Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others (Civil Appeal 172 of 2014) [2017] KECA 751 (KLR) (3 March 2017) (Judgment)

Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others [2017 eKLR

Neutral citation: [2017] KECA 751 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 172 OF 2014

MSA MAKHANDIA, W OUKO & K M'INOTI, JJA

MARCH 3, 2017

BETWEEN

SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED ..... APPELLANT

AND

THE MINISTER FOR EDUCATION ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE BOARD OF GOVERNORS, ALLIANCE HIGH SCHOOL .... 3RD RESPONDENT

NATIONAL GENDER AND EQUALITY COMMISSION ..... 4TH RESPONDENT

(Being an appeal from the judgment and decree of High Court of Kenya in Nairobi (Constitutional & Human Rights Division) (Lenaola, J) dated 18th December, 2013 in (H.C. Petition No.431 of 2012)

Limitation of the right to hold and manifest a religious belief in public schools

The appellants alleged that since 2011, a number of public schools had increasingly curtailed the right of their students (SDA students) who fellowship as Seventh Day Adventists their freedom of worship. That was done by failing to accommodate the religious practices of the church and allowing the SDA students to worship and fellowship in keeping with their religious beliefs and practice by observing the Sabbath between sunsets on Friday to sunset on Saturday. The Court of Appeal held that the trial court had erred in rejecting the prayer to declare that the failure of the 1st and 2nd respondents to introduce measures to ensure respect of the rights of SDA students in the concerned schools violated article 32 of the Constitution and section 26 of the Education Act (repealed). However, the trial court issued an order directed at the Cabinet Secretary Ministry of Education to promulgate appropriate regulations or issue appropriate circular with regard to respect of the student's rights and freedoms. The trial court was persuaded that there was need to expand the scope of freedom of religion in public schools; that

to redress that perennial controversy as a country we needed, like the other jurisdictions where religious rights had been embraced in schools, to seriously consider how those rights and fundamental freedoms could be actualized by providing in the law or regulations or by executive directive in form of a policy directive, for accommodation of various religious beliefs and practices.

Reported by Robai Nasike Sivikhe

Constitutional Law- *Fundamental Rights and Freedoms- Freedom of conscience, religion, belief and opinion- Freedom of students who were Seventh Day Adventists to worship from Friday sunset to Saturday sunset whenever they were at school and accommodation of that practise by schools- whether restricting SDA students from worshipping from Friday sunset to Saturday sunset infringed on their rights under article 32 of the Constitution - Constitution of Kenya, article 32*

Constitutional Law- *Fundamental Rights and Freedoms- Limitation of Rights and Fundamental Freedoms- Whether the right to hold and manifest a religious belief was subject to limitations- whether there was legislation that limited a person's right to hold and manifest a religious belief- whether failure to accord Seventh Day Adventist Students a day of worship in accordance with their faith was reasonable and justifiable under article 24 of the Constitution- Constitution of Kenya, article 24*

Brief facts

The appellants were alleging that since 2011, a number of public schools had increasingly curtailed the right of their students (SDA students) who fellowship as Seventh Day Adventists their freedom of worship. That was done by failing to accommodate the religious practices of the church and allowing the SDA students to worship and fellowship in keeping with their religious beliefs and practice by observing the Sabbath between sunsets on Friday to sunset on Saturday. They instituted an action against the Minister for education and Attorney General. The appellant's prayer for a declaration that the rights of the affected students under article 32 of the Constitution and section 26 of the Education Act (repealed) had been violated was dismissed by the High Court/trial Court. However, the High Court (trial court) ordered the 1st respondent to immediately promulgate appropriate regulations under section 19 of the Education Act to actualize the rights of the students under article 32 of the Constitution and section 26 of the Education Act, or in the alternative that directions be issued under section 27 of the Education Act to compel the schools to respect the rights of students under article 32 of the Constitution and section 26 of the Education Act. Aggrieved by the denial of some of its prayers, the appellant filed the instant suit challenging the trial court's decision.

Issues

i. Whether the restriction that denied SDA Students a day of worship in accordance with their faith was reasonable and justifiable under article 24 of the Constitution
ii. Whether restricting SDA students from worshipping from Friday sunset to Saturday sunset infringed on their right to freedom of conscience, religion, thought, belief and opinion.
iii. Whether the right to hold a religious belief was absolute whereas the right to manifest it was subject to limitations or suspensions

Held

1. The broad question in the appeal and at the High Court was whether failure to accord SDA students a day of worship in accordance with their faith was justified and reasonable under article 24 of the Constitution of Kenya, 2010 or whether it infringed their rights guaranteed by article 32 of the Constitution. In considering those questions the Court of Appeal bore in mind the following relevant factors in the context of the appeal:
    a. That freedom of religion was a complex issue that required delicate balance since it protected the rights to freedom of conscience both of believers and non-believers and those whose religious beliefs differed from the beliefs which were being observed in schools or by the majority. A fair balance had to be struck, between the rights of the individual and the rights of others, between the right to believe and manifest a religion and the right to education;

b. That human rights law generally provided a framework for the practical resolution of situations where there could be those conflicts or competing claims based on the protection of freedom of religion or belief; and

c. That religious and secular activity could also be entangled thus complicating the delicate balance further.

2. The Constitution in the preamble recognized the diversity of the Kenya nation by declaring the pride of its people. By further declaring in article 8 that there was no State religion, the Constitution recognized the pluralistic nature of the Kenyan society where persons or bodies asserting their own freedom of religion, conscience, thought, opinion, belief and expression, recognized that the same freedoms also attached to others who lived with them in the same society and who could have contrary beliefs, and whose rights to hold those contrary beliefs and to live in accordance with them were equally protected; and that the State could not unduly favour any one religion over the others.

3. The heart of the matter in controversy revolved around the construction and application of article 32, in accordance with the principles of interpretation vis a' vis the provisions of articles 24 on the limitation of rights and fundamental freedoms; article 27 on the right to equality and freedom from discrimination; article 36 on the freedom of association; and article 56 on the rights of the minority and marginalized groups. The right to freedom of conscience, religion, thought, beliefs and opinion, in its various facets was far-reaching and profound; it encompassed freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others, privately or in public. The manifestation through observance included observance of a day of worship, and a believer could not be subjected to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

4. From the plain reading of article 32 of the Constitution, the distinction that the right to hold a religious belief was absolute while the right to manifest it was limited could not be drawn. Without any such distinction whatsoever under article 32 of the Constitution, the freedom of religion and belief and the right to manifest those freedoms through worship, practice, teaching or observance were protected equally. Both the right to freedom of religious belief and the right to manifest that belief were subject to the general limitation provisions in article 24 of the Constitution.

5. It was not correct to conclude as the trial court had done that the right to hold a religious belief was absolute and not subject to limitations or suspension. That finding was based on the erroneous construction of article 32 of the Constitution, which in turn was informed by the article by Johan D. Van Der and article 1(3) of the United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.

6. It would have been sufficient for the trial court to rely on articles 24, 32, 52, and 259 of the Constitution and any other relevant international instruments and authorities in resolving the controversy before him. While foreign jurisprudence was sometimes useful, the context in which a particular pronouncement was made needed to be carefully examined. Certain international instruments and constitutions of other countries made provisions similar to those in articles 24 and 32 of the Constitution but there were also other instruments as well as other constitutions that had different provisions relating to rights and fundamental freedoms.

7. The provisions of article 18 of the Universal Declaration of Human Rights (UDHR) and article 18(1) of the International Covenant on Civil and Political Rights,1966 (ICCPR) were in similar language as article 32 of the Constitution and had not differentiated between the right to freedom of religion and the right to manifest the same. On the other hand, article 1(3) of the United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief and article 9(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR,) seemed to suggest, from the language, that the right to freedom of religion was absolute while providing that the freedom to manifest one's religion or beliefs was subject to limitations. The

position in Kenya was that freedom of religion included both the right to have a religious belief and the right to express such belief in practice.

8. While article 19(3) (c) of the Constitution recognized that the rights and fundamental freedoms in the Bill of Rights were only subject to the limitations contemplated in the Constitution; article 25 of the Constitution identified only four rights and fundamental freedoms that could not be limited. It followed that by article 24 of the Constitution the rest of the rights and fundamental freedoms under the Bill of Rights were enjoyed and guaranteed subject to strict terms of limitations.
    a. First, it had to be demonstrated that the limitation was imposed by legislation, and even then only when it had been shown that the limitation was reasonable and justifiable in an open and democratic society.
    b. Further, it had to be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there were less restrictive means to achieve the purpose.
9. The trial court ought to have inquired whether under article 24 of the Constitution any law had been enacted that restricted the enjoyment of religious rights before considering whether the limitation was justified or reasonable in an open and democratic society. The latter determination was dependent upon there being law limiting those rights or fundamental freedoms. It was only then that even the relevant factors to be taken into account listed under article 24(1) (a) to (e) of the Constitution could become available for consideration. Unless the party seeking to justify a limitation of a right demonstrated compliance with the entire provision of article 24 of the Constitution, any purported limitation was a nullity. Unless of course, it related to limitations of any of the rights and freedoms enumerated under article 24(5) (a) to (f) of the Constitution with regard to certain rights or fundamental freedoms of persons serving in the Kenya Defence Forces or the National Police Service.
10. Due to the importance of human rights and fundamental freedoms, courts insisted on the scrupulous compliance with all the conditions for limitation under article 24 of the Constitution. Even after establishing the existence of a law limiting any specific right and accepting that it was reasonable and justified the means chosen to achieve the objective had to pass a proportionality test by considering;
    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 had not prejudiced the rights and fundamental freedoms of others; and
    e. The relation between the limitation and its purpose and whether there were less restrictive means to achieve the purpose.
11. The fundamental character of those freedoms was reflected in the opening words of article 24 of the Constitution. In a practical sense, however it was granted that no legal order could guarantee absolute religious liberty without any qualification, hence the legitimate restriction and strictures in article 24. The overall objective of the article was, however not to asphyxiate the rights and fundamental freedoms but to ensure that the exercise of one religion had not unduly interfered with the exercise of other religions, or inhibited the exercise of other civil liberties. Ultimately the purpose of the limitation of human rights was still for the sake of protecting those very human rights.
12. In order to be considered along with the restrictions under article 24 and for one's right to freedom of religion to be protected and guaranteed under article 32, one's religious belief or practice had to be genuine and sincere and not spontaneous, isolated or occasional. The practice had to be peculiar and particularly significant manifestation of a person's faith and identity. The practice had to be a person's way of expressing his or her roots and faith and what was important was the meaning of the practice and belief to the person involved.

13. The Seventh Day Adventists accorded primal and overriding importance to the Sabbath as one of its trademark beliefs and core identity, wherever they were throughout the world. Given that significance to its members' moral obligation and duty, Sabbath-keeping was considered the ultimate test that defined the true SDA believer. As one of the Ten Commandments, observance of the Sabbath to the Adventist was a perpetual covenant binding them through observance throughout the generations forever. The Adventists appeared to be guided by the Hebrew calendar under which the first day of the week was said to begin on the preceding sunset of Friday till Saturday at sunset hence the belief that Sabbath fell on the hours between sunsets on Friday to sunset on Saturday. They also genuinely believed in the teaching that failure to observe the Sabbath attracted consequences.
14. It was apparent from the evidence on record that although the significance of the Sabbath to students who belong to the Adventist faith was appreciated by all, none of the schools concerned permitted those students to fully observe it from Friday sunset to Sunday sunset. Apart from Alliance High School where it was submitted that SDA students would be free at 11 am after Saturday classes, it seemed that the rest of the schools had no similar dispensation. But even with the arrangement at Alliance High School, SDA students were still aggrieved as the arrangement defied the requirement that Sabbath begins from sunset on Friday. In determining whether there was any justification for limiting the religious freedoms of the students, it had to be considered whether the actions of the schools amounted to discrimination against SDA students, and whether the limited accommodation extended to students by Alliance High School was sufficient.
15. article 27 enjoined both the State and individuals not to discriminate directly or indirectly against any person on account of, among other things, religion and that for the State to give full effect to the realization of the right to equality and freedom from discrimination, it had to take legislative and other measures to redress any disadvantage suffered by the individual or groups. That equality before the law was never to be confused with uniformity. Equality had not presupposed the elimination of differences. It had not implied levelling or homogenization of behaviour, but an acknowledgement and acceptance of difference. And difference could not and was not to be the basis for exclusion, marginalization, stigma or punishment.
16. Bearing in mind the provisions of article 32(4), the trial court was plainly wrong by upholding the requirements of the schools that SDA students had to attend classes and engage in all academic and other school activities on Saturday. That finding was contrary to article 32(4) which demanded that a person could not be compelled to act, or engage in any act, that was contrary to the person's belief or religion. To require SDA students to ignore their belief in the Sabbath which they held so dear, and to join students who belonged to other denominations that worship on Sunday, 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 believed in Sunday as their day of worship, were entitled to equal protection and benefit of the law.
17. The Constitution and many international instruments, by dint of article 2(5) and (6) of the Constitution form part of the laws of Kenya. That included the Universal Declaration of Human Rights (UDHR) which affirmed 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. Those two rights (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 was contrary to that person's religion had to be taken to mean that; the rights and freedoms of the SDA student to freely exercise their religion by observing the core principle of the Sabbath was guaranteed because article 32 (2) recognized the right to observe a day of worship as part of the right to freedom of religion.

18. At the time the impugned judgment was rendered in 2013 and even presently there was never any legislation prescribing limitations of rights and fundamental freedoms of religion under article 24.The repealed Education Act was not such law. As a matter of fact its section 26 was quite progressive in the advancement of the freedom of religion provided for under section 78 of the Constitution of Kenya (repealed). Section 78 of the Constitution (repealed) prohibited the compelling of a person attending a place of education to receive religious instruction or to take part in or attend a religious ceremony or observance if that instruction, ceremony or observance related to a religion other than his own.
19. There was nothing in the Basic Education Act that repealed the Education Act that limited religious freedoms in the manner contemplated by article 24. Section 34(2) of the Basic Education Act only outlawed discrimination on account of religion in admitting students. Schools had 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 proffered lame and gloomy arguments.
20. Among the arguments proffered were that the students had been warned of the schools policy that they would be required to attend classes and engage in other related programmes seven days a week and that with full knowledge of that policy they had consciously, without coercion or misrepresentation chosen to enrol 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. Those views were not only impractical, but also ignored many factors that a student or parent considered 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 violated, not only article 32 (3) of the Constitution but also section 34 of the Basic Education Act.
21. The other argument was that schools retained a measure of institutional autonomy and discretion in the decision-making process with regard to maintenance of academic standards and other related matters; that in those circumstances the students had to conform to the terms set by the school administration through school rules and regulations. While schools could be free to regulate academic, extra curriculum, teachers' and students' activities in schools, there was no debate on the court's supervisory powers over schools, as indeed any person, body or authority in the exercise of their decision-making powers where violation and fundamental rights and freedoms was alleged. The court's jurisdiction to uphold and enforce the Bill of Rights where the question whether a right or fundamental freedom had been denied, threatened or infringed could not be ousted by theories such as waiver of rights or institutional autonomy. Such considerations could not justify limitation on human rights and the learned Judge was plainly wrong in ignoring the Constitution.
22. There was no law, as contemplated in article 24 permitting any form of limitation, and the denial or restriction of the rights or fundamental freedoms of SDA students to observe the Sabbath as decreed in the Holy Book amounted to an infringement of their freedoms. The law had to exist first before the question of justification or reasonableness could be inquired into.
23. Because of the challenges encountered in trying to balance various competing rights and interests that were bound to arise in the exercise of those rights at the workplace, schools or anywhere else, courts in many jurisdictions evolved and applied the concept of "*reasonable accommodation*". For instance in schools with multi-faith students, the students were 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.
24. No attempt had been made to fully realize the fundamental freedoms of religion in schools through the concept of reasonable accommodation with the result that students have been forced into practices that were clearly against their religious beliefs. The Court of Appeal was not aware of and counsel for the 1st Respondent had not drawn its attention to any steps taken to ensure schools complied with the

Constitution and respected the rights of the learners. Instead when the Education Act was repealed by the Basic Education Act, section 26 of the Education Act was not retained in the latter.

25. The trial court had erred in rejecting the prayer to declare that the failure of the 1st and 2nd Respondents to introduce measures to ensure respect of the rights of SDA students in the concerned schools violated article 32 of the Constitution and section 26 of the Education Act (repealed). However, the trial court issued an order directed at the Cabinet Secretary Ministry of Education to promulgate appropriate regulations or issue appropriate circular with regard to respect of the student's rights and freedoms. The trial court was persuaded that there was need to expand the scope of freedom of religion in public schools; that to redress that perennial controversy as a country we needed, like the other jurisdictions where religious rights had been embraced in schools, to seriously consider how those rights and fundamental freedoms could be actualized by providing in the law or regulations or by executive directive in form of a policy directive, for accommodation of various religious beliefs and practices.

26. The appeal had merit. The orders rejecting the prayer for a declaration that the rights of SDA students were not infringed were set aside and substituted with the finding that they were infringed. The final orders of the trial court directed at the Cabinet Secretary Ministry of Education to promulgate appropriate regulations or issue appropriate circular in terms of orders of the trial court's decision was upheld. Because no steps were taken in compliance with the order of the trial court, the Cabinet Secretary in charge of education was ordered to comply with the Court of Appeal's order within one (1) year from the date of the judgment.

Appeal Allowed; judgment was to be served upon the Education Cabinet Secretary.

Citations

Cases

1. Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another (Petition 102 of 2011; [2011] KEHC 2099 (KLR)) — Explained
2. Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others (Petition 13 A, 14 &15; of 2014; [2014] KESC 9 (KLR)) — Explained
3. Mohamed Fugicha v Methodist church in Kenya (tuing through its registered trustees) , Teachers Service Commission, County Director of Education Isiolo County & District Education Officer Isiolo Sub-County (Civil Appeal 22 of 2015; [2016] KECA 273 (KLR)) — Followed
4. Mtana Lewa v Kahindi Ngala Mwagandi (Civil Appeal 56 of 2014; [2015] KECA 532 (KLR)) — Explained
5. Ndanu Mutambuki &119 others v Minister for Education &12 others (Petition 407 of 2007; [2007] KEHC 32 (KLR)) — Explained
6. Nyakamba Gekara v Attorney General & 2 others (Petition 82 of 2012; [2013] eKLR) — Explained
7. Republic v Head Teacher, Kenya High School & another; SMY (A Minor Suing Through her Mother and Next Friend AB) (Exparte) (Judicial Review 318 of 2010; [2012] KEHC 2492 (KLR)) — Explained
8. Sharon and Ors v Makerere University (Constitutional Appeal No. 2 of 2004; [2006] UGSC 210) — Explained
9. Christian Education South Africa v Minister of Education ((CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051) — Explained
10. Lewis v Media 24 Ltd ((C88/2007) [2010] ZALC 218; (2010) 31 ILJ 2416 (LC)) — Explained
11. MEC for Education: Kwazulu-Natal and Others v Pillay ((CCT 51/06) [2007] ZACC 21; 2007 (3) BCLR 287 (CC); 2007 (2) SA 106 (CC); (2007) 28 ILJ 133 (CC)) — Explained
12. National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others ((CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998) — Explained

13. Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise (17 D.L.R (4th) 503) — Explained
14. R v Big M Drug MartLtd ((1985)1 SCR 295) — Explained
15. R v Edwards Books and Art Ltd ((1986)2 SRC 713) — Explained
16. R. v. Videoflicks Ltd. et al. ((1984) 5 O.A.C. 1 (CA)) — Explained
17. Quinn's Supermarket V Attorney General ((1972) IR 1) — Explained
18. Selle & another v Associated Motor Boat Co. Ltd & others ((1968)EA 123) — Applied
19. South West Africa (Liberia v South Africa) ((1966) ICJ REP) — Explained
20. Ahmed v United Kingdom ((1981) 4 EHRR 126) — Explained
21. Begum, R (on the application of) v Denbigh High School ([2007] 1 AC 100; [2006] 1 FCR 613; [2007] AC 100; [2006] HRLR 21; [2006] UKHL 15; [2006] UKHRR 708; [2006] 2 WLR 719; [2006] 2 All ER 487) — Explained
22. Copsey v WWB Devon Clays Ltd ([2005] EWCA Civ 932; [2006] ICR 55; [2005] IRLR 811; [2005] ICR 1789; [2005] HRLR 32) — Explained
23. Williamson & Ors, R (on the application of) v. Secretary of State for Education and Employment & Ors ([2005] 2 AC 246; [2005] 2 All ER 1; [2005] 1 FCR 498; [2005] 2 FLR 374; [2005] UKHL 15, [2005] ELR 291; [2005] 2 WLR 590) — Explained
24. Lemon v Kurtzman ((1971) 403 US 602) — Explained
25. Sherbert v Verner (374 U.S. 398 (1963)) — Explained

Statutes

1. Basic Education Act, 2013 (Act No 14 of 2013) — section 26 — Interpreted
2. Constitution of Kenya, 2010 — article 27, 32 — Interpreted
3. Constitution of Kenya (Repealed) — section 78 — Interpreted
4. Education Act (Repealed) (cap 211) — section 19, 26, 27 — Interpreted

Texts

1. Van Der Vyer, JD., (2005), Limitations of Freedom of Religion or belief: International Law Perspectives' (Emory International Law Review, Vol 19 p 449-538)

International Instruments

1. EU Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950 — article 9 (2)
2. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 18 (1)
3. United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981 — article 1 (3)
4. Universal Declaration of Human Rights (UNDHR), 1948 — article 2 (6), (6); 18; 32 (2)

Advocates

None mentioned

JUDGMENT

1. The first book of Moses, called Genesis in the Christian Old Testament, contains the creation of the universe narrative that took God six days to accomplish and that on the sixth day, God;

> -....saw everything He hadmade, and indeed it wasvery good....Thus the heavens and the earth and all the hosts of them, were finished. And on the seventh day God ended His work which He had done, and He rested on the seventh day from all His work which He had done. Then God blessed the seventh day and sanctified it, because in it He rested from all His

work which God had created and made?(Genesis 1& 2 New International Version- NIV).-(Genesis 1:31-2:)

Moses further wrote how God revealed Himself to him at Mt Sinai where he was presented with the Ten Commandments. One of those Commandments directed as follows;

> -Remember the Sabbath day, to keep it holy. Six days you shall labour and do all your work, but the seventh day is the Sabbath of the Lord your God. In it you shall do no work: you, nor your son, nor your daughter, nor your male servant, nor your female servant, nor your cattle, nor your stranger who is within your gates. For in six days the Lord made the heavens and the earth, the sea, and all that is in them, and rested the seventh day. Therefore the Lord blessed the Sabbath day and hallowed it? (Exodus 20:8-11).

In Exodus 31:12 the Lord warned of the consequences of failing to observe the Sabbath saying;

> -Speak also to the children of Israel, saying: ?Surely My Sabbaths you shall keep, for it is a sign between Me and you throughout your generations, that you may know that I am the Lord who sanctifies you. You shall keep the Sabbath, therefore, for it is holy to you. Everyone who profanes it shall surely be put to death; for whoever does any work on it, that person shall be cut off from among his people. Work shall be done for six days, but the seventh is the Sabbath of rest, holy to the Lord. Whoever does any work on the Sabbath day, he shall surely be put to death. Therefore the children of Israel shall keep the Sabbath?

2. Among the Christian denominations that strictly observe the seventh-day Sabbath is the Seventh Adventist Church, to which the appellant, Seventh Day Adventist Church(East of Africa) Limited, (the Church) belongs . The Sabbath is observed and celebrated by them from Friday sunset to Saturday sunset.

3. In a petition filed in the High Court by the appellant on September 25, 2012 the appellant alleged that students who are members of the appellant in some eighteen named public High Schools in Kenya have had their freedom of worship protected under articles 27 and 32 of the *Constitution* violated; that prior to 2009/2010 the overwhelming majority of public schools in Kenya accommodated the religious practices of the Church and allowed the Adventist students to worship and fellowship in keeping with their religious beliefs and practices; that they were permitted to observe the Sabbath between sunset on Friday to sunset on Saturday. However from 2011 onwards a number public schools have increasingly restricted and curtailed this freedom by requiring the Adventist students to attend compulsory Saturday classes, during which exams are sometimes taken and also to be involved in the general cleaning; that in some schools the students would only nominally be allowed to observe the Sabbath after classes, while in other instances the students would be compelled to sign an undertaking that they would attend all classes including the half day classes on Saturday. Yet in other cases only Forms one and two students would be allowed to keep the Sabbath and those in Forms three and four were barred; that students who failed to attend classes but chose to observe the Sabbath on Saturday would be suspended from school or asked to elect to either remain in the school and attend all classes up to and including Saturday or leave the school; and that these complaints are replicated throughout the country, yet adherents of the other Christian faiths whose days of worship fall on Sunday are given full opportunity and facilities to practice their faith in accordance with the tenets of their belief.

4. After efforts and representations to address this imbalance failed, the appellant instituted the action as explained earlier against the Minister for Education and the Attorney General, the respondents, for a declaration that matters enumerated above were in violation of the rights of Adventist students in the schools concerned, an order directing them to either promulgate regulations under section 19

of the *Education Act* prescribing the obligations of public schools to respect the rights of students under article 32 of the *Constitution* and section 26 of the the *Education Act* and describing the manner in which the obligations are to be implemented and secured as well as setting up an administrative enforcement and complaints mechanism, or, in the alternative the Minister be directed to issue, pursuant to his powers under section 27 of the *Education Act*, a directive to public schools requiring them to respect the rights of students under article 32 of the *Constitution* and section 26 of the *Basic Education Act*.

5. Joined in the proceedings were the Board of Governors, Alliance High School as an interested party and the National Gender and Equality Commission as amicus curiae, now the 3rd and 4th respondents respectively. The petition was heard through the highlighting of the parties' respective written submissions.

6. Because we, as the first appellate court are expected to consider this appeal by way of a re- hearing, it is our duty to re-evaluate the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact. We, should however, in that process accord respect to the findings based on the observations of the trial court on the demeanour of witnesses. This duty was succinctly explained in the now famous decision of this court in *Selle v Associated Motor Boat Co Limited* (1968) EA 123 as follows;

> -An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions... In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.?

To that end we outline, only in summary the following arguments which were made before the trial court.

7. The appellant's case was that the Church holds certain beliefs derived from the Bible, one of which is the obligation to respect and observe the Sabbath; that while some public schools respected religious practices of the Seventh Day Adventist students to observe the Sabbath, a good number did not. The latter either restricted or altogether curtailed the opportunities of those students to worship and generally observe the Sabbath in accordance with the strict Scripture teaching. The schools concerned made it mandatory for the students to attend classes, write examinations and engage in cleaning duties on Saturday and those who missed such classes, duties, examinations and other chores would be suspended or asked to leave the school. This treatment was in contrast with that accorded to students of other faiths whose day of worship is on Sunday. Relying on two South African decisions in *Christian Education South Africa v Minister for Education* (CCT 4/2000),*MEC For Education: Kwa Zulu-Natal & 3 others v NavaneethumPillay & 3 others*, (CCT 51 of 2006) and an Irish Supreme Court case of *Quinn's Supermarket v Attorney General* (1972) IR 1, the appellant submitted that the concerned students' constitutional rights under articles 27 and 32 of the *Constitution* were violated.

8. On behalf of the 1st and 2nd respondents it was submitted that no religion is superior to the other and all religions ought to be treated in the same manner; that like the Supreme Court of the United States of America discouraged in *Lemon vKurtzman* (1971) 403 US 602) schools should never advance religious belief of one particular group as to cause hardship to the school and other students; that freedom of worship or religion is not an absolute right and can therefore be qualified or limited in accordance with the *Constitution*; that religious freedom on the one hand and right to education, on the other, must

be balanced; that in this case the scale tilted in favour of the right to education; that in the absence of school tuition, the only means of completing syllabus is by holding extra classes on Saturdays; and that the appellant was not entitled to an accommodation of its choice.

9. The 3rd respondent for its part submitted that all students of Alliance High School are made aware upon admission to the school of the school's regulations, including those that require them to attend extra classes so as to meet the syllabus requirements in order to maintain the high academic standards of the school; that, without exception it is a requirement that all students must attend classes on Saturday upto 11am and thereafter they would be free to engage in any personal or group activities; that it was this window, from 11am on Saturday that the Adventist students have over the years used for worship and other religious activities according to their faith. The 3rd respondent further argued that if a policy was to be introduced permitting each religious group represented in the school to adhere to and practice their respective religious beliefs, there would be anarchy in school hence the need to let school board of governors to regulate curriculum. Finally it argued, that although under article 32 the right to belong to a religion and to hold religious belief is absolute, the right to manifest that belief is qualified, according to articles 24, 27 and 43(d) and confirmed by judicial precedent in *R(On the Application of Begum) v Governors of Denbigh HighSchool*(2006) UKHL 15, *R(Williamson) v Secretary of State for Education and Employment* (2005) UKHL 15, *Ahmed V United Kingdom* (1981)4 EHRR 126, *Republic V Head Teacher, Kenya High School & another ex parte SMY (suing through her motherland next friend AB)* Petition No 318 of 2010, *Demanche Sharon & 2 others v Makerere University*, Constitutional Appeal No 2 of 2004 and *Ndanu Mutambuki & 119 others v Minister for Education &12 others* Petition No 407 of 2007.

10. The *amicus curiae*, on the other hand submitted that all forms of discrimination are outlawed by the *Constitution of Kenya* and international as well as regional human rights instruments; that the rights guaranteed under article 32 are two-faceted, the right to hold religious belief and the right to manifest that belief; that the latter right is subject to limitation under article 24 while the former is absolute. Relying on the Canadian decisions of *R v Big M Drug MartLtd*(1985)1 SCR 295and *R v Edwards Books and Art Ltd* (1986) 2 SRC 713, among other authorities, the amicus maintained that freedom of religion can only be limited to the extent permitted by law and only where such limitation is reasonable and justified.

11. Lenaola, J (as he then was) considered these submissions on the law and the evidence through affidavits as well as the authorities cited before him, and after expressing his appreciation of the fact that his role in resolving the dispute required him to balance the various conflicting constitutional rights and fundamental freedoms at play in the case, he identified the conflict between the right to education and the right to freedom of religion as the real gravamen in the matter and, that in his view only two issues fell for determination, namely whether the right and freedom of religion of the affected students guaranteed by article 32 were violated, and whether those rights were absolute or qualified under article 24 as read with articles 27 and 43(d)((d)does not exist). In the context of the case, he was of the view that the right to freedom of religion includes two related but distinguishable entitlements; freedom to adopt a religion or a belief in worship, observance, practice and teaching, on one hand and on the other hand freedom to manifest that choice of religion or belief; that the freedom to adopt a religion of ones choice is absolute while manifestation of that belief is subject to limitation. According to the learned Judge the choice of the Seventh Day Adventist faith by the concerned students was absolute. However the manner of its manifestation through observing the Sabbath from sunset on Friday to sunset on Saturday can be limited, the learned judge held. He found that the 3rd respondent had established that, since 1926 it had used the Saturday school programme and schedule to enable teachers and students to cover the expansive syllabus and to maintain its excellent academic performance.

12. While the learned judge expressed the view that the appellant had failed to call any of the affected students to demonstrate the extent and nature of violation or limitation imposed by the schools he, found, however that in the case of three students the parents swore affidavits based on the information supplied by the students where also based on their own experience, there was proof that the schools had in place programmes which had the effect of not exempting Adventist students from Saturday classes and cleaning. In his view however the programmes were necessary for uniformity, good order and certainty. He was equally persuaded with regard to the 3rd respondent's submissions, that apart from the Saturday programme being brought to the attention of the students and their parents at the stage of admission into the school, the school had made efforts to accommodate their religious needs by allowing free time before sunrise to 11am and thereafter between11am and sunset on Saturday; that even though the programme did not fully address the needs of the concerned students, the learned judge was nonetheless of the opinion that, due to diversity of the students and their religious persuasions, it would be impossible to expect the 3rd respondent to accommodate every student's religious needs, bearing in mind that the traditional day of rest in Kenya is Sunday. He asked himself several questions, bearing in mind that the schools involved are boarding facilities. For instance, he wondered what the Adventist students would be doing between Friday sunset and Saturday sunset while their colleagues of the other faiths were in class, where and how they would be manifesting their faith, would they interfere with the rights of other students to study in a peaceful and quiet atmosphere? And would they be under any supervision?

The learned judge observed that;

> One can only imagine the disconnect in school programmes if Friday, Saturday and Sunday were to be allocated as rest days for each of the three major religions in the country..... Suppose the traditionalists, atheists and others create other days of worship and rest and justify it within their doctrinal and dogmatic tenets? How can a 7- day school week accommodate each without affecting all others?.....I have seen that most worship services at, say, Maxwell SDA Church in Nairobi start at mid-morning on Saturday and adherents drive to church, fuel their cars and engage in other necessary chores attendant to being a metropolitan. What is the difference with the very limited activities undertaken by students at Alliance?.....I do not see how the right of these students to manifest their religion has been infringed as they have not been required to give up or forgo their cardinal tenet of religious beliefs and if I am wrong, it is also true that right to manifest the belief has only been limited for a few hours and for very good reasons?.

He went on to explain that a school is neither a worship centre nor a church; that a school only exists to impart knowledge on the students; that contrary to the demands by the appellant the right to education does not entail education on the terms set by the students.

13. With that observation the learned judge came to the conclusion that the limitation imposed on the affected students' rights by the 3rd respondent which he supposed, without evidence to apply to other schools, was reasonable and justifiable in an open democratic society. Citing the decision of the Supreme Court of Uganda in *Demanche Sharon* (*supra*), where it was observed that the freedom of religion in learning institutions is guaranteed but must be enjoyed alongside secular goals for which the educational institutions are established and that the regulations and policies promulgated by the institution concerned in that case that affected SDA students, did not violate their rights and freedoms, the learned judge dismissed prayer (a) of the petition in which the appellant had asked him to declare that, as a result of the failure by the respondents to act in accordance with their constitutional and statutory mandate, the rights of the affected students under article 32 of the *Constitution* and section 26 of the *Education Act* were violated. Instead and in our view rather strangely, after finding that there

was no violation, the learned judge invoked article 159(2)(c) of the *Constitution* to promote alternative disputes, resolution mechanism in resolving prayer (b), arguing that the contested issue required dialogue between the appellant, respondents, parents' and teachers' associations of the affected schools. With that view in mind he granted prayer(b).

14. Prayer (b) was to the effect that the 1st respondent be ordered to immediately promulgate appropriate regulations under section 19 of the *Education Act* to actualize the rights of the students under article 32 of the *Constitution* and section 26 of the *Education Act*, or in the alternative that directions be issued under section 27 of the *Education Act* to compel the schools to respect the rights of students under article 32 of the *Constitution* and section 26 of the *Education Act*.

Regarding these prayers the learned judge, again in a twist noted that although the respondents did not respond specifically to them he himself found them "attractive" if read within article 159 and also bearing in mind the need;

> -...to ensure that even where a party may not have succeeded in its main prayer, a court, in appropriate cases must see that a remedy is given.....the issue before me has clearly shown that an existing right has been limited but the facts only show the limitations (reasonably so) as imposed by the interested party....it is unclear to me if that limitation is standard and whether in fact a policy exists across the board?

15. The determination that the 3rd respondent and the other schools, by denying or limiting the students right to observe the Sabbath between sunset on Friday and sunset on Saturday, was reasonable and justifiable in an open and democratic society, has aggrieved the appellant who has challenged it on 14 grounds which were further condensed and argued in 7 clusters in the appellant's 43-page written submissions. It would appear from the length of those submissions that during case management conference no limits on the number of pages was imposed. Indeed the 1st and 2nd respondents' submissions are contained in only 6 pages while those of the 3rd respondent are 11pages. The 4th respondent has, however not filed submissions. The appellant's seven-point arguments are that;

a) The learned Judge made errors of fact in his conclusion by wholly relying blindly, "hook, line and sinker" on the affidavit evidence of the representative of the interested party and ignoring the evidence of the appellant's witnesses.That in the result the learned Judge erroneously found that the interested party had demonstrated reasonable accommodation of the students religious needs, and also that it was erroneous to find that there was no evidence of the nature and extent of violation by the other schools mentioned in the case, while the appellant produced evidence of the specific violations in the form of statements of parents of students in Kagumo High School, Siakago High School, a letter of protest citing specific instances of violations in respect of students in Kenya High School, Limuru Girls High School and Moi Isinya Secondary School; that the learned Judge further erred, without evidence to hold that the alleged accommodation of SDA students at Alliance High School applied to the other schools; that he turned himself into a witness on behalf of the respondents by giving evidence of how SDA adherents drive themselves to Maxwell Church in Nairobi on Sunday after fueling their vehicles for the mid morning worship to demonstrate that the limitations by the interested party were reasonable; that asking questions as to what the students would be engaged in if they were to be allowed to observe the Sabbath between the hours sought, the learned Judge turned into a defence counsel for the respondents; and that there was no evidence that the Saturday classes had been part and parcel of Alliance High School since 1926.

b) The Judge made an error in failing to declare that, by the schools allowing other faiths to observe their day of worship on Sunday and denying SDA students their Sabbath on Saturday,

the latter were discriminated against in violation of article 27 of the *Constitution*; that the learned Judge made a mistake in implying that Sunday is the traditional day of rest for all Kenyans, ignoring the days of others who, by their religions may have a different day of rest, and who, like the Adventists are in the minority.

c) The learned Judge, by drawing a legally unmoored distinction between freedom of religion and freedom to manifest religious belief and holding that the former freedom cannot be limited while the latter can, gravely erred as no such a distinction exists in the constitutional text of article 32 or indeed under any other provision or supported by any precedent.

d) By failing to apply the full text of article 32(2) and the clear provisions of article 6 of the General Assembly Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the learned Judge arrived at a wrong conclusion. The said General Assembly instrument declares that the right to freedom of thought, conscience, religion or belief include the freedom to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; that these provisions and the doctrine of stare decisis were ignored in the impugned decision, except those that were wrongly decided such as Demanche Sharon (*supra*).

e) On proportionality of limiting rights and fundamental freedoms in terms of article 24, the learned judge was criticized for holding that the students' rights under article 32 were subject to limitation in article 24 even after concluding that there was no violation of their rights. In any case, it was submitted, in terms of article 24 that, for a right or freedom to be limited the limitation must be contained in law, and only to the extent that it is reasonable and justifiable; that without proof of the existence of any law limiting the right to worship, the learned Judge erroneously concluded that the limitation was reasonable and justified; that reliance on the *Basic Education Act* and the Employment Act was equally wrong as both do not have any provision giving power to limit any right. It was also argued that although the learned Judge dutifully recited the proportionality test, he completely failed to apply it to the facts; that had he, his conclusion would have been that there was no proportionality between the compulsory Saturday programmes and the right to worship on Saturday; that instead he considered the burden that would result if each faith was to be allowed to elect when to attend classes and when to manifest their faith, yet such consideration cannot justify limitation on an individual's right. It was further submitted that, apart from failing to consider the appellant's evidence, the learned Judge also ignored the appellant's supplementary submissions in which it had demonstrated how the respondents had failed to extend to SDA students constitutional religious liberty; and that by ignoring those submissions article 50 was breached.

As a conclusion it was submitted that from the material presented, the learned Judge ought to have found in favour of the appellant on the question of violation of the students' rights.

16. The 1st and 2nd respondents in their brief submissions urged us to dismiss the appeal for lack of merit. According to them the learned Judge properly concluded, in accordance with the law and facts before him, that the students' right to freedom of religion was not breached by the concerned schools; that the appellant failed to produce evidence of the nature and extent of violation of those rights; that limitation of the right to manifest freedom of the right to worship was reasonable and justified in the circumstances of the case; that the learned Judge took into account the need to balance between the right to education and the right to freedom of religion, and found the former outweighed the latter; that he considered the need for equal treatment of students who must be subjected to the same learning environment irrespective of their faith. In any event, the 1st and 2nd respondents contended, the students and their parents having agreed, at the time of admission that they would abide by the rules

and regulations of the schools, they could not turn around to allege that those rules were a violation of their rights; that if the students and their parents found the rules and regulations onerous, they had a choice to relocate to schools where their demands would be accommodated.

17. The 3rd respondent, on the other hand submitted that indeed there is a distinction between the freedom of the right to religion and the freedom of the right to manifest that religion; that the former unlike the latter cannot be limited; that this distinction is supported by article 9 of the European Convention on Human Rights which has been imported to be part of the law of Kenya by article 2(6) of the *Constitution*.

18. The 3rd respondent agreed with the conclusion of the learned judge that the limitations imposed by the schools were justified and in accordance with the numerous authorities cited by the respondents before the learned judge; that in the case of the 3rd respondent the limitation was only for a few hours up to 11am; that discrimination was not proved; and that the trial court took into consideration all the relevant factors before arriving at the conclusion that the students' rights had not been violated.

19. It is common factor that the 3rd respondent and the rest of the schools in the dispute have in place measures which by their nature and application have the tendency of limiting or altogether curtailing the Seventh Adventist students' right to manifest their faith by observing the Sabbath or observing the Sabbath between Friday sunset to Saturday sunset. While the respondents maintain that the limitation was reasonable and justifiable, the appellant for its part considered it an affront to the freedom of the students' religious belief.

20. We reiterate that the learned judge agreed with the respondents and expressed the view that although the right to freedom of religion in article 32 was absolute, to manifest it was however subject to limitation by article 24; that Sabbath as a means for the Seventh Adventist manifesting their faith was subject to the provisions of article 24; and that it was reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom to limit that freedom, taking into account the diversity of religions of the students in public schools, good order in schools, the need for equal treatment of students irrespective of their religions and their right to education.

21. The broad question in this appeal, as indeed was in the court below is whether failure to accord SDA students a day of worship in accordance with their faith was justified and reasonable under article 24 or whether it infringed their rights guaranteed by article 32.In considering these questions we bear in mind the following relevant factors in the context of this appeal; that freedom of religion is a complex issue and requires delicate balance since it protects the rights to freedom of conscience both of believers and non-believers and those whose religious beliefs differ from the beliefs which are being observed in schools or by the majority. In other words a fair balance must be struck, as correctly observed by the learned Judge, between the rights of the individual and the rights of others, between the right to believe and manifest a religion and the right to education; that human rights law generally provides a framework for the practical resolution of situations where, like in this appeal there may be these conflicts or competing claims based on the protection of freedom of religion or belief; and that religious and secular activities may also be entangled thus complicating the delicate balance further. This conflict is real, judging from the nature of the numerous cases that have come before the courts around the world. Sachs, J in *Christian Education SouthAfrica* case (*supra*) aptly captured this conflict in the following passage in his judgment.

> The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and

which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.[2]

22. From the cases cited before the court below and before us, for instance, the freedom of religion may be impaired by acts or measures that compel the believers into doing or refraining from doing an act or task which goes against their religious beliefs. For example the prohibition of Muslims from wearing *hijab* (headscarf) or *hijab* and trousers or full-length Islamic dress(*jilbab*) in schools, colleges or workplace, the requirement for compulsory attendance of Christian Sunday worship by Muslim and SDA students, the banning of carrying to school of a *kirpan* (a small sword) or wearing of turban(headdress for men) by Sikh students (or Akorino) the objection, on account of religion to the banning of corporal punishment in schools, prohibition of nose stud worn by Tamil-Hindu girls, the banning of Sikh girls from wearing *kara* (a plain steel bangle)to school, the prohibition of dreadlocks in schools or workplace for the Rastafarian faith, among several instances.

23. From the case law several inter-related constitutional principles, which form the substratum of our decision in this appeal, can be derived. They include, non-discrimination, neutrality and impartiality of the State in contests between religions and as between religious and non- religious forms of belief, respect for others' beliefs and the duty of the State to create a level playing field between different religions or beliefs or those without religion or belief, tolerance of other religions and beliefs, proportionality in determining whether an interference with the right to believe or manifest one's religion is justified.

24. There is no doubt that the adoption in 2010 of a Constitution which enshrines a detailed, liberal and robust Bill of Rights was a milestone in the constitutional history of Kenya. Declared by article 2 as the supreme law, the *Constitution* binds all persons and all organs of State including the respondent. the The Bill of Rights is regarded in article 19 as the cornerstone of democracy and the framework for social, economic and cultural policy.

25. It is a basic duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. It is therefore important that in deciding the basic question whether the appellant's rights of religious freedom as guaranteed by article 32 were infringed the relevant provisions of the *Constitution* must be considered. In doing so we shall be guided by the principles of constitutional interpretation now settled by the *Constitution* itself in article 259,*inter alia*, that its various provisions be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. Because the law is always speaking, it is imperative that, in construing the *Constitution* that doctrine of interpretation be borne in mind. Specific to the Bill of Rights. Article 20(3)provides that in applying or interpreting any of its provisions, the court shall;

"(3) .....

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom". ....

In the process of doing so the courts or tribunals are enjoined by sub-article (4) to promote;

"(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights".

26. In addition to these principles the courts through the doctrine of precedent have over the years developed other parameters of constitutional interpretation that they adopt to augement those specifically provided for under the aforesaid articles 20 and 259.For instance, it is settled that the interpretation of the *Constitution* must be broad, liberal and purposive, taking into consideration the intended objective and purpose. The last principle was considered in the following passage in the oft-cited Canadian Supreme Court decision in *R v Big M DrugMart Limited* (1985)1RCS 295;

> 116. This court has already, in some measure, set out the basic approach to be taken in interpreting the charter . In *Hunter v Southam Inc,* [1984] 2 SCR 145, this court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the charter was a purposive one. The meaning of a right or freedom guaranteed by the charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect?.

The *Constitution* in the preamble recognizes the diversity of the Kenya nation by declaring our pride as a people;

> ....of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation?

27. By further declaring in article 8 that there shall be no State religion, the *Constitution* recognizes the pluralistic nature of the Kenya society where persons or bodies asserting their own freedom of religion, conscience, thought, opinion, belief and expression, recognize that the same freedoms also attach to others who live with them in the same society and who may have contrary beliefs, and whose rights to hold those contrary beliefs and to live in accordance with them are equally protected; and that the State does not unduly favour any one religion over the others.

28. The heart of the matter in controversy in this appeal revolves around the construction and application of article 32, in accordance with the principles of interpretation alluded to above vis a' vis the provisions of articles 24 on the limitation of rights and fundamental freedoms, 27, on the right to equality and freedom from discrimination, 36 to do with the freedom of association and the rights of the minority and marginalized groups under article 56.

Article 32 stipulates that;

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". (Our emphasis).

29. The right to freedom of conscience, religion, thought, beliefs and opinion, as explained above in its various facets is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others, privately or in public. The manifestation through observance includes observance of a day of worship, and a believer will not be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. We shall revert shortly to these provisions.

30. The learned judge relied on an article written by a leading South African professor of law, Johan D Van Der, *'Limitations of Freedom of Religion orbelief: International Law Perspectives'* as well as article 18(3) of the *United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*, to conclude that the right to hold a religious belief is absolute while the right to manifest it is limited. He said;

> As is now internationally perceived, freedom of religion includes two closely related but nevertheless clearly distinguishable entitlements: freedom to adopt a religion or belief of one's choice and freedom to manifest that religion or belief in worship, observance, practice and teaching. To ?hold a religious belief? has been said to relate to the inner act of believing and ?to manifest? has been said to relate to the external acts of giving expression of one's faith. The entitlement to hold belief is absolute in nature and cannot be subjected to limitations or suspensions – See Johan D Van Der Vyer in his article *'Limitations of Freedom of Religion or belief: International Law Perspectives' in Emory* International Law Review, Vol 19 page 449-538.
>
> Article 18(3) of the United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief also states that the external act of manifesting one's religion or belief can be subjected to limitations only if the limitation;
>
> a) is prescribed by law.
>
> b) is necessary to protect public safety, order, health or morals or the fundamental rights of others?.

31. First the reference in the foregoing passage to article 18(3) is in error as the correct provision of the instrument is article 1(3). But more fundamentally, and with respect, from the plain reading of article 32, set out in the previous paragraph, no such distinction can be drawn. Without any distinction whatsoever under article 32, the freedom of religion and belief and the right to manifest those freedoms through worship, practice, teaching or observance are protected equally. Secondly, both the right to freedom of religious belief and the right to manifest that belief are subject to the general limitation provisions in article 24, that;

> 24(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?.(Emphasis supplied).

32. It is therefore not correct to conclude as the learned judge did here that the right to hold a religious belief is absolute and not subject to limitations or suspension. That finding, as we have shown was based on the erroneous construction of article 32, which in turn was informed by the aforesaid article by Johan D Van Der and article 1(3)of the *United Nations Declaration on theElimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*. As was stated by the Supreme Court in the case of *Judges & Magistrates Vetting Board(JMVB)& 2 others, v The Centre For Human Rights & Democracy & 11 others*, SC Petition No 13A, 14 & 15 (Consolidated),it must always be remembered while interpreting or applying the Bill of Rights that the actual protection accorded to freedoms under our Constitution largely depends on that constitutional framework and architecture and any reliance on foreign jurisprudence is only permissible where there are similarities and parallels in the provisions. Mutunga, CJ delivered himself thus;

> "(218) Although certain jurisdictions, such as India and Germany, have perceived judicial review as an immutable structure of their Constitutions, these jurisdictions do not have Constitutions that are as unique as Kenya's. We must ask whether the foreign jurisdictions we seek reliance upon, have Constitutions and, if they do, whether these Constitutions have provisions akin to articles 1, 23, 159 and 259 which emphasize the sovereignty of the people; or whether they have principles and values, like the ones found in article 10, which apply to the interpretation and application of the *Constitution*; or whether they have legislation similar to our Supreme Court Act, which introduces Kenya"s historical context into the interpretation of the *Constitution*. If the answers to these questions are in the negative, then the common law doctrines found in other jurisdictions, foreign cases and foreign constitutions, must be interpreted in such a manner as to reflect our modern Constitution, and our unique conditions and needs?.

33. It was sufficient for the learned judge to rely articles 24 and 32which are themselves clear, articles 52, 259 and any other relevant international instruments and authorities in resolving the controversy before him. While foreign jurisprudence is sometimes useful, the context in which a particular pronouncement was made needs to be carefully examined. Certain international instruments and constitutions of other countries may make provisions similar to those in articles 24 and 32 but there are also other instruments as well as other constitutions that may have different provisions relating to rights and fundamental freedoms. For instance the provisions of article 18 of the *Universal Declaration of Human Rights* (UDHR) and Article 18(1) of the *International Covenant on Civil and Political Rights,1966* (ICCPR) are in similar language as our article 32 and do not differentiate between the right to freedom of religion and the right to manifest the same. Article 1(3) of the *United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* and article 9(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (ECHR,) on the other hand seem to suggest, from the language, that the right to

freedom of religion is absolute while providing that the freedom to manifest one's religion or beliefs is subject to limitations. The position in Kenya, as we have stated earlier is that freedom of religion includes both the right to have a religious belief and the right to express such belief in practice.

34. While article 19(3)(c) recognizes that the rights and fundamental freedoms in the Bill of Rights are only subject to the limitations contemplated in the *Constitution*, article 25 identifies only four rights and fundamental freedoms that cannot be limited. It follows that by article 24 the rest of the rights and fundamental freedoms under the Bill of Rights are enjoyed and guaranteed subject to strict terms of limitations. First, it must be demonstrated that the limitation is imposed by legislation, and even then only when it is shown that the limitation is reasonable and justifiable in an open democratic society. Further it must be based on dignity, equality and freedom, taking into consideration the nature of the right or fundamental freedom sought to be limited, the importance of the purpose of the limitation, its nature and extent, the enjoyment by others of their own rights as well as a consideration whether there are less restrictive means to achieve the purpose. We observe here that these were the factors the learned Judge was expected, indeed required to apply. While the learned judge was alive to these conditions and indeed framed the question;

> ...whether the failure to accommodate the SDA students ?religious manifestation by means of exemption from Saturday classes, examinations and cleaning, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality,?

35. He did not consider the entire article 24 but restricted his determination to the question as to what would happen to students of other religious persuasions if the religious beliefs and manifestations of SDA students to observe the Sabbath on Sunday were to be accepted by public schools, considering that the day of rest in Kenya is Sunday. He was concerned only with whether the limitations against the Saturday Sabbath were reasonable and justified and came to the conclusion that they were not taking into account the rights of other students and the school regulations, and further that some of the schools had put in place limited measures to accommodate SDA students. 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.

36. We reiterate that limitation imposed by law contemplated under article 24(1) must be reasonable and justifiable. as was emphasised by this court in *Mtana Lewa v Ngala Mwagandi*, CA No 56 of 2014, the limiting law must be clear enough and devoid of ambiguity, for if a guaranteed constitutional right is to be limited, the limitation must be specific enough for the citizen to know the nature and extent of the limitation, his or her rights and obligations under the right as limited and the law supplying the limitation must be easily accessible to the citizen. As we have stated, the learned Judge did not inquire into the question of the existence of such a law, but instead proceeded to consider the justification and reasonableness of the limitations imposed by the schools.

37. Because of the importance of human rights and fundamental freedoms, courts insist on the scrupulous compliance with all the conditions for limitation under article 24. Even after establishing the existence

of a law limiting any specific right and accepting that it is reasonable and justified the means chosen to achieve the objective must pass a proportionality test by considering;

(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.

38. The fundamental character of these freedoms is reflected in the opening words of article 24, that;

> "A right or fundamental freedom in the Bill of Rights shall not be limited except....." (our emphasis).

In a practical sense, however it is granted that no legal order can guarantee absolute religious liberty without any qualification, hence the legitimate restriction and strictures in article 24. The overall objective of the article is, however not to asphyxiate the rights and fundamental freedoms but to ensure that the exercise of one religion does not unduly interfere with the exercise of other religions, or inhibit the exercise of other civil liberties. Ultimately the purpose of the limitation of human rights is still for the sake of protecting those very human rights.

39. To be considered along with the restrictions under article 24 and for one's right to freedom of religion to be protected and guaranteed under article 32 one's religious belief or practice must be genuine and sincere and not spontaneous, isolated or occasional. As Langa CJ explained in *MEC For Education:KwaZulu-Natal* case(*supra*) the practice must be peculiar and particularly significant manifestation of a person's faith and identity; that the practice has to be a person's way of expressing his or her roots and faith; and that what is important is the meaning of the practice and belief to the person involved.

40. The Seventh Day Adventists accord primal and overriding importance to the Sabbath as one of its trademark beliefs and core identity, wherever they are throughout the world. Given this significance to its members' moral obligation and duty, Sabbath-keeping is considered the ultimate test that defines the true SDA believer. As one of the Ten Commandments observance of the Sabbath to the Adventist is a perpetual covenant binding them through observance throughout the generations forever. Exodus 31:12-17. The Adventists appear to be guided by the Hebrew calendar under which the first day of the week is said to begin on the preceding sunset of Saturday till Sunday at sunset hence the belief that Sabbath falls on the hours between sunset on Friday to sunset on Saturday. They also genuinely believe in the teaching that failure to observe the Sabbath attracts consequences.

41. It is apparent to us from the evidence on record that although the significance of the Sabbath to students who belong to the Adventist faith was appreciated by all, none of the schools concerned permitted those students to fully observe it from Friday sunset to Sunday sunset. The learned Judge as a matter of fact found this to be true when he observed that;

> -If I understand the petitioner well, it wants Adventist students to be exempted from any kind of 'work' in any school from Friday sunset to Saturday sunset so as to enable them observe the Sabbath day. Clearly, this demand has not been met positively by most of the

schools cited in this judgment and many have led to suspension of some students for failure to observe school regulations in that regard?.

42. At the same time the appellant presented before the trial court evidence in the form of affidavits and witness statements to demonstrate the depth of their belief as Seventh Day Adventists and the nature and extent of restrictions on the students by some of the schools. Of significance are two publications annexed to the affidavit of Pastor Samwel Makori, Seventh Day Adventist Church;Fundamental Beliefs and Seventh-Day Adventist: Church Manual-Revised 2010,18th Edition, which Pastor Makori quoted inextenso in his affidavit. According to the latter publication, Sabbath is considered a token of God's love to humanity, a sign of His grace, a sacred time set aside by God's eternal law, a day of delight, worship and sharing with others. They believe that the seventh day of creation runs from sunset Friday to sunset Saturday; that because the Sabbath hours belong to God and are to be used for Him alone, their own pleasure, business, and thoughts on the Sabbath have no place. Because of the depth of their belief on the Sabbath there are several instances in some of the authorities cited before us where the believers were willing and ready to sacrifice their careers and education rather than contravene the Sabbath. See South African Labour Court case of *David Robert Lewis v Media 24 Ltd* , (2010) 2 ALC 218, the English case of *Stephen Copsey v WWB Devon Clays Ltd*, (2005) EWCA 932 and *Demanche Sharon*(*supra*).Indeed in the matter before us many students, supported by their parents opted to be sent away from school instead of being compelled to attend classes, write examinations or engage in cleaning work on Saturday. Some missed all the programmes conducted on Saturdays thereby delaying the completion of their studies or courses or even abandoning the studies or courses altogether. The classic example of the conviction and the extent to which a genuinely held belief can be taken was demonstrated in the well-known Supreme Court of America case of *Sherbert v Verner* 374 US 398, where a Seventh Day Adventist was dismissed from employment after she refused to work on Saturday. She was as a result disqualified from receiving unemployment benefits because she declined to accept any job that required her to work on Saturday. In upholding her belief the court was of the opinion that;

> -If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.....(conversely) no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious . . . objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner.?

43. Because religion is essentially a matter of personal faith and belief, the court can only embark on a limited inquiry into the genuineness of a person's professed belief. Freedom of religion protects the subjective belief of the individual as Lord Nicholls of Birkenhead observed in the decision of the House of Lords in *Regina Williamson & others v Secretary of State For Education &Employment* (2005) AC 245;

> -Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention?.

44. Apart from Alliance High School where it was submitted that SDA students would be free at 11am after Saturday classes, it seems to us the rest of the schools had no similar dispensation. But even with the arrangement at Alliance High School, SDA students were still aggrieved as the arrangement defied the requirement that Sabbath begins from sunset on Friday. In determining whether there was any justification for limiting the religious freedoms of the students, we must first consider whether the actions of the schools amounted to discrimination against SDA students, and secondly whether the limited accommodation extended to students by Alliance High School was sufficient.

45. The learned Judge came to the conclusion that, in view of the thousands of students admitted in public schools and for good order in schools it was imperative to maintain uniform programmes that would apply to all students irrespective of their social and religious backgrounds. In addition to this he also believed that, since in some schools the students were made aware of the rules and regulations that left no choice on the students participating in various academic and extra curriculum activities on Saturday, students waived their rights to challenge those rules and regulations; that Sunday was the day recognized for rest; that schools would be reduced to chaotic institutions if each students unique religious beliefs and practices were to be sanctioned.

46. Article 27 enjoins both the State and individual not to discriminate directly or indirectly against any person on account of, among other things, religion and that for the State to give full effect to the realization of the right to equality and freedom from discrimination, it must take legislative and other measures to redress any disadvantage suffered by the individual or groups.

47. In the recent decision of this court in *Mohamed Fugicha v MethodistChurch in Kenya (Suing through its registered trustees) & 3 others*, Nyeri Civil Appeal No 22 of 2015 it was noted, following the decision in *South West Africa Case* (1966) ICJ REP, *Federation of Women Lawyers (FIDA) & 5 others v Attorney General & another* Nbi HC Petition No 102 of 2011 and South African Constitutional Court decision in *National Coalition for Gay and Lesbian Equality v Minister For Justice*,(1998) ZAAC 15,that equality before the law must never be confused with uniformity. Equality does not presuppose the elimination of differences. It does not imply leveling or homogenization of behaviour, but an acknowledgement and acceptance of difference. And difference cannot and should not be the basis for exclusion, marginalization, stigma or punishment.

48. 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.?

49. 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.

50. 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 rightto freedom ofthought, 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.

51. We repeat that at the time the impugned judgment was rendered in 2013 and even presently there has never been any legislation prescribing limitations of rights and fundamental freedoms of religion under article 24.The repealed *Education Act* is not such law. As a matter of fact its section 26 was quite progressive in the advancement of the freedom of religion provided for under section 78 of the former *Constitution*. Section 78 aforesaid prohibited the compelling of a person attending a place of education to receive religious instruction or to take part in or attend a religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own. Section 26 on the other hand stipulated that;

> 26.(1) If the parent of a pupil at a public school requests that the pupil be wholly or partly excused from attending religious worship, or religious worship and religious instruction, in the school, the pupil shall be excused such attendance until the request is withdrawn.
>
> (2) Where the parent of a pupil at a public school wishes the pupil to attend religious worship or religious instruction of a kind which is not provided in the school, the school shall provide such facilities as may be practicable for the pupil to receive religious instruction and attend religious worship of the kind desired by the parent?.

52. Similarly we find nothing in the *Basic Education Act* that repealed the *Education Act* that limits religious freedoms in the manner contemplated by article 24. Section 34(2)only outlaws discrimination on account of religion in admitting students. 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 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*.

53. The other argument which sadly, once more was upheld by the court below was that schools retain a measure of institutional autonomy and discretion in the decision-making process with regard to maintenance of academic standards and other related matters; that in those circumstances the students must conform to the terms set by the school administration through school rules and regulations.

54. While schools may be free to regulate academic, extra curriculum, teachers' and students' activities in schools, there can no debate on the court's supervisory powers over schools, as indeed any person, body or authority in the exercise of their decision-making powers where violation and fundamental rights and freedoms is alleged. The court's jurisdiction to uphold and enforce the Bill of Rights where the question whether a right or fundamental freedom has been denied, threatened or infringed cannot be

ousted by theories such as waiver of rights or institutional autonomy. The learned Judge followed his own earlier decision in *Nyakamba Gekara v Attorney General & 3 others*High Court Petition No 82 of 2012, in which he maintained that to join a public school is a voluntary decision of the student and parents; and that the court cannot regulate the way schools are run, particularly where ?the offending policy is acceptable to 99.99% of those affected by it?. With respect, and for the reasons we have already explained, such considerations cannot justify limitation on human rights and the learned judge was therefore plainly wrong in ignoring the *Constitution*.

55. We have determined the question and found that there was no law, as contemplated in article 24 permitting any form of limitation, and that the denial or restriction of the rights or fundamental freedoms of SDA students to observe the Sabbath as decreed in the Holy Book amounted to an infringement of their freedoms. We repeat that the law must exist first before the question of justification or reasonableness can be inquired into. We can do no better than to rely on a passage in the Canadian Federal Court of Appeal decision. In *Reluscher&Deputy Minister, Revenue, Canada, Customs & Excise*, 17 DLR (4th) 503, where it was said that;

> -[O]ne of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability of the legal consequences.?

56. 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 –vs- 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.?

On the other hand the court in *Videoflicks*(*supra*) said;

> -[The *Constitution*] determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogenous requirements.?

57. Finally in *Mohamed Fugicha* the court (Waki, Nambuye and Kiage, JJA) expressed concurrence with the above thus;

> -We are of the same view with regard to the donning of the *hijab* in the case at hand. We find and hold that the school ought to have worked out a reasonable accommodation to enable the Muslim girls to wear the *hijab* considering, especially, that there was a willingness to agree on the colour of such *hijab* so as to rhyme and not overly clash with the school uniform.?

58. No attempt has, however been made to fully realize the fundamental freedoms of religion in schools through the concept of reasonable accommodation with the result that students are forced into practices that are clearly against their religious beliefs. The reluctance of the relevant Government agencies in intervening on behalf of students and to comply with the *Constitution*, is demonstrated by the fact that, even after the promising answer given by the former Minister for Education, Professor Sam Ongeri when this question was raised in Parliament in 2011 nothing followed. He is recorded in the Hansard of August 11, 2011 as saying;

> - Prof Sam Ongeri ?
>
> Mr Deputy Speaker, Sir, the worship is from sunrise to sunset, and not necessarily up to the time the Hon Member has specified. The Seventh Day Adventist Church members need not worry, just like the Muslims and Christians need not worry. Any other persons observing any legal religious worship, they are not barred from observing their day of worship. Rest assured that anybody who goes outside this Act is in breach of the Act. If it is Maseno High, which the Hon Member mentioned, I will bring it to the attention of the principal that he is in breach of this Act. He is a very competent principal.... Mr Chanzu is fully aware that I have appointed a taskforce and they are due to bring in their reports on aligning the Ministry of Education with the new Constitution vis-a-vis the *Education Act* of 1968....Mr Deputy Speaker, Sir, it has been my assumption that the schools are observing the Act itself and more so, Article 32 of the new Constitution. Anybody who is operating outside this parameter is obviously out of date. If need be, I will remind them again in a fresh circular through my Permanent Secretary that this is the requirement and they need to conform to it.?

It transpired during the debate that the Minister is himself an Adventist.

59. We are not aware of and counsel for the 1st respondent did not draw our attention to any steps taken after the date of this answer by the Minister or his successor to ensure schools comply with the *Constitution* and respect the rights of the learners. Instead when the *Education Act* was repealed by the *Basic Education Act*, section 26 was not retained in the latter.

60. Faced with the perennial and similar debacle, the Philippines and South Africa governments have adopted measures to accommodate SDA students in those countries. In the Philippines, for example, through the law, the Professional Regulation Commission is empowered to provide an accommodative administration of professional examinations for Sabbath-keepers by directing that examinations be conducted on a day other than Saturday. In addition the Philippines Commission on Higher Education has directed schools and other institutions of higher learning in that country, as a policy to exempt students, teachers, lecturers and other staff members from attending or participating in school

or related activities if such schedule conflicts with the exercise of their religious obligations. Instead, the affected students, teachers, lecturers and staff may be allowed to do remedial work to compensate for the day or days lost, within the bounds of school rules and regulations and without their grades being affected, or with no diminution in their salaries or leave credits or performance evaluation or assessment, provided they submit a certification or proof of attendance or participation duly signed by their pastor, priest, minister or religious leader for periods of absence from classes, work or school activities.

61. The Minister of Education of South has similarly formulated the National Policy on Religion and Education,2003 to provide for a framework? that is best for religion and best for education in a democratic South Africa?. Key to this policy is the requirement that public schools may not violate the religious freedom of pupils and teachers by imposing religious uniformity on a religiously diverse school population. Where a religious observance is included in a school assembly, pupils may be excused on grounds of conscience, from attending it, and instead equitable arrangements are made for these pupils.

62. In the Daily Nation newspaper of May 1, 2016 the Education Cabinet Secretary, Dr Fred Matiangi, who according to that report, like Professor Ongeri, is an Adventist is reported to have lamented that;

> -Some schools have punished students who subscribe to the Seventh Day Adventist (SDA) for refusing to attend tuition on Saturday...school managements should not force students to attend tuition outside the official teaching hours particularly students whose faith requires them to observe Sabbath days.?

63. From what we have said up to this stage it must be apparent that the learned Judge erred in rejecting the prayer to declare that the failure of the 1st and 2nd respondent to introduce measures to ensure respect of the rights of SDA students in the concerned schools violated article 32 of the *Constitution* and section26oftheEducation Act (repealed).But by some strange twist and simply because some argument was attractive to the learned judge, having found that there was no violation of the students' rights, he went ahead to order the 1st respondent to;

> - ..... immediately either;
>
> (i) Promulgate appropriate regulations under his powers under section 19 of the *Education Act* prescribing the obligations of public schools to respect the rights of students under article 32 of the *Constitution* and section 26 of the *Education Act*, describing the manner in which the obligations are to be implemented and secured as well setting up an administrative enforcement and complaints mechanism; or
>
> (ii) Issue appropriate directions under his powers under section 27(1) of Education Act prescribing the obligations of public schools to respect the rights of students under article 32 of the *Constitution* and section 26 of the *Education Act*, describing the manner in which the obligations are to be implemented and secured as well setting up an administrative enforcement and complaints mechanism.....?.

64. We are justified to believe, from these orders that the learned Judge somehow was persuaded that there was need to expand the scope of freedom of religion in public schools; that to redress this perennial controversy as a country we need, like the other jurisdictions where religious rights have been embraced in schools, to seriously consider how these rights and fundamental freedoms can be

actualized by providing in the law or regulations or by executive directive in form of a policy directive, for accommodation of various religious beliefs and practices.

65. We come to the conclusion that that this appeal is merited. We allow it and set aside the orders rejecting the prayer for a declaration that the rights of SDA students were not infringed and substitute it with one finding that they were infringed. With respect, however, we agree with the final orders of the learned judge directed at the Cabinet Secretary Ministry of Education to promulgate appropriate regulations or issue appropriate circular in terms of order (b) of the learned judge's decision reproduced above. Because no steps have been taken in compliance with the order of the High Court and even that in Mohammed Fugicha, we order that the Cabinet Secretary in charge of education complies with this order within one (1) year from the date of this judgment. We make no orders as to costs.

66. Like the bench in *Mohamed Fugich*a, we too order that this judgment be served upon the Education Cabinet Secretary.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2017.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL