Fugicha v Methodist Church in Kenya (Through its registered Trustees) & 3 others (Civil Application 4 of 2019) [2020] KESC 55 (KLR) (23 January 2020) (Ruling) (with dissent - JB Ojwang, SCJ)

Mohamed Fugicha v Methodist Church in Kenya (Through its registered trustees) & 3 others [2020] eKLR

Neutral citation: [2020] KESC 55 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 4 OF 2019

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, N NDUNGU & I LENAOLA, SCJJ

JANUARY 23, 2020

IN THE MATTER OF REVIEW OF THE JUDGEMENT AND ORDER OF THE SUPREME COURT (MARAGA, CJ&P; IBRAHIM, NJOKI, LENAOLA AND OJWANG SCJJ) DELIVERED ON 23RD JANUARY 2019 - IN- PETITION NO 16 OF 2016

BETWEEN

MOHAMED FUGICHA ..... APPLICANT

AND

METHODIST CHURCH IN KENYA (THROUGH ITS REGISTERED TRUSTEES) ..... 1ST RESPONDENT

TEACHER SERVICE COMMISSION ..... 2ND RESPONDENT

COUNTY DIRECTOR OF EDUCATION, ISIOLO COUMTY .... 3RD RESPONDENT

DISTRICT EDUCATION OFFICER, ISIOLO SUB-COUNTY 4TH RESPONDENT

(An Application for Review of the Judgment and order of the Supreme Court (Maraga, CJ&P; Ibrahim, Njoki, Lenaola and Ojwang SCJJ) 1 Petition No. 16 of 2016 dated and delivered on the 23rd day of January 2019)

The Supreme Court could not determine an issue that had not been properly instituted and the issues canvassed and determined in the chain of courts.

The applicant sought to review the Supreme Court's earlier decision in Methodist Church in Kenya v. Mohamed Fugicha & 3 Others, Petition No. 16 of 201 6; where the Supreme Court declined to determine the issues raised therein for the reason that the said suit was improperly instituted. The majority of the Supreme Court held that

it could not determine an issue that had not been properly instituted and the issues canvassed and determined in the chain of courts leading up to the Supreme Court

Reported by Ribia John

Jurisdiction *– jurisdiction of the Supreme Court – jurisdiction to review its own decisions - factors that guided the Supreme Court's power to review its own decisions - what factors guided the Supreme Court's power to review its own decisions*

Jurisdiction *- jurisdiction of the Supreme Court – hierarchy of courts – appellate vis a vis original jurisdiction of the Supreme Court – jurisdiction over matter that had not been properly instituted and the issues canvassed and determined by the hierarchy of courts - whether the Supreme Court could determine an issue that had not been properly instituted and the issues canvassed and determined in the chain of courts leading up to the Supreme Court.*

Constitutional Law *– national values and principles – institution of suits – where there was a procedural impropriety in the institution of a suit - whether the Constitution could be read with sufficient breadth to accommodate procedural improprieties in the filling of a suit/cross petition – Constitution of Kenya, 2010 article159 (2)(d) and (e)*

Brief facts

The applicant sought to review the Supreme Court's earlier decision in *Methodist Church in Kenya v. Mohamed Fugicha & 3 Others,* Petition No. 16 of 201 6; where the Supreme Court declined to determine the issues raised therein for the reason that the said suit was improperly instituted. In particular, the cross-petition that was the subject of the initial decision was ruled to be improperly before the trial court, and ought not to have been introduced by an interested party. The final determination was that a cross-petition should not and could not have been entertained by the appellate court.

Aggrieved by the initial decision of the Supreme Court, the applicant filed the instant appeal on the grounds that the initial decision was ambiguous and did not address the main issue being hijab being outlawed in schools. The applicant sought orders for the Supreme Court to clarify the ambiguity created in the initial decision. The respondent opposed the review on grounds that the application lacked merit as the applicant sought an appeal but canvassed it in an application for review.

Issues

i. What factors guided the Supreme Court's power to review its own decisions?
ii. Whether the Supreme Court could determine an issue that had not been properly instituted and the issues canvassed and determined in the chain of courts.
iii. Whether an interested party could lodge a cross-petition in a suit.
iv. Whether the Constitution could be read with sufficient breadth to accommodate procedural improprieties in the filling of a suit/cross petition.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 159(2)(d) and (e)

Judicial Authority

2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles -

. . .

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

Held

1. The Supreme Court's power to review its own decision were limited to instances where:
    a. the judgment, ruling, or order, was obtained, by fraud or deceit;
    b. the judgment, ruling, or order, was a nullity, such as, when the court itself was not competent;
    c. the court was misled into giving the judgment, ruling, or order, under a mistaken belief that the parties had consented thereto;
    d. the judgment, ruling, or order, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.
2. The applicant had not met those conditions and had not demonstrated where or if at all the judgement he sought to review was obtained fraudulently, deceitfully, was a nullity, was made under a mistaken belief that the parties had consented thereto, was rendered on the basis of a repealed law or as a result of a deliberately concealed statutory provision.
3. The applicant intended to appeal the instant matter in the form of review. The process of review was not intended to give a party an opportunity to appeal, and where review it was sought, the party had to demonstrate to the satisfaction of the court, how if at all, it erred in the exercise of its discretion.
4. The issue was an important national issue that would provide a jurisprudential moment for the Supreme Court to pronounce itself upon in the future. However, to do so, it was imperative that the matter ought to reach the Supreme Court in the proper manner, so that when a party sought redress from the Supreme Court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to the Supreme Court. Should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court. Should a party seek to litigate the issues of the right to wear a *hijab*, they ought to institute fresh proceedings at the High Court.
5. The door was open for the applicant to specifically seek a determination of the issues he had raised in the instant application. That door was however at the High Court and not in the Supreme Court. The *hijab* issue was never one requiring the pronouncement of the High Court, the Court of Appeal nor the Supreme Court. The issue was important, but it had to be addressed by known procedures in and not by ingenuity of counsel, litigants or court.

Dissenting opinion

Per JB Ojwang

1. The instant application for review related, in particular, to the majority judgment of the Supreme Court in *Methodist Church in Kenya v. Mohamed Fugicha & 3 Others,* Petition No. 16 of 2016. A substantive dissenting opinion in the said petition having already been issued, the dissenting perception of the relevant issues, as well as the lines of conviction, were clearly set, and on that account did not rest on an even keel with the majority decision in the instant application, by which the 1st respondent in the earlier cause was calling upon the court to review, or set aside its said majority decision.
2. The majority rested their decision on the technical point that, in the proceedings before the trial court, the name of the applicant therein had appeared against the interested-party rubric, rather than that of the primary parties. The Constitution of Kenya, 2010 (Constitution) was designed mostly to safeguard certain broad values that secured a rewarding and beneficent life for the human being, as an individual, and in community. In the value-laden sphere of religious beliefs and practices, or of majority and minority expectations or entitlements, the governance mandate entrusted to the courts of law, called for adoption of the broad, interpretive mien, which looked askance at claims founded upon pure technicality, craft or style. The judicial horizon, at such a functional nexus, extended flexibly, and met the more general, political mandate, at the most practical frontiers: and any steadfast resort to technicality, showed itself as an improper course for the court.
3. The Constitution was not to be read as prescribing rules, but as committing the nation to certain values. Such a reading was appropriate because the Constitution was intended to endure for ages

to come, and, consequently, to be adapted to the various crises of human affairs. Its provisions had to be read with sufficient breadth to accommodate changing circumstances and the heightened understanding of successive generations regarding the requirements for achieving the goals that it established. Such was the context in which the dissent considered the majority's standpoint in the original decision of the instant court to be indefensible, just as the dissent still considered the majority bench to have taken leave from the precious opportunity for rectification in the instant matter.

4. No significance, in principle, merited being attached to the terms "interested party", or "cross-petition", as they related to the applicant's position in the earlier case. That was a case meriting disposal on the merits only in which case, the applicant's cause had rested on firm grounds, and the outcome declared by the appellate court in his favour was, in principle, unalterable. The instant court ought to have been guided in that case, just as in the instant matter, by the vital demands of the Constitution of Kenya, 2010 which thus stipulated in article 159 (2)(d) and (e) that justice would be administered without undue regard to procedural technicalities and that the principles and purposes of the Constitution ought to be protected and promoted. The instant application ought to have been guided in its hearing and mode of disposal, by the express principles of the Constitution.
5. Application for review would have been allowed.

Application for review dismissed, the applicant would bear the respondent's costs.

Citations

Cases

Kenya

1. *Kibisu, Robert Tom Martins v Republic* Petition 3 of 2014; [2018] KESC 34 (KLR) - (Applied)
2. *Methodist Church in Kenya v Fugicha & 3 others* Petition 16 of 2016; [2019] KESC 59 (KLR) - (Mentioned)
3. *Outa & another v Okello & 5 others* Petition 10 of 2014; [2014] KESC 20 (KLR) - (Explained)
4. *Outa, Frederick Otieno v Jared Odoyo Okello & 3 others* Petition 6 of 2017; [2017] KESC 25 (KLR) - (Explained)
5. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2013] e KLR; [2013] 2 KLR 142 - (Explained)

India

1. *Rupa Ashok Hurra v Asho Hurra & anor* [2002] case No Writ Petition (Civil) 509 of 1997 - (Applied)
2. *Sow Chandra Kanta v Sheik Habib* [1975] INSC 68 - (Explained)
3. *Vinjay Sharma & Ano v State of NCT of Dehli and Ors* [Review Petition (CLR) No6 671673 of 2017; Criminal Appeal Nos 608 & 609610 of 2017 - (Explained)

Texts

Sandalow , T., Proff (Ed) (1977) *Judicial Protection of Minorities* Michigan Law Review**,** University of Michigan Vol 75 1162, p 1178

Statutes

Kenya

1. Basic Education Act (cap 211) In general - (Cited)
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 3(5)(a)(8) - (Interpreted)
3. Constitution of Kenya, 2010 articles 2(4);10;21 (3) ; 27(5); 32; 159; 159(2)(d)(e); 163(1); 163(7); 259(1) - (Cited)
4. Supreme Court Act (cap 9B) sections 3, 20(4); 21; 21(2); 21(4) - (Interpreted)
5. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 20(4); 20(4)(A) - (Interpreted)

Advocates

None mentioned

RULING

A. Introduction

1. This is an application under certificate of urgency dated February 7, 2019. The application is anchored on articles 163(1), 159(2)(d) and (e) of the *Constitution*, sections 3 and 21 (2) of the *Supreme Court Act*, rules 20(4), 20 (4A) and 26 of the *Supreme Court Rules*, rules 3(5) (a)and (8) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* and all other enabling provisions of Law.

2. The applicant seeks orders that:

   (a) The application be certified urgent and be heard ex-parte in the first instance.

   (b) This court has inherent powers to reviews its judgment so as to meet the ends of justice.

   (c) This court be pleased to review or set its judgment of January 23, 2019.

   (d) This court review of its judgment delivered on January 23, 2019 to re-asses the submission on the record and determine the appeal on the basis of the 1st respondent/ applicant's opposition to the petitioner's High Court petition as an interested party.

   (e) This court be pleased upon review of its judgment delivered on the January 23, 2019 to clarify its said decision and its position on the High Court decision.

3. The application is supported by the affidavit of Mohammed Fugicha.

4. In opposing the application, the 3rd and 4th respondents have filed grounds of opposition dated March 1, 2019.

5. Similarly, the 2nd respondent has filed grounds of opposition dated March 12, 2019 to oppose the application for review.

B. Submissions

(i) The applicant's submissions

6. It is the applicant's submission that this court in the *Fredrick Otieno Outa v Jaren Odoyo Okello and 3 others*, Supreme Court Petition No 6 of 2014; [2014] eKLR the (*Outa*) case, at para 92 affirmed that it can (in exceptional circumstances) exercise its inherent powers to review its decisions ' so as to meet the ends of justice' arguing that while the basis for reviewing this courts decisions does not fall under any of the circumstances enunciated in that case, he does have legal and factual reasons warranting review.

7. He contends that in *Robert Tom Martins Kibisu v Republic* [2018] eKLR, the court did consider a review application even when the Applicant had failed to meet the threshold set out in the Outa case adding that, legally, the court can expand the criteria set out in that matter.

8. It is his other submission that there was an oversight on the part of the court where it failed to consider his opposition to the petitioner's High Court petition and erroneously prejudiced his entire case in the cross petition as an interested party. That therefore, the applicant has not had a just determination of the eventual proceedings between the petitioner and himself arguing that even when the cross petition was found defective, it could still be the basis of the applicant's opposition to the High Court petition.

9. It is also his case that the court can expand the criteria set out in the *Outa Case* in various manners. The first being under article 259(1) of the *Constitution of Kenya* which permits the development of the law. He thus cites this court's decision in S.C Petition No 4 of 2012, *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR (*the Rai Case*) imploring the court to be persuaded by the dissenting opinion of Ibrahim SCJ where he opined that the criteria for review by the court should not be deemed to be exhaustive and that there is need to consider an oversight or mistake because of judicial fallibility as a ground for review of its decisions. Further, that the court derives its review powers from its inherent powers thus when exercising such powers and implicitly reading article 163(1) of the *Constitution*, it should permit the development of the law.

10. The second manner for expansion of the set criteria is through the invocation of the persuasive jurisprudence in other Commonwealth apex courts and in that regard, the applicant relies on decisions of the Supreme Court of India which court has severally found mistakes by judicial fallibility as cogent grounds for reviewing its decisions. To this end he cites *Sow Chandra Kanta v Sheik Habib* [1975] INSC 68 where that court held that review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or grave error has crept in by fact of judicial fallibility. He also relies on *Rupa Ashok Hurra v Asho Hurra & anor* [2002] Case No Writ Petition (Civil) 509 of 1997 where the court observed that situations may arise requiring reconsideration of final judgments to set miscarriage of justice complained of, and that it would therefore be proper but also obligatory, both legally and morally, to rectify the error. Similarly, reference is made to *Vinjay Sharma & Ano v State of NCT of Dehli and Ors* [Review Petition (CLR) No6 671673 of 2017 in Criminal Appeal Nos 608 and 609610 of 2017 where the court reiterated that it will only review its previous decision if there was a 'mistake of an apparent error on the face of the record or some reason akin thereto'. That a 'glaring omission or patent mistake 'must have' also crept in the earlier decision due to judicial fallibility.

11. The third manner for expansion advanced is under article 163(7) of the *Constitution*. It is the applicant's argument in that regard that the court is not bound by its previous decisions and that it can depart from them as observed in the *Rai* case. Similarly, he claims that articles 159 and 259 (1) of the *Constitution* and section 3 of the *Supreme Court Act* also instruct the Court to do so.

12. The fourth reason advanced is premised on the court's decision in the *Kibisu Case* where the applicant submits that this court decided to consider the review application so as to clearly put everything into context. It is his submission that the court ought to clarify the ambiguity as to this court's position on the High Court decision which outlawed the wearing of the hijab, leading to uproar and confusion in the country as to whether school uniform rules can limit a right granted by the *Constitution* and the *Basic Education Act, 2013*. Moreover, that this court did not expressly reinstate the High Court decision but it did so constructively by setting aside the Court of Appeal decision and thereby sanitized a declaration by the High Court which declaration violated articles 2(4), 10, 21 (3) 27(5) and 32 of *Constitution*. Further, that this court's decision seems to have left intact the Court of Appeal order which was to the effect that,

    "(a) the High Court's order that the decision to allow Muslim students to wear hijab/trousers is discriminatory, unlawful and unconstitutional is set aside." According to the applicant, this apparent conclusion also conflicts with the court's final orders at paragraph 98 where this court allowed the appeal and set aside the judgment of the Court of Appeal. And that while reproducing the Court of Appeal orders, this court wrongly numbered them thus creating more confusion.

13. He thus urges the court to review or set aside its judgment in this matter.

(ii) The 2nd respondent's submissions

14. It is the submission of the Teachers Service Commission that the instant application and grounds in support lack merit, are bad in law and fatally defective. They further argue that this court does not have jurisdiction to review, set aside and/or vacate its judgment save as provided under section 20 (4) of the *Supreme Court Act* which is not applicable in this matter.

15. They also contend that the application does not also meet the test, threshold and criteria encapsulated in this court's decision in the *Outa Case* to invoke the inherent power to review its decisions.

16. They further submit that as the applicant has conceded that the instant application does not fall within the criteria set out in the *Outa Case*, indulgence by the court to expand that criteria to include what the applicant terms as "a mistake" amounts to derogation of the finality character of the decisions of the court and ought to be declined adding that this court has no jurisdiction to entertain appeals from its own decisions.

17. It is the 2nd respondent's concluding submission that the application contravenes the deeply rooted principle of law that litigation must come to an end and thereby impugns the integrity of the judicial process. And, emphasize that the applicant has not disclosed a cause of action against them and that no compelling grounds have been set out to support the application and they urge the court to dismiss the same with costs to all the respondents.

(iii) 3rd and 4th Respondents written submissions

18. It is the 3rd and 4th respondents' submission that the Supreme Court of Kenya has no powers to review its own decisions except in limited cases. Further, that the applicant's reliance on article 163(1) of the *Constitution* for review is misguided as the Constitution does not confer on the court, express powers to review its decisions.

19. They also contend that section 21 of the *Supreme Court Act 2011* outlines the powers of the Supreme Court to make ancillary and interlocutory orders but notwithstanding, the provisions on ancillary orders should not conflict with constitutional provisions or other provisions of the Act. They furthermore argue that the orders which the applicant seeks are inconsistent with the law, as the court is only empowered to review its decision under section 21(4) of the *Supreme Court Act*.

20. They, in addition, submit that the provisions of section 21 (4) of the *Supreme Court Act* were explained by this court in the Outa case and the court has no power to review its decisions except as provided therein.

21. They finally contend that the orders sought in the application are to an appeal and that the court lacks jurisdiction to allow the application, is functus officio and ought to dismiss the application with costs.

C. Analysis

22. We deem it necessary to address the issue of jurisdiction in limine. In a nutshell, in addressing that, issue, the respondents contention is that this court does not have jurisdiction to review, set aside and or vacate its judgment save as provided under section 20 (4) of the *Supreme Court Act* which is not applicable in this matter. Further that, the present application does not meet the conditions set out in the *Outa Case*. The applicant on the other hand is emphatic that this court can expand the criteria set out in the *Outa* case for the development of the law, to clarify a mistake by judicial fallibility, and to put uncertainties into context.

23. The legal position as regards this court's power to review its own decision was settled in the *Outa* case. That case, set out circumstances in which this court can vary any of its judgments, rulings or orders, limiting them to instances where;

    (i) the judgment, ruling, or order, is obtained, by fraud or deceit;

    (ii) the judgment, ruling, or order, is a nullity, such as, when the court itself was not competent;

    (iii) the court was misled into giving judgment, ruling or order, under a mistaken belief that the parties had consented thereto;

    (iv) the judgment or ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.

24. It is apparent that the applicant in this matter has not met the conditions precedent set out in the *Outa* case; has not demonstrated where or if at all the judgement he seeks to review was obtained fraudulently, deceitfully, was a nullity, was made under a mistaken belief that the parties had consented thereto, was rendered on the basis of a repealed law or as a result of a deliberately concealed statutory provision.

25. It is also clear that the applicant intends to appeal this matter in the form of review. The process of review was not intended to give the party an opportunity to appeal, and where review it is sought, the party has to demonstrate to the satisfaction of the court, how if at all, it erred in the exercise of its discretion.

26. We must also emphasize that this court was clear in its judgement in the present matter that, should a party seek to litigate the issues of the right to wear a hijab, they ought to institute fresh proceedings at the High Court. We specifically stated;

    (59) In the same breadth, we recognize that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this apex court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court."

    In effect, the door is open for the applicant to specifically seek a determination of the issues he has raised in the present application. That door is however at the High Court and not in this court. For avoidance of doubt, we reiterate our position as expressed in our Judgment, that the hijab issue was never one requiring the pronouncement of the High Court, the Court of Appeal nor this court. The issue is indeed important, but it must be addressed by known procedures in our realm and not by ingenuity of counsel, litigants or court.

The Dissenting Ruling of Ojwang, SCJ

I) Introduction

27. The instant application for review relates, in particular, to the majority Judgment in *Methodist Church in Kenya v Mohamed Fugicha & 3 others*, Petition No 16 of 2016, which was delivered on 23 January 2019. As I had given a substantive dissenting opinion in the said petition, it will be clear that my perception of the relevant issues, as well as my lines of conviction, are clearly set, and, on this account, do not rest on an even keel with the majority's ruling in the instant application, by which the 1st respondent

in the earlier cause is calling upon the court to review, or set aside its said majority Judgment. The applicant founds his case upon the terms of articles 159 (2) (d) and (e), and 259 (1) of the *Constitution of Kenya*, 2010; sections 3 and 21 (2) of the *Supreme Court Act*, 2011 (Act No 7 of 2011); rules 20 (4), 20 (4A) and 26 of the *Supreme Court Rules*; and rules 3 (5) (a) and (8) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*; and all other enabling provisions of the law.

(II) Applicant's Case

28. The applicant cites this court's earlier decisions, as a basis for the call for review. He submits that the court, in *Frederick Otieno Outa v. Jared Odoyo Okello & 3 others*, Sup. Ct. Petition No. 6 of 2014; [2014] eKLR, had affirmed (at para. 92) its discretion, in exceptional circumstances, to apply its inherent power to review its earlier decision, in order to "meet ends of justice". He cites in the same category *Robert Tom Martins Kibisu v. Republic* [2018] eKLR, in which the court had further underlined its discretion to undertake a review of its past decision.

29. The applicant invoked further cause in his case for review of a past decision, by way of comparative experience. He cited in this regard the Indian case, *Sow Chandra Kanta v Sheikh Habib* [1975] INSC 68 ¾ in which it was held that the exceptional decision to review a Supreme Court verdict could only be justified in the light of a glaring omission, a patent mistake, or a related grave error, in the earlier decision. The applicant further cited India's Supreme Court decision in *Rupa Ashok Hurra v Ashok Hurra & Another*, Writ Petition (Civil) No 509 of 1997 (2002), where it was observed that a situation may arise that calls for the reconsideration of final Judgment, so as to rectify a miscarriage of justice, in answer to legal or moral imperative.

30. The focus of legal principle guiding the applicant, however, is to be found in express terms of the *Constitution of Kenya, 2010* - articles 159 (2) (d) and (e); and 259 (1). Article 159 is concerned with "judicial authority" in broad terms; and clause (2) thereof signals the sources of guidance, in the exercise of such authority: clause (d) prescribes that the court is to dispense justice "without undue regard to procedural technicalities"; and clause (e) places a broad scheme of obligation upon the court: "the purpose and principles of this Constitution shall be protected and promoted".

31. Such a broad-based intent, in the exercise of the court's mandate, is underlined in article 259 (1) of the *Constitution*, in the following terms:

> "This *Constitution* shall be interpreted in a manner that-
>
> (a) promotes its purposes, values and principles;
>
> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
>
> (c) permits the development of the law; and
>
> (d) contributes to good governance."

32. The applicant underlines his submission regarding the Supreme Court's discretion to reverse its decision by citing the terms of article 163 (7) of the *Constitution*:

> "All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court".

33. The applicant submitted that, a patent shortfall had marked the majority decision of 23 January 2019: that decision bears palpable ambiguity on the most crucial question, which had been the subject

of trial before the Superior Court of first instance- What was the standing in law of that court's decision outlawing the hijab, as an essential dressing for Muslim schoolgirls? The effect of the resulting decisional ambiguity, the applicant submitted, had led to much confusion and misunderstanding, throughout the country, on the question whether, by administrative school-rules, it was possible to limit a right which held a clear place under both the Constitution and the relevant statute, the *Basic Education Act*, 2013.

34. The applicant submitted that the majority decision had occasioned doubts in the law relating to an important aspect of public governance, which also bore crucial constitutional implications: notwithstanding a perception that the Supreme Court had not reinstated the trial-court decision, the setting-aside of the appellate court decision would leave the original decision as the basis of management of education in the primary schools - even though this stood in contradiction to the prescriptions of the *Constitution*. In this regard the following instances were cited:

(i) Article 2 (4) of the *Constitution* provides:

> Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid".

(ii) Article 10 (1) provides that:

> "The national values and principles in this article bind all State organs, State officers, pubic officers and all persons whenever any of them-
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions."

(iii) Article 21 (3) provides that:

> "All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities."

(iv) Article 27 (5) thus provides:

> "A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4) [i.e., race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dresses, language or birth];" and

(v) Article 32 (1) which provides:

> "Every person has the right to freedom of conscience, religion, thought, belief and opinion" - basic requirements

reflected in substantial detail in the same Article, clauses (2), (3) and (4).

III) Responses to Applicant's Case

35. From the respondents' side, it is contended, inter alia, that: the *Constitution* has no provision in express terms, allowing the Supreme Court to review its decisions; the court may not "sit on appeal" over its own decision; there is no jurisdictional basis for the review being sought; the applicant is, in effect, seeking a second hearing - but this is untenable in law; the applicant, where he apprehends injustice in the Supreme Court's decision, should file a constitutional petition in the first superior court; there must be finality to litigation, and the application; is incompetent; section 21 (4) of the *Supreme Court Act, 2011* would allow only for a review of clerical errors - and this rules out the applicant's case; the Supreme Court, following its decision, became *functus officio* and may not entertain the application; the Supreme Court is being asked to sit on appeal over its own Judgment, and this is not tenable.

(IV) Majority's Stand

36. The Bench majority has considered the issues in this application, not so much on the broad principles which the applicant draws from the terms of the Constitution, but on the basis of one past case, *Frederick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR. In that context, the majority thus speak (para. 23):

> "The legal position as regards this court's power to review its own decision was settled in the *Outa* case. That case set out circumstances in which this court can vary any of its Judgments, Rulings or Orders, limiting them to instances where:
>
> (i) the judgment, ruling or order is obtained by fraud or deceit;
>
> (ii) the judgment, ruling or order is a nullity, such as when the court itself was not competent;
>
> (iii) the court was misled into giving judgment, ruling or order under a mistaken belief that the parties had consented thereto;
>
> (iv) the judgment or ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision."

37. Such was the one and only test which led the majority to their conclusion:

> "Consequently, we find that the application for review is not merited. We make the following orders:
>
> (i) the notice of motion dated 7 February 2019 is hereby dismissed.
>
> (ii) the applicant shall bear the respondents' costs".

38. The majority rested their decision on the technical point that, in the proceedings before the trial court, the name of the applicant herein had appeared against the "interested-party" rubric, rather than that of the primary parties. This is evident from the majority's stand in the original proceedings (para. 59):

> "[W]e recognise that the issue as contained in the impugned cross-petition is an important national issue [the Constitution's safeguards for 'human rights and fundamental freedoms' (article 259 (1)); 'religious or cultural communities' (article 21 (3)); 'right to freedom of conscience, religion ...' (article 32 (1)), that will provide a jurisprudential

moment for this court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this apex court. In view of this, it is our recommendation that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court".

(V) My Point of Departure

39. On the earlier occasion, I stood in departure from the majority's position. That remains the case, yet again. From the foregoing paragraph, it will be clear enough that the *Constitution of Kenya* - indeed, any modern Constitution - is designed mostly to safeguard certain broad values, that secure a rewarding and beneficent life for the human being, as an individual, and in community. In the value-laden sphere of religious beliefs and practices, or of majority and minority expectations or entitlements, the governance mandate entrusted to the courts of law, calls for adoption of the broad, interpretive mien, which looks askance at claims founded upon pure technicality, craft or style. The judicial horizon, at such a functional nexus, extends flexibly, and meets the more general, political mandate, at the most practical frontiers: and any steadfast resort to technicality, shows itself as an improper course for the court.

40. The foregoing point would claim scholarly relevance also by the careful reflection by Professor Terrance Sandalow of the University of Michigan ["*Judicial Protection of Minorities*", in Michigan Law Review, Vol 75 (1977), 1162, at p 1178], who thus remarked:

> "The heart of the argument is a claim that the Constitution should not be read as prescribing rules, but as committing the nation to certain values. Such a reading is said to be appropriate because the Constitution was 'intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs'. Its provisions must, accordingly, be read with sufficient breadth to accommodate changing circumstances and the heightened understanding of successive generations regarding the requirements for achieving the goals that it establishes".

41. Such is the context in which I had considered the majority's standpoint in the original decision of this court to be indefensible, just as I still consider the majority to have taken leave of the precious opportunity for rectification in the instant matter.

42. It bears restating elements which featured centrally in my earlier dissenting opinion, as they equally touch on the instant application before the Supreme Court. No significance, in principle, merits being attached to the terms "interested party", or "cross-petition", as they related to the applicant's position in the earlier case. This was a case meriting disposal on the merits only - in which case, the applicant's cause had rested on firm grounds, and the outcome declared by the appellate court in his favour was, in principle, unalterable. This court ought to have been guided in that case, just as in the instant matter, by the vital demands of the *Constitution of Kenya, 2010* which thus stipulates (article 159 (2) (d) and (e)):

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> . . .
>
> (d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted".

43. The instant application ought to have been guided, in its hearing and mode of disposal, by the express principles of the *Constitution*, which I did recall in my earlier Judgment:

> ... Article 159 (e) requires the courts of justice to uphold 'the purpose and principles of this *Constitution*'. The abode of such 'purposes and principles' is article 10, clause (b) of which calls upon us to uphold:
>
> > 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised'."

44. I would, therefore, have set aside the said decision, and substituted it with a rational and proper Judgment founded upon the relevant principles of the Constitution and the law.

D. Court's Determination and Orders

45. Consequently, we find that the application for review is not merited. We make the following orders:

(i) The notice of motion dated February 7, 2019 is hereby dismissed.

(ii) The applicant shall bear the respondents' costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY JANUARY, 2020

.....

D. K. MARAGA

CHIEF JUSTICE/PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT OF KENYA