



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 10 OF 2019

JWM (alias P).....PETITIONER

VERSUS

BOARD OF MANAGEMENT O HIGH SCHOOL.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. This is the first ever case in this country brought on behalf of a Rastafarian child who has been denied the right to receive education because she wears rastas (dreadlocks) due to religious beliefs. *JWM* alias P, the Petitioner, is father to *MNW* a 15 years Rastafarian girl who was admitted to Form One at O High School, a public secondary school, for her secondary school education in January 2019. She reported to school, paid the required fees and was dully issued with admission Number, allocated a class and even attended lessons. However, it was soon discovered that keeps rastas which lead to her being sent home with a warning not to return to school until she had shaved the rastas.

2. The Petitioner felt this was discrimination and a violation of *MNW*'s right to education based on her religious beliefs. He filed this petition on behalf of the minor against the Board of Management of O High School, the ministry of Education and the Attorney General, the 1st, 2nd and 3rd respondents respectively, challenging the School's action.

3. The Petitioner averred that his family is Rastafarian by faith and keeps rastas as a mark of their religious beliefs; that after *MNW*'s Kenya Certificate of Primary Education Examination (KCPE) results, she applied for form 1 admission at the 1st respondent's school and indicated in the form that she was Rastafarian by religion; that she was admitted and reported to school on 10th January, 2019; paid the required school fees; issued with admission number and attended classes. He further averred that *MNW* was later summoned by the school authorities, admonished for keeping rastas and sent home not to return until she shaves the hair.

4. The Petitioner stated that he approached Head Teacher the following day, 11th January, 2019, with a view to sorting out the issue in order to have *MNW* back in school but was turned away without being given a hearing. His attempt to have the Education Officer intervene bore no fruit. It is the Petitioner's case that the Respondents' action was not only discriminatory on grounds of religion but also a violation of *MNW*'s right to religion, education and fair administrative action, contrary to Articles 27, 32, 43 and 47(1) of the constitution. The Petitioner therefore sought the following reliefs;

a) A declaration due hereby issue that the 1st respondent's decision and/or action of constructively suspending the minor herein

namely M N W on the basis of her Rasta religious inclination and culture characterized by her sporting of dreadlocks is a violation of her right to be treated with dignity, freedom from discrimination, freedom of conscience, religion, belief and opinion, freedom of expression, right to Culture and her right to fair administrative action that is lawful and reasonable under Articles 27,28,32,33,44 and 47 of the Constitution.

b) An order do hereby issue permanently restraining the Respondents by themselves, their servants and/or agents from in anyway interfering with M N W's secondary school education on the basis of her cultural beliefs and practices as a Rastafarian.

c) That consequently, an order do issue directing the respondent's Headmaster and the Deputy Headmistress herein to jointly or severely compensate the Petitioner and/or Ms. M N W for the inconvenience, embarrassment, waste of time and the violation of MNW's fundamental human rights and freedoms under Articles 27,28,32,33,44 and 47 of the Constitution.

d) The costs of this Petition be provided for.

e) Any other order that this Honourable Court may deem just and fit in the circumstances.

Respondents' response

5. The Respondents filed grounds of opposition dated 25th January 2019 and a replying affidavit by **Michael Kahora Waichinga**, the Head Teacher and Secretary of the 1st Respondent, sworn on the same day in response to the petition. In the grounds of opposition, the Respondents contended that it is the 1st Respondent's mandate to make rules for the management the school; that the Petitioner has not challenged the legality or constitutionality of the school rules; that **MNW** accepted to be bound by the school rules; that the Petitioner has misconstrued and misapplied the import of enjoyment of rights and fundamental freedoms and the limitation thereof; that the school dress code is part and parcel of school management and that the Petitioner has not shown how the right to religion is related to the right to education.

6. In the replying affidavit, **Mr. Waichinga** deposed that as a public secondary school, the school is managed by a Board of Management; that the school admits students from all walks of life and from various religious backgrounds; that **MNW's** mother approached the school seeking a chance for her daughter and that after the school was satisfied with her KCPE performance, she was admitted but strictly in accordance with the school rules and regulations.

7. **Mr. Waichinga** further deposed that a calling letter was issued to **MNW** with an admission form which she filled and thereafter reported for admission on 10th January, 2019. According to the deponent, **MNW** was given admission No. 4016 after the she signed to be bound by school rules and regulations. He stated that although **MNW** had indicated her religion as Rastafarian, she wore a hijab and she had informed teachers that she was Muslim which explained why she had a hijab.

8. He further stated that it was when she was being issued with school uniform that the hijab fell off revealing the rastas. He contended that it was at that point that **MNW** was reminded about the school rules but was allowed to attend classes for the day and advised to comply with school rules the following day.

9. According to the deponent, the following day, 11th January 2019, the Petitioner went to school accompanied by **MNW** but they were told that she had to comply with school rules and that she would not be treated in a special way. He deposed that at that point the Petitioner and **MNW** stormed out of the office and left. **Mr. Waichinga** further deposed that he informed the Sub county Director of Education of the incident who ordered that a report be prepared; that a report was prepared and showed that **MNW** had violated rule 7 of the school rules and regulations which prohibits students from keeping dreadlocks. He contended that the Rastafarian Society has nothing to do with the right to Education and denied that they violated any of **MNW's** rights.

Oral testimony

10. The Petitioner offered to give oral testimony in support of the petition during the hearing. He testified that his family is Rastafarian by faith which they have espoused since birth; that they follow biblical teachings found in various books, including Numbers 6: 1-6, Leviticus 21: 5 – 6 among others which he said prohibit eating certain foods and cutting of the hair, as a sign of their dedication to God's teachings and that they, therefore, keep the hair as a manifestation of their faith. He stated that the

command to keep the hair is biblical and that keeping the hair is a manifestation of their faith and as such his family never shaves their hair in keeping with their faith.

11. The petitioner further testified that *MNW*, now 15 years old, has never shaved her hair since birth due to their religious beliefs; that she attended public nursery and primary schools wearing rastas and attached photographs to show that *MNW* has always had Rastas. He added that *MNW* was admitted to the 1st Respondent's school having clearly indicated in her admission form that her religion was Rastafarian; that she paid school fees, issued with uniforms, but was later sent away due to her hair style which she keeps by reason of her faith and nothing else. He told the court that his attempt to have the issue resolved amicably was not successful because the school leadership insisted that *MNW* had to shave her rastas which is against her faith.

12. In cross examination, the Petitioner stated that they follow the Ten Commandments and keep the Sabbath as their day of worship. Regarding school rules, the Petitioner argued that the rule that requires *MNW* to shave her hair violates her right to religion. He insisted that Rastafarians keep "Rastas" and not "dreadlock"; that rastas is a sign of faith as opposed to "dreadlocks" which is a matter of one's choice or style.

Petitioner's submissions

13. Mr. Ochiel, appearing with Mr. Wambui for the Petitioner, submitted that the Petitioner's case presents an element of discrimination on the basis of religion in that *MNW* has been compelled to choose between keeping her faith and education. According to counsel, section 23 (2) (ii) of the Children Act requires parents to give children parental responsibility which includes religious and moral values. He argued that *MNW* is a member of the Rastafarian religion, a fact she fully disclosed in her admission form; that one of *MNW*'s genuinely held beliefs according to biblical teachings is that of keeping the hair. For those reasons, counsel contended, there is a genuine threat to *MNW*'s right to freedom of religion and education.

14. Relying on Article 32 of the Constitution, Mr. Ochiel submitted that the Constitution guarantees freedom of religion which includes the right to manifest religious beliefs through worship practices, teachings and observance, whether in public or private. He argued that *MNW* keeps her hair as a mark of expression and observance of her faith and relied on *Seventh Day Adventist Church v Ministry for Education* [2017] e KLR for the submissions that freedom of religion includes both the right to have religious belief and the right to express such belief in practice.

15. In counsel's view, *MNW* was excluded from school for reason of keeping hair in accordance to her faith, an action that has limited her right to education on grounds of her religious beliefs. He contended that school rules and regulations cannot stand in the way of the Constitution. He submitted, referring to the *Seventh Day Adventist case* that the Court of Appeal had observed that Article 27 of the Constitution enjoins both the state and individuals not to discriminate either directly or indirectly on, among other grounds, religion. In this regard, counsel argued that the application of school rules and regulations on *MNW* in the manner the school has done amounts to direct discrimination without considering reasonable accommodation of her religious beliefs and, therefore, violates the Constitution.

Respondents' submissions

16. Mr. Ogosso, learned counsel for the Respondents submitted in opposition to the petition, that there cannot be a selective application of school rules in favour of a Rastafarian student. He contended that section 59(1) of the Basic Education Act mandates the Boards of School Management to formulate rules and regulations for the management of schools. With regard to the present petition, he argued that school rules were formulated and each student is required to abide by them; that *MNW* understood the school rules and signed the admission letter to that effect and, therefore, she cannot claim that they violate her rights. Counsel relied on *Republic v Head Teacher Kenya High School & Another ex parte SMY* [2017] e KLR and *Ndanu Mutambuki & 119 Others v Minister for Education & 2 Others* [2007] e KLR.

17. He submitted that once the 1st Respondent formulated the rules and regulations, it was the duty of the students to abide by those rules and there is a legitimate expectation that students admitted to the school will obey and adhere to the school rules.

18. Mr. Ogosso contended that the school is applying the rules as formulated and, therefore, it has not violated *MNW*'s rights; that the right to express her faith under Articles 32(2) is not absolute; that there is no evidence that she has been denied the right to

worship or receive teachings of her faith or that she has been treated differently on account of her religious beliefs. In counsel's view, the right to manifest religious beliefs can be limited by requiring her to abide by school rules which is a justifiable limitation. He relied on *J.K. Suing on behalf of Club Board of Directors v. School & another* [2014] eKLR for the proposition that although the right to education is important, the court should not ordinarily interfere with school affairs except in exceptional cases.

Analysis and determination

19. I have considered the petition, the response, submissions and the authorities relied on. The facts of this petition are straight forward. *MNW* is a member of the Rastafarian whose religious beliefs do not allow her to shave the hair. She was admitted to the school and she clearly indicated in her admission form that her religion was Rastafari. She reported to school, paid the required fees and was given admission number and a class, form 1A. Later the school authorities noticed her rastas, ("dreadlocks") and sent her home until she shaves the rastas.

20. The Petitioner, *MNW*'s father, tried to have the issue sorted out to no avail, with the school administration insisting that *MNW* has to shave the hair before rejoining the school. The petitioner argued that shaving hair is against their religious beliefs and that what *MNW* keeps are "rastas" which manifest their faith and not "dreadlocks" which are a matter of choice or style. The Respondents on their part maintained that school rules and regulations prohibit dreadlocks and apply to all students and for that reason, *MNW* will not be accorded preferential treatment and will only be allowed back to school once she shaves the dreadlocks.

21. The single question that arises for determination in this petition is whether the decision to exclude *MNW* from school has violated her right to education on religious grounds. However, before I venture to answer this question, I find it necessary to address a preliminary issue, namely; whether Rastafari is a religion to warrant invocation of protection under Article 32 of the Constitution. But, first, what is religion"

22. The Constitution does not define the word "religion." We must therefore turn elsewhere to find the meaning of this word. Concise Oxford English Dictionary, Twelfth Edition defines "religion" as;

"(1) the belief in and worship of a superhuman controlling power, especially a personal God or gods, a particular system of faith and worship;

(2) a pursuit of or interest followed with great devotion."

23. Black's Law Dictionary, Ninth Edition defines "religion" as;

"A system of faith and worship usually involving belief in in a supreme being and usually containing a moral or ethical code; especially such a system recognized and practiced by a particular church, sect, or denomination."

24. On the other hand, Greil, A.L. & D.G. Bromley; *Defining Religion: Investigating the Boundaries between the Sacred and Secular*, 2003. Amsterdam: JAI, define religion as;

"a unified system of beliefs and practices relative to sacred things set apart and forbidden, beliefs and practices which unite into a single moral community called a church and all those who adhere to them"

25. It follows from the above definitions that religion encompasses aspects such as beliefs, faith and worship of a superior being which determine a person's moral or spiritual conduct. And from what the Petitioner averred in his pleadings, deposed in his affidavits and testified on oath in court, that they believe in the biblical teachings which forbid shaving of hair; that they keep the Ten Commandments given by a superior being and that they observe the Sabbath as their day of worship, it is my holding that Rastafari is a religion whose sincere adherents should be accorded full protection under Article 32 of the Constitution just like those of other religions.

26. This view finds support in an Article by Midas H. Chawane, *The Rastafarian movement in South Africa: A religion or way of life*" (Journal for the Study of Religion vol.27 n.2 Pretoria 2014) in which he opines that whether Rastafarians see their movement

as religious or not will depend on their definition of religion. He argues that when other aspects of the definitions are applied such as ***“a unified system of beliefs and practices, Rastafarianism qualifies as a religion”***.

27. Within Judicial circles, the issue of whether or not Rastafari is a religion was considered in ***Reed v Faulkner*** 842 F 2d 960 (7th Cir 1988), where the US Circuit Court held that Rastafarianism was a form of religion. The court observed that the Rastafarians are a religious sect that originated among black people in Jamaica though it has adherents among black American and that its tenets are derived by interpretation of passages in the Bible and, therefore, Rastafarian faith was a bona fide religion for purposes of the First Amendment.

28. And in ***re chikweche*** 1995 (4) SA 284 (ZC), The Supreme Court of Zimbabwe held that the status of Rastafarianism as a religion, in the wide and non-technical sense, has to be accepted and wearing dreadlocks was a manifestation of this religion and fell within the protection afforded by s 19(1) of the Constitution of Zimbabwe.

29. It follows that it is no longer contestable that Rastafarian is a religion for purposes of constitutional protection. That done, I now turn to consider the core issue in this petition regarding ***MNW***'s rights.

Whether MNW's rights have been violate

30. Article 32 (1) of the Constitution guarantees every person the right to freedom of conscience, religion, thought, belief and opinion. Sub Article (2) provides that;

“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.”

31. Sub Article (3) further provides that, a person may not be denied access to ***any institution***, employment or facility or enjoyment of any right because of the person's ***belief or religion***. While Sub Article (4) states that ***a person should not be compelled to act or engage in any act that is contrary to the person's belief or religion***. Article 32, therefore, guarantees the right to manifest, observe and practice religious beliefs and prohibits actions that compel one to act in a manner that goes against his or her religious beliefs.

32. Similarly, Article 43 (1) (f) guarantees every person the right to education. While Article 53 (1) (b) guarantees every child the right to compulsory basic education. Sub Article (3) makes it clear that a child's interests are of paramount importance in every matter concerning the child. A child's right to compulsory education is replicated in section 28(1) of the Basic Education Act which requires the Cabinet Secretary to implement the right of every child to free and compulsory basic education. In that regard, a child has a constitutional right to have basic education as a matter of compulsion.

33. Parents have a legal responsibility to take their children to school. To that extent, section 30 of the Basic Education Act provides th us;

1 “Every parent whose child is-;

(a) Kenyan, or

(b) resides in Kenya;

Shall ensure that the child attends regularly as a pupil at a school or such other institution as may be authorized and prescribed by the Cabinet Secretary for purposes of principal, mental, intellectual or social development of the child.

34. Subsection (2) makes it an offence where a parent fails to take his or her child to school providing that a parent who fails to take his or her child to school as required under subsection (1) commits an offence and on conviction, is liable to a fine of Kshs. 100,000/= or one year imprisonment or both, signifying the importance the state attaches to education for the children. In this respect, the Petitioner discharged his statutory obligation when he took the minor to school

34. The fact that the Petitioner and his family belong to the Rastafarian religion is not in doubt and that is why they do not shave their hair as a manifestation of their religious beliefs. *MNW* indicated in her admission form that she is Rastafarian by religion. The Petitioner was also emphatic that *MNW* has never shaved her hair since birth and that doing so is against their faith and religious beliefs. He maintained that *MNW* went through public nursery and primary schools without encountering the prospect of being forced to shave her hair against her religious beliefs and that the scenario she faces now has traumatized her.

35. The stance taken by the Respondents that *MNW* must shave her hair before she is allowed back to school is clearly contrary to Article 32 which guarantees every person's right to religion and to manifest that religion through practice. Keeping rastas is the minor's outward manifestation of her religious beliefs and forcing her to cut the hair is contrary to those beliefs. Article 32(3) is also clear that a person may not be denied access to an "institution" because of his or her religion while Sub Article (4) states that, no person should be compelled to act or engage in an act that is contrary to the his or her beliefs or religion.

36. It is therefore plain to me that the Respondents' demand that the minor must cut her hair is constitutionally prohibited. Article 32 contains constitutional guarantees that should not be undermined in a way that violates one's religious beliefs. In that regard, Article 32 underscores the breadth and width of the right to religion and, therefore, guarantees *MNW*'s right to declare, express, practice and manifest her religious beliefs to the fullest extent.

37. As was observed by the Supreme Court of Canada in *R v Big M Drug Mart Ltd* (1985) 1 SCR 295; [1986] LRC (Const) 322);

“The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal...[E]very individual [i]s free to hold whatever religious beliefs his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.”

38. Article 19 of our Constitution unashamedly proclaims that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals, communities and to promote social justice and the realisation of the potential of all human beings. The Article is also categorical that the rights and fundamental freedoms in the Bill of Rights belong to each individual; are not granted by the State and are subject only to the limitations contemplated in the Constitution.

39. In the same vain, Article 20(1) states that every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The Article requires courts when interpreting the Bill of Rights, to ***adopt an interpretation that most favours the enforcement of a right or fundamental freedom.***

40. Regard must also be had to Article 21(1) which makes it a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. All State organs and public officers have a duty to address the needs of vulnerable groups within society, including “***children***” and members of particular ethnic, “***religious***” or cultural communities.

41. As already stated, Articles 43(1) (f) of the Constitution guarantees the right to education while Article 53 (1) (b) guarantees every child, including *MNW*, the right to compulsory basic education. This right cannot be compromised on the basis of one's religious beliefs or the way one manifests those beliefs. These constitutional guarantees notwithstanding, the minor finds herself torn into choosing between the right to keep her rastas as a way of manifesting her religious beliefs and education. If she opts to keep her rastas, she must then forgo her right to education because of school rules. The opposite is that she shaves her rastas, thus surrenders her right to manifest her religious beliefs, and resumes school, despite this being a right guaranteed by the Constitution. School rules and regulations stand in the way of her right to religion and education because they do not allow one to wear “dreadlocks.”

42. To the extent that the school rules and regulations have been applied in a manner that denies *MNW* the right to access the 1st Respondent's school to receive education unless she cuts her rastas, violates the essence of Articles 32 and 43 on the right to religion and education respectively. This is because although these rights are guaranteed by the Constitution, the Respondents have applied school rules in a manner that negates the fundamental essence of these rights.

43. The Constitution demands that the Bill of Rights be interpreted in a manner that favours enforcement and enjoyment of rights

and fundamental freedoms. In this regard, I find it appropriate refer to the Court of Appeal decision in *Attorney General v Kituo Cha Sheria & 7 others* [2017] e K LR, where it stated thus;

“Quite beyond argument then, the Bill of Rights in Kenya’s constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country’s democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.”

44. The Court then stated with regard to the application and interpretation of the Bill of Rights;

“...Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation.... [C]ourts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and highest claims... [T]hey are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom. It is the duty of every judge, magistrate, member of a tribunal or other body invested with judicial functions to deliberately and unrelentingly pursue, encourage, entrench, protect, jealously guard, educate and propagate Project Freedom and aim to advance openness, democracy, and ensure that liberty rings loud and true in every place and sphere of Kenyan’s socio-political life. The Constitution demands that everything the Bill of Rights stands for in its text, its purport, its spirit, philosophy and intendment as a charter of liberty must be given full effect in a bold and unflinching manner. Judges must speak the language of rights and fundamental freedoms and do so with neither apology nor embarrassment. To fail to do so or to do otherwise would be to violate the express precepts of the Constitution.”(Emphasis)

45. The principle of maximization in interpreting constitutional provisions containing rights and fundamental freedoms was also advocated for in *Tinyefuze v Attorney General* [1997]UGCC3, thus;

“A Constitutional provision containing a fundamental right is a permanent provision n intended to cater for all time to come and, therefore, while interpreting such a provision, the approach of the Court should be dynamic, progressive and liberal or flexible, keeping in view ideals of the people, socio-economic and politico - cultural values so as to extend the benefit of the same to the maximum possible.”

46. Applying the principles in the above decisions, it follows that the Respondents are bound to uphold the minor’s rights guaranteed under Articles 32, 43(1) (f) and 53(1)(b) as well as section 28(1) of the Basic Education Act. This is because these fundamental rights and freedom are enshrined in and protected by the Constitution. I therefore find and hold that the Respondents’ decision to exclude *MNW* from school for reason of keeping rastas on religious grounds is not only discriminatory but also violates her right to religion and education. She does not keep the rastas out of choice but due to her strongly held religious beliefs. Her right to education cannot, therefore, depend on violating her right to manifest those religious beliefs. The Respondents are also acting in violation of the Constitution by not only excluding her from school but also forcing her to act in a manner that is contrary to her religion, beliefs and practices.

47. This holding is buttressed by persuasive foreign but important decisions on the issue. in *re chikweche* (supra), Chikweche, a

citizen of Zimbabwe and a devout follower of the Rastafari movement, applied for registration as a legal practitioner in terms of the Legal Practitioners Act, 15 of 1981 of Zimbabwe, but despite possessing the necessary qualifications required by the appropriate regulations and satisfying the additional requirements laid down in the Act, the Judge declined to hear his application when he appeared wearing dreadlocks. The Judge considered him 'unkempt' and improperly 'dressed' and did not allow him to take the oath of loyalty and of office in terms of s 63 of the Act, as a preliminary to registration. Chikweche filed a reference in the Supreme Court under s 24(2) of the Constitution of Zimbabwe, arguing that wearing of dreadlocks was a symbolic expression of his religious outlook inspired by Rastafarianism.

48. The Supreme Court allowed the reference and held, *inter alia*, that the reference in s 19(1) of the Constitution to freedom of conscience was intended to encompass and protect systems of belief which were not centred on a deity or were not religiously motivated, but were founded on personal morality. Gubbay CJ, stated;

'It seems to me, therefore, that in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.'... It is obvious to me that the refusal by the learned Judge to entertain the application placed the applicant in a dilemma. Its effect was to force him to choose between adhering to the precepts of his religion and thereby foregoing the right to practise his profession and appear before the courts of this country, or sacrifice an important edict of his religion in order to achieve that end.'

49. In *DZvova v Minister of education, Sports and Culture and Others* (2007) A4RLR 189(SWSC 2007), a minor of Rastafarian faith was excluded from school for keeping dreadlocks. The matter was first filed at the High Court but was referred to the Supreme Court of Zimbabwe for determination of constitutional issues. The Supreme Court held that Rastafarian was not only a religion, but also that expulsion of the minor from school on the basis of her expression of his religious belief through his dreadlocks was a contravention of sections 19 and 23 of the Constitution of Zimbabwe. The Court observed that the attempt by the school to bar the child from school contravened not only the Constitution, but also the provision of the Education Act.

50. And in *Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPC2V) and others* [2013] ZASCA 40, the Supreme Court of Appeal upheld the decision of the Employment and Labour Relation Court that dismissal from employment of officers who wore dreadlocks based on their religious or cultural beliefs was discriminatory and unconstitutional. The Supreme Court of Appeal stated;

"[22] Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment."

51. Applying the jurisprudence emerging from the above persuasive decisions to the present case, it is plain that where the Constitution guarantees the right to religion, the constitutional guarantee includes the right to manifest that religion. It is, therefore, an invasion of that right when one is forced to act contrary to his beliefs.

52. The fact that *MNW* keeps rastas as a manifestation of her religious beliefs should not have been the basis for excluding her from school. The school's decision to force her to shave the hair effectively punished the practice of her religion, degraded and devalued her and the other followers of that religion in the eyes of other members of society. The ultimate result was to force her to choose between adhering to her religious edicts thereby foregoing education, or sacrifice an important aspect of her religion in order to pursue education. This is a clear violation of the constitution and the law both of which guarantee her right to compulsory basic education as none of the rights can give way.

53. In that regard, school rules and regulations, (including rule7), though necessary for proper governing the conduct and discipline of students, must not be applied in a manner that infringes on rights guaranteed by the Constitution. School rules and regulations are intended to 'regulate and guide students' conduct and discipline for their well-being and proper management of the school but not to punish them. They should not therefore undermine substantive constitutional rights and being subordinate to the Constitution, they should not be applied so as to overrides constitutional provisions. Rather, they should augment those provisions. The fact that rule 7 does not allow keeping of dreadlocks, is not to say *MNW* must give up her religious beliefs and do away with rastas given

that shaving hair is against her religious beliefs.

54. The Respondents argued that rights under Article 32 are not absolute and that the right to manifest religious beliefs can be limited by school rules. I do not agree that rights under Article 32 may be limited given the way the Article is couched. Even if they were to be limited, the limitation must be one contemplated by the Constitution. That is why Article 19 is clear that rights and fundamental freedoms in the Bill of Rights belong to each individual, are not granted by the State and are subject only to the limitations contemplated in the Constitution.

55. In that respect, I do not think the Constitution contemplates that school rules should force *MNW* to act contrary to her religious beliefs. There must be a balance between school rules and rights and fundamental freedoms. Where genuinely held religious beliefs clash with school rules, both sides must strike a balance between religion and education for the good of the learner and the institution. School rules must appreciate genuinely held religious beliefs and should not be applied as though they are superior to the text of the Constitution. They should not be a bar to full realization and enjoyment of rights and fundamental freedoms guaranteed by the Constitution.

56. As the Court of Appeal observed in *Seventh Day Adventist church v Minister for Education* (Supra);

“[F]reedom 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..., 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...”

57. The court then stated;

“The right to freedom of conscience, religion, thought, beliefs and opinion...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.”

58. For *MNW*, keeping rastas is not a matter of choice. It is about her religion and manifestation of what she genuinely believes to be aspects of that religion which she must not be forced to compromise. The limitation that Article 24(1) contemplates is to the extent only that it is reasonable and justifiable in an open and democratic society. The limitation should however take into account the nature of the right so that enjoyment of one’s right is not prejudicial to the rights of others. Most importantly, limitation is acceptable if there is no less restrictive means of achieving the intended limitation.

59. Looking at the totality of *MNW*’s case, I am not persuaded that the rule demanding that she cuts her hair which manifests her religious beliefs is a reasonable limitation. It is intrusive and invasive of her right to religion and to manifest that religion. It is therefore not justifiable in an open and democratic society based on human dignity, equality and freedom. The Respondents have not shown that there is no less restrictive means to achieve the intended limitation other than coercing her to cut her hair. The Respondent’s argument cannot therefore pass the test in Article 24. It is not tenable in our constitutional scheme and its expanded Bill of Rights. It plainly violates the right to religion and to manifest that religion and the right to education guaranteed under Articles 32, 43(1)(f) and 53(1)(b) of the Constitution respectively as well as section 28(1) of the Basic Education Act.

60. In the end, therefore, having considered the petition, submissions, the Constitution and the law, as well as both local and foreign decisions, I am satisfied that the Petitioner has made out a case that the Respondents’ decision to exclude the minor from school for keeping rastas which symbolize her religious beliefs and the attempt to force her to act contrary to her religious beliefs, is a violation of her constitutional rights to religion and education guaranteed by the Constitution and is therefore null and void.

61. Consequently, the petition amended on 29th January 2019 is allowed and I make the following orders.

a. A declaration is hereby issued that the decision by the School administration of O High School to exclude MNW from school on the basis of her keeping Rastas which manifests her religious beliefs is a violation of her rights guaranteed under Articles 32,

43 and 53 of the constitution and is therefore unconstitutional null and void.

b. An order is hereby issued directing the School administration of O High School to immediately recall MNW to resume and continue with her education unhindered.

c. A permanent injunction is hereby issued restraining the School administration of O High School from negatively interfering with MNW's education based on her religious beliefs, particularly for keeping rastas.

d. The Respondents do pay costs of this Petition.

Dated, Signed and Delivered at Nairobi this 13th Day of September 2019.

E C MWITA

JUDGE



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