
53. It is now well established that inequality treatment is not per se prohibited (see *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & Another*, NRB Petition No 102 of 2011; [2011]eKLR and *Community Advocacy and Awareness Trust & 8 Others v Attorney General*, NRB Petition 243 of 2011 [2012]eKLR). The question as to whether a discrimination is fair or unfair hence illegal is to be weighed against the rationality test. This is to say that the aim of the inequality should be aimed to achieve a certain legitimate governmental objective. This was clearly elucidated in *RM v Attorney General* [2008] 1 KLR (G & F) 574, the court stated that,

“The equal protection do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different. The law does all that is needed when it does all it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as first as its means allow.” The court further stated that, “We further hold that the principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful if they satisfy the following:-

- (1) Pursue a legitimate aim such affirmative action to deal with factual inequalities;
and
- (2) Are reasonable in the light of their legitimate aim.”

Although the court referred to a reasonable basis for differentiation, I think the proper test is one of rationality in the sense that all the court needs to be satisfied is that the object of differentiation bears a rational relationship to a legitimate government purpose compatible with the principles and values of the *Constitution*. Such a test maintains fidelity to the principle of separation of powers that is one of the pillars of the Constitution (see *Political Parties Coalition Forum Coalition & others v Office of the Registrar of Political Parties and others* NRB Petition No 436 of 2013; [2014]eKLR).



54. The question for my determination is not merely whether the provisions are discriminatory or amount to unequal treatment, but whether the different treatment of children in public and private schools in the circumstances of this case bears a rational connection with legitimate governmental purpose. The issue of the different treatment of public and private schools was considered in *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* (*supra*). The question for consideration was whether the formula used to determine the number of Kenya Certificate of Primary Education candidates to be placed in national schools from public and private primary schools of a particular district discriminated against candidates from private schools. The effect of the formula was to diminish the number of private school students proceeding to national public secondary schools compared to their public school counterparts. The petitioners contended that the policy discriminated against private school students and that the policy did not afford them the opportunity to realize their full potential. In considering the matter the High Court observed as follows;

“Rightly or wrongly, and it is not for the courts to decide, the framers of the Constitution manifestly regarded as inadequate a blanket right to equal treatment, and their intention was to remedy the perceived societal inequalities thus recognising the necessity of corrective measures, namely those envisaged in article 27(6), which were at the same time given the status of constitutional guarantee. It was out of the realization that unequal people cannot be treated equally. Comparisons between different groups are necessary to discern the differential effect of policy and to assist the court in properly characterizing and identifying the groups that are relevant to the particular article 27 at hand. Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in equality or whether, on the other hand, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.”

55. In order to determine whether the policy is discriminatory, it is necessary to consider whether funding or in kind support for public schools to the exclusion of private schools achieves a legitimate aim consistent with the constitutional values and principles. It is not in dispute that the state has limited funding for education. The limited funding is one of the reasons why the State has invited private institutions to invest in the education sector. In Sessional Paper No 1 2005 titled “*A Policy Framework for Education, Training and Research*” the State recognized this as follows,

“[10.4] In view of the heavy public support required for basic education, there is need for increased participation by the Private Sector in the provision and expansion of education, particularly at Secondary, Tivet and University levels. Encouraging investments from the private sector will be crucial for sustained sector expansion and will require a new policy frame work within which to promote and regulate private investment, private school registration as well as quality assurance and supervision. The policy focus here will be on resolving the constraints to private sector participation in education, for example, in the areas of school financing and land acquisition by giving incentives to investors. Increased private sector investments will relieve public funds to finance the implementation of curriculum reform and assure quality and relevance on the provision of basic education.”

56. In order to progressively realize the free secondary school education, the government must give priority to public schools which serve the majority of students across the country. According to the Education Policy Framework Paper of 2012,

“A review of secondary education development in Kenya indicates that the number of secondary schools increased from 2,678 in 1990 to 3,999 (11.3% private) enrolling 0.870



million students in 2003 and 4,215 (13% private) schools enrolling 1.03 million students (10% in private schools) in 2006 and 1.7 million in 2010 (8% private).”

This shows that the majority of students in secondary schools go to public schools. Under article 43(3) of the *Constitution*, the state also has the obligation to give priority to the most vulnerable and marginalized in the society. This means the funding of children in private schools while a goal to be progressively realized, its application immediately would undermine affirmative action which is also permitted under article 27(6) of the *Constitution*.

57. I therefore find and hold that the failure by the state to provide financial and in kind assistance to private schools is not discriminatory. The distinction between children in private and public school is intended to achieve the overall goal of progressively providing free education to all children in the future. My reasoning is further buttressed by the ICESCR General Comment No 13 on Education which states at Para 54 that,

“54. States parties are obliged to establish “minimum educational standards” to which all educational institutions established in accordance with article 13(3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State party has no obligation to fund institutions established in accordance with article 13(3) and (4); however, if a state elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.”

Conclusion and Disposition

58. For the reasons I have stated above and in the issues for determination framed, I find as follows;

- a. The right to education protected under article 43(1)(f) of the *Constitution* is to be realized progressively in accordance with article 21(3) of the *Constitution*.
- b. Free and compulsory basic education guaranteed to every child under article 53(1)(b) of the *Constitution* includes both primary and secondary education as provided by the Education Act, 2013.
- c. The government’s policy for funding and in kind support for public secondary schools to the exclusion of private secondary schools does not discriminate between children in public or private school.
- d. Section 29(1) of the *Basic Education Act, 2013* does not contradict section 28 of the Act.

59. In the result the petition is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF OCTOBER 2014.

D.S. MAJANJA

JUDGE

Mr Ndolo instructed by Musembi Ndolo and Company Advocates for the Petitioner

Mr Ojwang, Litigation Counsel, instructed by the Officer of the Attorney-General for the respondents.

Mr Konosi instructed by Konosi and Company Advocates for the Interested Party.

