PO (Suing as next friend of AA & 9 others v Board of Management St. Annes Primary School, Ahero & 3 others (Civil Appeal 173 of 2020) [2023] KECA 571 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 571 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 173 OF 2020

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 12, 2023

BETWEEN

PO (SUING AS NEXT FRIEND OF AA) ..... 1ST APPELLANT

PO (SUING AS NEXT FRIEND OF IA) ..... 2ND APPELLANT

PO (SUING AS NEXT FRIEND OF BA) ..... 3RD APPELLANT

PO (SUING AS NEXT FRIEND OF FA) ..... 4TH APPELLANT

PO (SUING AS NEXT FRIEND OF GO) ..... 5TH APPELLANT

PO (SUING AS NEXT FRIEND OF SN) ..... 6TH APPELLANT

PO (SUING AS NEXT FRIEND OF IO) ..... 7TH APPELLANT

PO (SUING AS NEXT FRIEND OF WT) ..... 8TH APPELLANT

PO (SUING AS NEXT FRIEND OF PS) ..... 9TH APPELLANT

LAW SOCIETY OF KENYA ..... 10TH APPELLANT

AND

BOARD OF MANAGEMENT ST. ANNES PRIMARY SCHOOL, AHERO ..... 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

ASSOCIATION OF JEHOVA'S WITNESSES IN EAST AFRICA .... 4TH RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Kisumu (Ochieng, J.) dated 30th September, 2019 in Petition No. 6 of 2018)

Compelling students to participate in interfaith activities contrary to their religious beliefs was a violation of their freedom of religion

The appellants were Jehovah Witness students whose petition against the compulsory attendance of non-classroom interfaith activities which included a mandatory 30-minute Catholic Mass every Friday morning had been dismissed by the school's board of management. The court held that compelling the appellants to participate in interfaith activities, particularly the Friday Mass, contrary to their belief, was a violation of their fundamental right and freedom as envisaged in article 32(4) which provided that a person shall not be compelled to act or engage in any act, that was contrary to the person's belief or religion.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – freedom of conscience, religion, belief and opinion - whether the compelling of students to participate in interfaith activities contrary to their religious beliefs was a violation of their freedom of religion – Constitution of Kenya, 2010, article 32.*

Constitutional Law *– fundamental rights and freedoms – limitation of fundamental rights and freedoms – factors to consider in the limitation of fundamental rights and freedoms - limitation of freedom of conscience, religion, belief and opinion - whether failing to consider whether there was a law limiting the freedom of religion but considering whether the limitation was justified rendered the limitation a nullity - Constitution of Kenya, 2010, article 24.*

Brief facts

The appellants were Jehovah Witness students who attended St. Annes Primary School, Ahero (the school). It was averred that on September 26, 2017, the appellants petitioned the school against the compulsory attendance of non-classroom interfaith activities, which they deemed adverse to their freedom of religion. The school's board of management dismissed the concerns of the appellants, determining that all students in the school were bound by the rules and regulations which included a mandatory 30-minute Catholic Mass every Friday morning. Subsequently, the 1st appellant was expelled by the 1st respondent for her refusal to attend the compulsory Friday Mass. She was later re-admitted on condition that she would attend the Mass, and was made to sign a declaration to that effect.

Aggrieved, the appellants filed a petition at the trial court complaining that the rule that required every student to attend a compulsory Catholic Mass every Friday morning, grossly violated articles 32(1) and (2) of the Constitution which provided for freedom of conscience, religion, thought, belief and opinion, as well as the right to manifest any religion or belief through worship, practice, teaching or observance of any day of worship. The appellants further contended that the mandatory 30-minute Mass every Friday morning contravened article 32(4) which stated that a person shall not be compelled to act, or engage in any act that was contrary to the person's belief or religion.

The trial court found in favour of the 1st respondent and ordered among others that; the 1st petitioner and her parents had originally accepted the school rules and regulations, which included the requirement that all students must attend Mass on Friday mornings. Aggrieved, the appellants filed the instant petition.

Issues

i. Whether the compelling of students to participate in interfaith activities contrary to their religious beliefs was a violation of their freedom of religion.
ii. Whether failing to consider whether there was a law limiting the freedom of religion but considering whether the limitation was justified rendered the limitation a nullity.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 32 - Freedom of conscience, religion, belief and opinion

1. *Every person has the right to freedom of conscience, religion, thought, belief and opinion.*
2. *Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.*
3. *A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.*
4. *A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.*

Held

1. The appellants and their parents had been made aware of the rules and regulations of the school including the Friday Mass at 7am. Further, the record had a commitment letter signed by one of the appellants on February 9, 2018 undertaking to obey the school rules and regulations. There was nothing more indicating that the rest of the appellants and their parents committed themselves to be bound by the school and rules and regulations. In the circumstances, the trial court fell into a reversible error in making the findings especially if, as in the instant case, such finding was interpreted by the trial court to mean a wholesale acceptance of a religious practice the appellants found objectionable to their faith.
2. The appellants through their parents expressly stated in the letter dated September 26, 2017 that their faith as Jehovah Witnesses prohibited them from participating in interfaith activities and sought their children's exemption from those activities. The refusal of that request by the 1st respondent, was akin to coercing the appellants to abandon or forgo tenets of their faith and to adopt a religion which was not of their choice, ultimately infringing the appellants right to freedom of religion as envisaged under article 32 of the Constitution.
3. Compelling the appellants to participate in interfaith activities, particularly the Friday Mass, contrary to their belief, was a violation of their fundamental right and freedom as envisaged in article 32(4), and they were entitled to protection of the law.
4. The appellants' conduct could not possibly limit their constitutionally guaranteed rights. Rights were entitlements that one could demand and stand on. The appellants sincerely held a belief against interfaith activities, and the trial court erred in failing to so find.
5. The trial court did not conduct the entire article 24 of the Constitution analysis but restricted itself to considering whether attendance of the mandatory Catholic Mass was justified. Having failed to consider whether there was a law in place limiting the appellants' freedom of religion, the limitation on that fundamental freedom was a nullity. While Holy Mass was a very integral part of the life of a Catholic, one could not, without violence to the right to freedom of religion, be compelled to attend it.
6. Religion was a fundamentally subjective matter of faith and belief that was not susceptible to rational justification. Indeed, it would be absurd for a particular religious tenet to be subjected to the test of believability by those who did not believe in it. The school would not have suffered any hardship by exempting the appellants from the 30-minutes Friday Mass. In compliance with the concept of reasonable accommodation, the school ought to have adjusted its rules to enable all students to practice their respective religions while still complying with the school rules and regulations.
7. The school should have worked out a reasonable accommodation for the appellants, especially considering the fact that it was a public school, a school maintained or assisted out of public funds. The circular dated March 4, 2022 from the Office of the Principal Secretary, Ministry of Education, advising on the need to respect the religious rights of learners outlined the right to exercise and manifest the freedom of conscience, religion, belief as stipulated in article 32 of the Constitution and urged school administrators, boards of management, sponsors and any other stakeholder not to violate those rights.
8. Although the circular was not existent when the facts in issue arose, going forward it would be a useful guideline in respecting and enforcing the religious rights of learners, and school administrators would

do well to heed it. The judgment, like the court's earlier decisions, accords with the guidance given in the circular.

9. *Seventh Day Adventist Church (east Africa) Limited v Minister for Education* [2017] eKLR was practically indistinguishable from the facts in issue and the applicable legal principles in the instant case. The trial court referred to that case selectively omitting the salient findings of the court which was binding upon it.

Appeal partly allowed.

Orders

i. *A declaration was issued that the 1st appellant's expulsion from school on the basis of her religious views amounted to indirect discrimination; constituted a violation of her right to education and right to dignity and was therefore null and void.*

ii. *A declaration was issued that the school rules and regulations that provided for a mandatory 30-minute Mass every Friday morning for all children at the 1st respondent were indirectly discriminatory, unconstitutional, and invalid.*

iii. *No order as to costs.*

Citations

Cases

Kenya

1. *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Applied)
2. *Mohamed Fugicha v Methodist Church In Kenya (suing Through Its Registered Trustees) & 3 Others* Civil Appeal 22 of 2015; [2016] KECA 273 (KLR) - (Followed)
3. *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others* Civil Appeal 172 of 2014; [2017] KECA 751 (KLR) - (Applied)

South Africa

1. *Mec For Kwazulu Natal, School Liaison Officer & others v Pillay* (CCT 51/06) [2007] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC) - (Applied)
2. *Prince v South Africa* AHRLR 105 (ACHPR 2004) - (Applied)

Regional Court

Selle v Associated Motor Boat Co [1968] EA 123 - (Applied)

Statutes

Kenya

1. Basic Education Act (cap 211) sections 4, 27(c); 34- (Interpreted)
2. Children Act (cap 141) sections 8-10- (Interpreted)
3. Constitution of Kenya articles 2(5)(6); 20(3)(b); 21; 23; 27(4); 32(1)(2)(4); 52 -(Interpreted)

Advocates

None mentioned

JUDGMENT

Judgment of Kiage, JA

1. This appeal is against a judgment delivered on September 30, 2019, by which Ochieng, J found in favour of the 1st respondent and ordered as follows;

"a As the 1st petitioner confirmed having sat for the KCPE Examinations in 2018, her right to education had not been violated.

b. Not only did the 1st petitioner sit for her exams, she and her parents had originally accepted the school rules and regulations, which included the requirement that all students must attend mass on friday mornings.

I find that the 1st petitioner was not entitled to any award of damages for the alleged violation of her fundamental rights and freedoms.

c. Pursuant to article 32(4) of the *Constitution* of Kenya, no person should be compelled to act or engage in any act that is contrary to the person's belief or religion. If there is any such compulsion, it would be unconstitutional.

d. In this case, the petitioners had accepted the rules by appending their signatures and by their parents also appending their signatures to the same; thus signifying acceptance of the said rules.

e. As this is a public interest litigation, I order that each party will pay his or her own costs".

2. A brief background to the case before that court is that the 1st to 9th petitioners (the appellants) were Jehovah Witness students who attended St Annes Primary School, Ahero (the school). It was averred that on September 26, 2017, the appellants petitioned the school against the compulsory attendance of non-classroom interfaith activities, which they deemed adverse to their freedom of religion. That petition prompted a meeting of the school's board of management which dismissed the concerns of the appellants, determining that all students in the school were bound by the rules and regulations which included a mandatory 30-minute Catholic Mass every friday morning. Subsequently, the 1st appellant was expelled by the 1st respondent for her refusal to attend the compulsory friday mass. She was later re-admitted on condition that she would attend the mass, and was made to sign a declaration to that effect.

3. The foregoing events triggered the petition before the High Court wherein the appellants complained that the rule that required every student to attend a compulsory Catholic Mass every Friday morning, grossly violated articles 32(1) and (2) of the *Constitution* which provides for freedom of conscience, religion, thought, belief and opinion, as well as the right to manifest any religion or belief through worship, practice, teaching or observance of any day of worship. The appellants further contended that the mandatory 30-minute mass every Friday morning contravened article 32(4) of the *Constitution* which states that a person shall not be compelled to act, or engage in any act that is contrary to the person's belief or religion. It was pleaded that the school's re- admission of students to the school pegged on their attendance of Mass was a violation of article 53 which provides that every child has the right to free and compulsory basic education. Moreover, failure to provide reasonable accommodation for Non-Catholics violated article 27(4) of the *Constitution* which forbids both direct and indirect discrimination against any person on any ground.

4. In conclusion the appellants sought the following reliefs from the High Court;

a. A declaration that the 1st petitioner's expulsion from school on the basis of her religious views amount to indirect discrimination; constitute a violation of the 1st petitioner's right to education, right to dignity and was therefore null and void.

b. Damages for violation of the 1st petitioner's fundamental rights and freedoms.

c. A declaration that the school rules and regulations that provide for a mandatory 30- minutes mass every Friday morning for all children is indirectly discriminatory, unconstitutional and invalid.

d. That the 2nd and 3rd respondents be compelled to provide a directive and or regulations for schools in Kenya on the exercise of freedom of conscience, religion, belief and opinion."

5. The 1st respondent opposed that petition, asserting that before admission, the 1st to 9th appellants were made aware of the rules and regulations of the school including the Friday Mass at 7.00 am; it was inequitable for them to change their mind mid-stream after making the school believe that they had accepted the rule; the school received a letter signed by the parents of the 1st to 9th appellants requesting that their children be exempt from all interfaith activities; the request was considered and consultations made by the board of management upon which a decision was made that it was not possible to exempt the said children from activities as they requested since they were part of the rules and regulations; the school is sponsored by the Catholic church and has a mandate to incorporate spiritual growth in its curriculum.

6. The 2nd and 3rd respondents equally opposed the petition stating that in a meeting held on October 12, 2017, the 1st appellant together with other parents of the Jehovah Witnesses faith had demanded that their children should not sing the National Anthem or participate in any co-curricular activities, an action that is not proper since reciting of the National Anthem and participation in co-curricular activities are for all learners in Education institutions. Further, while recognizing and promoting the constitutional right of the appellants, they too have to abide by the laid down rules and procedures of educational institutions which are sponsored.

7. The 4th respondent, an interested party in the proceedings before the High Court, supported the appellants' position by highlighting some of the beliefs of the Jehovah's Witnesses, and the constitutional, statutory, and jurisprudential foundation for their right to hold those beliefs and manifest them.

8. Upon consideration of the petition, as aforesaid, the learned judge held in favour of the 1st respondent.

9. That holding provoked this appeal in which the appellants fault the learned judge on 7 grounds, later condensed to 4 questions in the written submissions thusly;

    a. Did the High Court make findings of fact that are not supported by the record?

    b. Did the High Court err by failing to find that forbiddance of interfaith activities is a genuinely held belief by Jehovah Witnesses, and consequently, that expulsion of the appellants from school for refusing to attend the compulsory Catholic Mass interfered with this belief?

    c. Did the High Court err by upholding limitation of the appellants' right to religion without undertaking the mandatory, three-part test in article 24 to determine if or not the limitation of the appellants' right to religion:

        i) was by law;

        ii) served a legitimate aim; and

        iii) was the least restrictive measure in the circumstances?

    d. Did the High Court disregard this court's controlling precedent in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education* [2017] eKLR, which was binding on the questions raised in the petition?

10. At the virtual hearing, learned counsel Mr Ochiel J Dudley appeared for the appellants, Mr Gerbera Qeu for the 1st respondent, Mr Daniel Kobimbo for the 2nd and 3rd respondents, and Mr Anami with Ms Waishigo appeared for the 4th respondent.

11. Before hearing of the substantive appeal, counsel for the 4th respondent sought to adduce additional documentary evidence vide a motion dated October 12, 2022, which was on record. The additional evidence was in the form of a letter from the Office of the Principal Secretary, Ministry of Education, State Department of Early Learning and Basic Education dated March 4, 2022, reference no MOE.HQS/3/10/18. The letter, addressed to all County Directors of Education, points out the various ways that some schools violate the religious rights of learners and warns school administrators, Boards of Management, Sponsors or any stakeholders from violating those rights. While the appellants did not object to the introduction of that evidence, the 1st respondent opposed it.

12. Mr Anami submitted that the letter (circular) issued by the 2nd respondent on March 4, 2022 was not available at the time when the case was decided at the High Court. He explained that the reason they wished to introduce the document was because it is a public document that guides freedom of religion in schools. Mr Qeu on the other hand objected to the adduction of that evidence arguing that additional evidence should not be further evidence as was in the instant case. He asserted that evidence was only additional if at the time when the matter was live before the High Court, that evidence existed and could have been brought before court, but for reasons advanced by the applicant. This was not the case, however, Mr Qeu continued, as the circular was not before the school when the events leading to this case transpired, hence the school could not be adjudged on appeal on documents that were non-existent then.

13. We pointed out to Mr Qeu that the circular was now in the public domain and we could not simply shut our eyes to it. Further, just like the High Court decision, this court's judgment is intended to give future guidance to schools on religious rights of students, hence it was important to consider new developments in this area. In the end, parties agreed by consent that the circular be placed before us and we would decide what to make of it.

14. Moving to the substantive appeal, Mr Ochiel faulted the learned judge for making findings of fact that were not supported by the record notably, that "the petitioners had from the onset indicated their readiness to comply with the school rules", and that "petitioners and their parents had accepted the rules by appending their signatures signifying acceptance of the rules". The truth of the matter is that, counsel contended, only one petitioner, AA, signed a commitment letter as part of the disciplinary process as a precondition to her admission back to the school. Her parents and the other appellants did not sign the commitment, contrary to what the High Court found.

15. Mr Ochiel submitted that subsequent to that wrong finding, the learned judge failed to conduct the three-part test in article 24 of the *Constitution* to determine if or not the limitation of the appellants' right to religion was by law, served a legitimate aim, and was the least restrictive measure in the circumstances. Relying on this court's decision in *Seventh Day Adventist Church (East Africa) Limited v Minister for Education* [2017] eKLR (the SDA case), counsel asserted that the court has to first determine whether a law has been enacted restricting the enjoyment of a right. Had the High Court undertaken that analysis, it would have found that no law was enacted to restrict the enjoyment of the appellants' religious rights.

16. It was contended that the rule on mandatory attendance of the Catholic Mass did not serve any legitimate aim. Moreover, counsel urged, the appellants' case was that the uniform application of the compulsory rule on attendance of Catholic Mass was indirectly discriminatory towards them and the discrimination was exacerbated by the 1st respondent' failure to afford the appellants reasonable accommodation. It was argued that the appellants were discriminated against both directly and indirectly, contrary to article 27 of the *Constitution*. Direct discrimination was based on their

religion and indirect discrimination was premised on the fact that the uniform rule to attend Mass disproportionately affected some students more than others.

17. We sought to know from Mr Ochiel how the appellants were directly discriminated against, seeing that the rule on mass attendance seemed neutral and there was no direct singling out of the Jehovah Witnesses. To this, counsel's response was that what he meant was that there was a direct violation of article 32. He posited that whereas the school would not have suffered any loss by exempting the appellants from the Mass, it instead compelled them to attend in violation of article 32. The decision in the SDA case (*supra*) was cited for the proposition that reasonable accommodation is required where discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which, nevertheless, has a marginalizing effect on certain portions of society where a reasonable balance between conflicting interests may and should more easily be struck.

18. We probed further whether counsel's arguments on exemption from interreligious activities would equally apply in private schools like parochial schools. In reply, counsel referred the court to section 27(c) of the *Basic Education Act*. The section requires the sponsoring church to, while providing spiritual development, safeguard and respect other denominations.

19. Mr Ochiel faulted the learned judge for failing to find that forbiddance of interfaith activities is a genuinely held Jehovah Witness belief, and that expulsion of the appellants from school for refusing to attend compulsory Catholic Mass limited their right to freedom of religion and the right to education. Counsel urged that forbiddance of interfaith activities is a genuinely held belief in terms of article 32 which permits every person, whether individually or in community, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance.

20. Mr Ochiel further criticized the learned judge for disregarding this court's binding precedent in the SDA case (*supra*) which he claimed was cited to him but he ignored it. He insisted that the said decision was relevant, decisive and binding on all issues that were raised in the petition. It was argued that the court failed to adopt an interpretation that most favours the needs of the vulnerable groups within society, including women, children and members of particular ethnic, religious or cultural communities pursuant to articles 20(3)(b) and 21 of the *Constitution*.

21. On the kind of relief that the appellants were seeking from us, Mr Ochiel submitted that under article 23 of the *Constitution*, this court has the power to grant any appropriate relief, and primarily a declaration that there was a violation of rights. He, however, intimated that he would not be insistent on the award of damages.

22. For the 4th respondent, Mr Anami submitted in support of the appellants, arguing that the discourse about freedom of conscience and religion had been on-going for almost 2,500 years and with the advent of the *Constitution* of Kenya, 2010, there was a deliberate effort by the Government of Kenya, the Judiciary and the Legislature to ensure that these protected rights were equally applied to all citizens in Kenya. Counsel referred us to various constitutional and statutory provisions which he deemed protective of the appellants' right to education and religion namely; articles 32 and 52 of the *Constitution*, section 27 of the *Basic Education* Act, and sections 8, 9, & 10 of the *Children Act*. Mr Anami urged the court to consider its decision in *Mohamed Fugicha v Methodist Church in Kenya (suing Through Its Registered Trustees) & 3 others* [2016] eKLR (the *Fugicha* case), which was approved in the *SDA* case with respect to recognizing article 32 rights.

23. Mr Anami further drew our attention to various regional and international instruments that provide for the rights of every child to education and the right to freedom of thought, conscience and religion. These instruments include; the African Charter on the Rights and Welfare of the Child, the Universal Declaration of Human Rights, the UN Convention on the Rights of the Child, the International

Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

24. In opposition to the appeal, Mr Qeu for the 1st respondent posited that the facts in this case were distinguishable from those in the SDA and the Fugicha cases for reasons that, the appellants joined the school, participated in its interfaith activities and continued to do so until they reached standard 7, going to standard 8 at least for the 1st appellant. Their parents then suddenly, with no explanation, decided in a unanimous letter to command the school to exempt their children from these interfaith activities that they had been participating in. Accordingly, the learned judge did not misapprehend the facts. To counsel, the appellants were estopped by their conduct and their consent to participate in the interfaith activities throughout the duration of their stay in the school from refusing to participate in those activities later. In Mr Que' view, given the previous conduct of the appellants, their belief was not seriously held.

25. When we engaged him robustly on his stance, counsel conceded that there was a possibility for religious accommodation, but only if the nature of the appellants' sincere belief was explained to the school and to the learned judge. We further posed the question what harm the school would have suffered if it had exempted the students from the 30 minutes' weekly Mass and he agreed that the school would not suffer any prejudice. Counsel contended that the appellants were not forced into enrolling their daughters into the school especially if they were not in agreement with the school rules and regulations. The Human Rights Committee decision in *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) was cited for the argument that the right to manifest a person's religion is not absolute and may be subject to limitations to protect public order and the fundamental rights and freedoms of others. As he rested counsel urged that the appeal was improper, baseless and ought to be dismissed with costs.

26. Mr Kobimbo appearing for the 2nd and 3rd respondents buttressed the submissions by Mr Que. He granted that they were not disagreeable to the appellants being granted exemption. Rather, they were of the view that the same should be granted within a certain framework, and it was for the appellants to demonstrate that their faith is a genuinely held belief. The holding in *Mec For Kwazulu Natal, School Liaison Officer & others v Pillay* CCT51/06 [2007] ZACC was referred to in support of that assertion. Mr Kobimbo urged that for a Catholic school, the compulsory mass and the school curriculum were intertwined. At this we posed, whether that meant that a sponsor of a school has a right to inculcate its belief on all students, including those with objections to that inculcation. In answer counsel stated, 'You cannot compel somebody to attend mass'. When we quizzed him further, counsel was in agreement that the school should have yielded more in accommodating the students.

27. In reply to the submissions by the respondents' counsel, Mr Ochiel contended that the appellants gave the reasons of their belief in their letter to the school dated September 26, 2017, asking to be exempted from interfaith activities. This letter was later read in the meeting of the Board of Management held on October 12, 2017. To counsel, therefore, the exemption was not denied by the school because of the failure of the appellants to show the genuineness in their belief.

28. This being a first appeal, I have taken time to lay out the evidence in a rather detailed manner to enable me to sufficiently re-evaluate, re-assess and reanalyse the entire record and then determine whether the conclusions reached by the learned trial Judge are to stand or fall, and give reasons either way. See *ABok James Odera T/a AJ odera & Associates v John Patrick Machira T/a Machira & Co Advocates* [2013] eKLR See also *Selle v Associated Motor Boat Co* [1968] EA 123.

29. I have already set out issues for determination in this appeal as were outlined and addressed by counsel.

30. Starting with whether the learned judge made findings of fact that were not supported by the record, the appellants complained that the learned judge made certain findings that were not borne by the

record being, "that the petitioners had from the onset indicated their readiness to comply with the school rules", and that "petitioners and their parents had accepted the rules by appending their signatures signifying acceptance of the rules". The appellants asserted that contrary to the learned judge's findings, only one petitioner, AA, signed a commitment letter as part of the disciplinary process as a precondition to her admission back to the school. Her parents and the other appellants did not sign the commitment.

31. A reading of the judgment confirms that the learned judge indeed made those findings. However, as contended by the appellants, I observe that those findings were unsubstantiated. What can be gleaned from the record is the 1st respondent's averment that the appellants and their parents had been made aware of the rules and regulations of the school including the Friday Mass at 7am. Further, the record has a commitment letter signed by one of the appellants, AA, on February 9, 2018 undertaking to obey the school rules and regulations. There is nothing more indicating that the rest of the appellants and their parents committed themselves to be bound by the school and rules and regulations. In the circumstances I find that the learned fell into a reversible error in making those findings especially if, as here, such finding was interpreted by the learned judge to mean a wholesale acceptance of a religious practice the appellants found objectionable to their faith next is whether the learned judge erred by failing to find that forbiddance of interfaith activities is a genuinely held belief by Jehovah Witnesses. The appellants protested that forbiddance of interfaith activities is a genuinely held belief in terms of article 32, of the Constitution, which permits every person whether individually or in community, in public or in private to manifest any religion or belief through worship, practice, teaching or observance. The 1st respondent, however, contested that position arguing that the appellants were estopped, by their conduct and their consent to participate in the interfaith activities throughout the duration of their stay in the school, from refusing to participate in those activities later.

32. It is important to note that the appellants expressed their request to be exempted from interfaith activities in a letter dated September 26, 2017, signed by their parents. That letter was later read and discussed in the school's board of management meeting held on October 12, 2017, whereupon it was decided that the parents be informed that it was not possible to exempt the students from interfaith activities as they were part of the school rules and regulations. The learned judge upon referring to the letter of September 26, 2017 and citing parts of the SDA case (*supra*) reasoned as follows;

> "58. In this case, the petitioners have not asserted that there was any attempt to coerce them to adopt a religion or belief which was not of their choice.
>
> 59. They have also not asserted that they had been coerced to do something which would impair their freedom to manifest their religion of belief".

33. I am, with much respect, of the considered view that the learned made a wrong finding on this question. I note that the appellants through their parents expressly stated in the letter dated September 26, 2017 that their faith as Jehovah Witnesses prohibited them from participating in interfaith activities and sought their children's exemption from those activities. They stated thus:-

> "...in keeping with the tenets of our faith of pure worship as Jehovah's Christian Witnesses (Ex 20:4, 5; Lu 4:8) and in accordance with the rights of choice in the Constitution and various laws:
>
> We, the parents of the pupils listed below, hereby direct that they be perpetually exempted from interfaith activities: worship of any kind, prayers, hymning, church attendance, religious instructions or discourses (those extraneous of the academic curriculum)".

34. The refusal of that request by the 1st respondent, was akin to coercing the appellants to abandon or forgo tenets of their faith and to adopt a religion which was not of their choice, ultimately infringing the appellants right to freedom of religion as envisaged under article 32 of the Constitution. That provision, worthy of full citation, stipulates:-

(1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.

2. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

2. A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

3. A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion." [Emphasis mine]

35. This court succinctly expounded on the import of article 32 in the SDA case (*supra*) as follows;

> In view of this and bearing in mind the provisions of article 32(4), the learned Judge was plainly wrong by upholding the requirements of the schools that SDA students must attend classes and engage in all academic and other school activities on Saturday. That finding was contrary to article 32(4) which demands that;
>
> "(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion".
>
> To require SDA students to ignore their belief in the Sabbath which they hold so dear, and to join students who belong to other denominations that worship on Sunday, in our opinion amounted not only to discrimination against them but gross violation of their fundamental freedoms. They, although the minority in those schools, like their counterparts who believe in Sunday as their day of worship, are entitled to equal protection and benefit of the law.
>
> The *Constitution* and many international instruments, by dint of article 2(5) and (6) of the Constitution form part of our law, including the Universal Declaration of Human Rights (UDHR) which affirm the general precept and humanitarian values to be adopted so as to afford every human being the "right to freedom of thought, conscience and religion", as well as the "right to manifest his religion or belief in teaching, practice, worship and observance"... "including observance of a day of worship". These two rights, that is, the right to freedom of religion and the right to express and practice one's beliefs, coupled with the prohibition against compelling a person to act or engage in anything that is contrary to that person's religion, must be taken to mean that the rights and freedoms of the SDA, students, to freely exercise their religion by observing the core principle of the Sabbath is guaranteed because article 32(2) recognizes the right to observe a day of worship as part of the right to freedom of religion ". (Emphasis mine)

36. Just like for the SDA students, I have little difficulty finding that compelling the appellants to participate in interfaith activities, particularly the Friday Mass, contrary to their belief, was a violation of their fundamental right and freedom as envisaged in article 32(4), and they were entitled to protection of the law.

37. It was argued for the 1st respondent that the appellants were estopped by their conduct from refusing to participate in interfaith activities, having initially consented to and proceeded to participate in those

activities during their stay at the school. It is apparent to me that the appellants' conduct could not possibly limit their constitutionally guaranteed rights. Rights are entitlements that one can demand and stand on. As this court observed in the SDA case;

> "The schools have been reluctant to relax the Saturday school engagements to accommodate students of the SDA Church in the face of clear constitutional guarantee and in the absence of any law restricting those rights. Instead the schools, even in this case have proffered lame and gloomy arguments, which the learned Judge, unfortunately agreed with, such as the fact that the students were warned of the schools policy that they would required (*sic*) to attend classes and engage in other related programmes seven days a week and that with full knowledge of this policy they had consciously, without coercion or misrepresentation chosen to enroll and embark on their studies; that by so doing they bound themselves to abide by the rules and regulations of the school; that in any event the students had the choice to join any other school where they would freely practice their religions and observe the Sabbath. This view is not only impractical, but also ignores many factors that a student or parent considers in choosing a school, such as the availability of public schools where the students' particular religious beliefs would be accommodated, the student's personal career choice and academic standards of the school. It violates, not only sub-article (3) of article 32 of the *Constitution* but also section 34 of the *Basic Education Act* ". (Emphasis mine)

38. We were decidedly of the same mind in the Fugicha case (*supra*), a decision whose rationale was adopted in the SDA case. The court categorically stated;

> "We are not prepared to hold that, by merely signing the admission letter or the school rules, a student and/or her parent or guardian is thereby estopped from raising a complaint or seeking exemptions *ex post facto*. Where, as here, the exemptions or accommodation sought are on clear constitutional grounds, it would be escapist even surreal, for a court to point at the signed letter of admission as a bar to assertion of fundamental rights and freedoms. We do not accept that schools are enclaves that are outside the reach of the sunshine of liberty and freedom that the Constitution sheds. Students do not abandon their constitutional rights when they enter the school gate to regain them when they leave. Nor can fundamental rights and freedoms be contracted away in the name and at the altar of education. Schools cannot raise an estoppel against the Constitution. No one can. We are firm in our assessment that students in Kenya are bearers and exercisers of the full panoply guarantees in our Bill of Rights and they are no less entitled to those rights by reason only of being within school gates ." (Emphasis mine)

39. From my analysis above, it is clear that I am persuaded that the appellants sincerely held a belief against interfaith activities, and the learned judge, with respect, erred in failing to so find.

40. On whether the learned judge erred by upholding limitation of the appellants' right to religion without undertaking the mandatory three-part test in article 24 to determine if or not the limitation of the appellants' right to religion was, by law; served a legitimate aim; and was the least restrictive measure in the circumstances, it was argued for the appellants that had the learned judge carried out the three-part article 24 analysis, he would have found that there was no law that limited the appellants' right to exercise their freedom of religion. The 1st respondent contended that the right to manifest a person's religion is not absolute and may be subject to limitations to protect public order and the fundamental rights and freedoms of others.

41. I observe that in addressing this issue on limitation of the appellant's right to religion, the learned judge posed the question,

42. 'Is the right to freedom of religion absolute?' He then proceeded to consider parts of the SDA case and noted that where a limitation exists, it ought to be justifiable. From the learned judge's conclusion, it is discernible that he was of the view that the limitation of the appellants' right to freedom of religion in the school was justified. He surmised;

> 71. In the result, the court appreciates that the Holy Mass is a very integral part of life (*sic*) of a catholic.
>
> 72. Therefore, it is not at all surprising that Mass takes a central place at a catholic sponsored school.
>
> 73. But the said school does not discriminate against students who are non-catholics. To that extent, the school can be applauded for showing respect and tolerance to other religions".

43. In effect, the learned judge did not conduct the entire article 24 analysis but restricted himself to considering whether attendance of the mandatory Catholic Mass was justified. This court, noting the importance of human rights and fundamental freedoms, persuasively expressed itself in the SDA case on the need to action and employ the article 24 analysis in any limitation of a fundamental right or freedom. The court deduced: -

> The learned judge ought to have inquired whether under article 24 any law has been enacted restricting the enjoyment of religious rights before considering whether the limitation was justified or reasonable in an open and democratic society. The latter determination is dependent upon there being law limiting those rights or fundamental freedoms. It is only then that even the relevant factors to be taken into account listed under article 24(1)(a) to (e)can become available for consideration. Unless the party seeking to justify a limitation of a right demonstrates compliance with the entire provision of article 24, any purported limitation is a nullity, unless of course, it relates to limitations of any of the rights and freedoms enumerated under article 24(5)(a) to (f) with regard to certain rights or fundamental freedoms of persons serving in the Kenya Defence Forces or the National Police Service". (Emphasis mine)

44. Article 24 in relevant part states;

> (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;
>
> a. the nature of the right or fundamental freedom;
>
> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation;
>
> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose".

45. The learned judge having failed to consider whether there was a law in place limiting the appellants' freedom of religion, the limitation on that fundamental freedom was a nullity. While I agree that Holy Mass is a very integral part of the life of a Catholic, one cannot, without violence to the right to freedom of religion, be compelled to attend it. Indeed, the learned judge appreciated this very fact stating:-

78. If attending the Holy Catholic Mass is contrary to the beliefs or the religion of the petitioners, it would be unconstitutional to compel them to attend Mass.

46. It was asserted for the appellants that the school should have accorded them reasonable accommodation by exempting them from the Friday Mass. The respondents agreed that indeed there was a possibility for granting religious accommodation. However, they were insistent that that accommodation was only available upon proof by the appellants that their faith was a genuinely held belief. I have already found that the appellants' belief was genuinely held. In making that finding, I am convinced by the holding in the SDA case that religion is a fundamentally subjective matter of faith and belief that is not susceptible to rational justification. Indeed, it would be absurd for a particular religious tenet to be subjected to the test of believability by those who do not believe in it.

47. Essentially therefore, I am of the view, as was admitted by parties herein, that the school would not have suffered any hardship by exempting the appellants from the 30-minutes Friday Mass. In compliance with the concept of reasonable accommodation, the school ought to have adjusted its rules to enable all students to practice their respective religions while still complying with the school rules and regulations. The concept of reasonable accommodation was broadly espoused in the SDA case in the following terms.

> Because of the challenges encountered in trying to balance various competing rights and interests that are bound to arise in the exercise of those rights at the workplace, schools or anywhere else, courts in many jurisdictions have evolved and applied the concept of "reasonable accommodation". For instance in schools with multi-faith students, the students are able to co-exist, each practicing their respective religions and balancing that with their right to education under the Constitution and the law, while at the same time complying with school rules and regulations. This concept was explained in simple terms in two persuasive cases decided by the South Africa Constitutional Court, Pillay (*supra*), (per Langa, CJ), and that of the Canadian Court of Appeal in *R v Video flicks* [1984] 48 OR (2d) 395, both cited with approval by this court in Mohamed Fugicha (*supra*). Starting with the former (Pillay) the duty of reasonable accommodation was explained as follows;
>
> > "Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalizing effect on certain portions of society. Second, the principle is particularly appropriate in specific localized contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck.....
> >
> > At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms""

48. The school should have worked out a reasonable accommodation for the appellants, especially considering the fact that it was a public school, a school maintained or assisted out of public funds. During the hearing, our attention was drawn to a circular dated March 4, 2022 from the Office of the Principal Secretary, Ministry of Education, advising on the need to respect the religious rights of learners. The circular outlines the right to exercise and manifest the freedom of conscience, religion,

belief as stipulated in article 32 and urges school administrators, Boards of Management, sponsors and any other stakeholder not to violate those rights.

49. The circular is in the following terms; ...

> RE: Violation of Religious Rights in Schools
>
> The Ministry of Education (MOE) is committed to the provision of quality education to all children in Kenya. Towards this end, the Ministry has achieved significant milestones in ensuring no child is left behind or excluded from getting education. It is however noted that even as the Government is allocating more and more resources to ensure all children are in school, a few of the school administrators and managers are using flimsy excuses to keep learners away from schools. In particular, it has been noted that some schools are violating the religious rights of learners and using religion as a factor to either deny admission or expel learners from school. This violation normally takes the form of;
>
> a. Prohibition from wearing religious attire like *hijab* and turbans;
>
> b. Forcing students to take Islamic Religious Education (IRE), Christian Religious Education (CRE), Hindu Religious Education (HRE) subjects;
>
> c. Denying learners an opportunity to observe religious rights and prayers;
>
> d. Failure to allocate worship rooms or spaces; and,
>
> e. Forcing learners to participate in religious rites and activities that are contrary to their beliefs.
>
> The violation of religious rights is against various national legislation, regional and international conventions. In particular, the Constitution of Kenya 2010, acknowledges that Kenyans belong to diverse ethnic, cultural and religious backgrounds and the Constitution elaborately expounds on the need to respect these diversities.
>
> In particular, chapter 4 on Bill of Rights bestows rights and fundamental freedoms that include:
>
> i. The right to freedom of conscience, religion, belief and opinion (article 32(1)).
>
> ii. The right to manifest his/her beliefs through worship, practice, teaching and observance (article 32(2)).
>
> iii. No one may be denied access to any institution, employment, facility or enjoyment of any right because of one's religion or belief (article 32(3)).
>
> iv. One cannot be compelled to act or engage in an act that is contrary to his/her religion (article 32(4)).
>
> Further, the *Basic Education Act* 2013 protects the rights of children to access education. Section 4 on the guiding principles in provision of education provides among others;
>
> a. The right of every child to free and compulsory basic education.
>
> b. Protection of every child against discrimination within or by an education department or education institution on any ground whatsoever.
>
> The violation of religious rights in schools has negative effects on maintenance of peace and tranquility and some students end up dropping out altogether.

The Ministry of Education is committed to ensuring the religious rights of learners are protected and will not allow school administrators, Board of Management, sponsors or any other stakeholder to violate these rights.

You are directed to enforce the contents of this circular and cascade the same to:

1. All Sub County Directors of Education in your County

2. All Basic Education institutions under your jurisdiction."

50. Although the circular was not existent when the facts in issue arose, I think that going forward it is a useful guideline in respecting and enforcing the religious rights of learners, and school administrators would do well to heed it. This judgment, like our earlier decisions, accords with the guidance given in that circular. The last issue for my consideration is whether the learned judge disregarded this court's controlling precedent in the SDA case which was binding on the questions raised in the petition. Certainly, as is apparent from this judgment, the SDA case was practically indistinguishable from the facts in issue and the applicable legal principles in this case. This explains my reference to it in extenso in this decision. While the learned judge also referred to the case, I think, respectfully, he did so selectively, omitting the salient findings of the court in that case which was binding upon him.

51. In the end, I would allow this appeal to the extent that:-

a. A declaration be and is hereby issued that the 1st appellant's expulsion from school on the basis of her religious views amounted to indirect discrimination; constituted a violation of her right to education and right to dignity and is therefore null and void.

b. A declaration that the school rules and regulations that provide for a mandatory 30-minute Mass every Friday morning for all children at the 1st respondent are indirectly discriminatory, unconstitutional, and invalid.

53. I would make no order as to costs.

As Tuiyott and Joel Ngugi, JJA are of the same opinion, it is so ordered.

Judgment of Tuiyott, JA

1. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

Judgment of Joel Ngugi, JA

1. I have had the advantage of reading in draft the judgment of my learned brother Kiage, JA. I entirely concur with his findings and I have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR