REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 450 OF 2014

J K

(Suing on behalf of CK)……..... PETITIONER

AND

BOARD OF DIRECTORS OF R SCHOOL.....1ST RESPONDENT

R SCHOOL LIMITED .....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner has filed this matter on behalf of her son, CK, alleging violation of his rights under Articles 27, 43 and 44 of the Constitution. CK, who was born on 29th August 2008, is 6 years old and was a kindergarten pupil at the respondent school, R School. He sports dreadlocks. The petitioner is unhappy that the respondent has demanded that as a pre-condition to his continued attendance at the school, CK should cut off his dreadlocks in order to comply with the school's code of conduct.

2. The petitioner alleges that the rule that prohibits boys from wearing dreadlocks is discriminatory on the basis of their gender and therefore violates Article 27 of the Constitution; that the failure to allow CK back to school violates his right to education guaranteed under Article 43; and that requiring him to shave his dreadlocks violates his right to culture guaranteed under Article 44 as dreadlocks are part of the culture of Jamaica, from which CK's father hails, and which CK visits regularly.

3. In her petition dated 10th September 2014, the petitioner seeks the following orders:

a. ***The Respondent to this Petition, M/s R School, its servants or agents be compelled to allow the Petitioner's son (CK) to attend classes pending the hearing and final determination of this suit.***

b. ***The Respondent to this Petition M/s R School, its servants or agents be compelled to allow the Petitioner's son (CK) to attend classes at the determination of this suit.***

c. ***A declaration that the Respondent's supported rule that boys at the school are not allowed dreadlocks is illegal as it is discriminatory against the petitioner's son as its basis is his gender.***

d. ***The Honourable Court do make such further orders as it deems just and expedient to meet the ends of justice in this case.***

e. ***The Respondent do pay the costs of this Petition.***

The Petitioner's Case

4. The facts leading to the present petition are set out in the affidavit sworn by the petitioner on 10th September 2014. The petitioner enrolled her son in the kindergarten class at R School in September 2010. He had been wearing dreadlocks, which the petitioner states he has had since he was eighteen months old. She states that the dreadlocks have become a part of him and are an expression of who he is and his individuality as a child whose father is of Jamaican descent. He was at all times allowed to attend all classes and participate in all school activities for a period of four years without being prevented from entering the school premises because of his dreadlocked hair.

5. The petitioner states that on or about 3rd July 2014, during the minor's kindergarten school graduation, she raised the issue with his teachers who informed her that it was a school requirement that she cut off his dreadlocks before he resumed school in September 2014.

6. The petitioner contends that the rule is discriminatory against her son as it is based on his sex and is therefore contrary to Article 27 of the Constitution. It is also her contention that neither the students' general requirements and parents' orientation guide book mention that boys are not allowed dreadlocks while in school or that girls are allowed dreadlocks. It is also her case that any school rule that requires that her son cuts off his dreadlocks is in contravention of Article 44 of the Constitution.

7. Learned Counsel, Ms. Mutung'a, submitted on behalf of the petitioner in support of the contention that there had been a violation of **Article 27** that dreadlocks are not gender specific, like skirts and washrooms; that it is unfair for the respondent to allow girls to have dreadlocks while boys are not allowed; and that there are three girls with dreadlocks in the school. She submitted that while the school regulations stated that hair styles should be selected with great judgment to avoid drawing attention to oneself, then it was her view that if it is dreadlocks that drew attention, then the rule should apply to both girls and boys.

8. With regard to the school's code of conduct, it was the petitioner's submission that the code provides that boys' hair should be short, neat and well groomed; that the terms used are not synonymous with dreadlocks and have no correlation to dreadlocks; that the term "short" is subjective and the respondents have failed to inform the petitioner or the court what the prescribed length of hair is.

9. With regard to **Article 43,** Ms. Mutung'a submitted that the other children in the minor's class have been in class and continued learning since school opened in September, while the minor is still at home and is being left behind.

10. Finally, on the alleged violation of Article 44, it was her submission that the minor's father is of Jamaican descent; that the minor regularly travels to Jamaica where his father is based; and that he has expressed the wish to keep the dreadlocks. Ms. Mutung'a relied on the

decision in **Peter K. Waweru vs Republic [2006] eKLR** on the definition of discrimination against a person based on their sex.

11. The petitioner also alleged violation of the child's legitimate expectations. Ms. Mutung'a argued, in reliance on the High Court decision in **Monicah Karimi Njiru** v **Egerton University[2011] eKLR**, that the respondent had, for four years, permitted the petitioner's son to attend all classes and school activities while he had dreadlocks; and that the failure by the school administration to communicate with the petitioner led her to believe that the minor could continue at the school while he had dreadlocks.

The Response

12. In opposing the petition, the respondents relied on replying affidavits sworn by **Mrs.Nelly Omino** on 15th September 2014; the affidavit of **Mrs**. **Patricia Gathoni Echessa-Kariuki** of 22nd September 2014, submissions and authorities.

13. In his submissions on behalf of the respondents, their Counsel, Mr. Amoko argued that while the school was unhappy about the situation relating to the minor, it had a duty to administer its rules to the best of its understanding. It was its case that the petitioner was made aware of and agreed to abide by the school's code of conduct, that she signed the code on 30th March 2010, that she undertook to ensure that the minor understood and would abide by the code, and she would ensure that he did. She was therefore bound by the undertaking she gave and must abide by it.

14. According to the respondents, R School is a private school founded on certain sets of beliefs and values based on the Christian faith which are reflected in the code of conduct and which all parents who send their children to the school are required to subscribe to. It is their case also that the school is relaxed with regard to enforcement of the code with regard to kindergarten children given their age, but that it enforces the code from prep school.

15. The respondents deny that there is any discrimination or that boys are being disadvantaged for not being allowed to wear dreadlocks, and that the claim based on Article 27(3) is baseless and should be disregarded. Mr. Amoko submitted that the argument that

boys were discriminated against was based on a misunderstanding of the safeguards under Article 27(3); that equal treatment is not equivalent treatment; that the grooming code imposes restrictions on both gender, but differently on the basis of social norms and the understanding of the school on what is appropriate. Counsel submitted further that a boy with dreadlocks will attract more attention than a girl, and that the respondent was therefore entitled to impose a code of conduct that prohibited boys from having dreadlocks. He relied on the case of **Attorney-General of St Christopher and Nevis & Others v Kaleel Jones HCVAP 2004/001** which related to a situation similar to the one now before the court.

16. The respondents argued that they were applying conventional standards in their school, and had no invidious gender specific animus seeking to subordinate one gender over another; that looked at in its entirety as the court ruled should be done in the **Kaleel Jones** case, the R School grooming code did not treat any one gender less favourably than the other; and what the school had was even handed treatment of the genders based on the conventional attitudes of the respondents.

17. With regard to the alleged violation of Article 44 on culture, the respondents submitted that there is no Jamaican culture for sporting dreadlocks; that no evidence of such culture has been produced; and that the petitioner had said that she has no knowledge of such matters. It was also his submission that there was no suggestion that the child subscribed to the Rastafarian religion.

18. Mr. Amoko further submitted that Article 44 does not impose an obligation on a school to promote the culture of one student; that Article 44(2) makes reference to enjoyment of culture with other members of that community; and that culture cannot be imposed on persons who do not subscribe to it.

19. To the contention that they had violated the minor's right to education, the respondents' submission was that a private school does not owe any person the right to education; that the duty to educate is imposed on the state, and under the Education Act, on the parents and the state.

20. Mr. Amoko submitted that the best interests of the child should be addressed; that there is no suggestion that the petition has been brought to promote the best interests of the child as required under Article 53(2); that it cannot be in the best interests of the child to be encouraged to think that rules and regulations are made to be broken; and that the child must be encouraged to appreciate that rules and regulations are important and their observance protects the rights of other people. The respondents therefore prayed that the petition be dismissed, but with no order as to costs.

Submissions in Reply

21. In her response, Ms. Mutung'a submitted in response to the submission that the school was founded on Christian principles that not having dreadlocks is not a biblical doctrine; and that it is in fact mentioned in the Bible that men should not shave their hair. She argued with regard to the respondent's contention that the school was applying social norms and conventional attitudes that both men and women in this country do sport dreadlocks. It was also her contention that the petitioner was not denying that the school had rules on grooming. Rather, that there are no rules prohibiting dreadlocks; and finally, that the petitioner does not wish to impose any cultural attitudes but seeks that her child should enjoy his without being stifled by the respondents.

Determination

22. I have set out above in some detail the parties' respective pleadings and submissions. For the most part, there is no significant dispute on the main facts: the minor on whose behalf this petition was filed has been a kindergarten pupil at the respondent school for the last four years. He sports dreadlocks. The school has a code of conduct which contains certain prescriptions for students in the school, including rules on uniform and appearance which the respondents' Counsel refers to as a grooming code. It is with regard to this aspect of the school's code of conduct that the dispute arises. The school's position is that while its rules are relaxed in relation to kindergarten pupils, it is enforced and insisted upon in relation to pupils in prep school, and it does not allow boys to maintain dreadlocks. The petitioner contends that the code is discriminatory against boys by not permitting them to wear dreadlocks, and the respondents had violated the minor's right to education and culture.

23. While detailed averments and submissions have been made with regard to the Christian foundation and ethos of the school, it is my view that this does not lie at the core of the dispute. In my view, the determination of this matter turns on the court's findings on two main issues:

i. ***Whether the respondents' code of conduct is discriminatory in its requirements in relation to boys and therefore a violation of Article 27;***

ii. ***Whether its interpretation and application violates the minor's rights under Articles 43 and 44 of the Constitution.***

24. Before considering these issues, it is important to acknowledge the right of educational institutions to set rules of conduct for their students. Courts will not ordinarily interfere with those rules and regulations except in very exceptional circumstances. The court recognises that it is those charged with the responsibility of educating children and nurturing them into adults who respect the rule of law and the rights of others who are best placed to make regulations for students, and enforce them. Only if it is demonstrated that such rules or the enforcement thereof violate the rights of those subject to them, or the Constitution, will the court intervene. As the court observed at paragraph 28 of its decision in **Fredrick Majimbo & Another vs The Principal, Kianda School, Secondary Section High Court Petition No. 281 of 2012**:

> [28]…*The school must be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct, and the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions are placed before it, which has not been done in this case. I agree with the sentiments of Nyarangi, JA in Nyongesa & 4 Others -v- Egerton University College (1990) KLR 692, which were cited with approval by Musinga J in Republic -v- Egerton University ex parte Robert Kipkemoi Koskey Nakuru Misc. Civil Application No 712 of 2005 that:*
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> ***"Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decision of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side."***

25. I now turn to consider the alleged violation of the minor's constitutional rights by the respondents through the enforcement of the school's grooming code.

Violation of Article 27

26. The Constitution prohibits discrimination at Article 27 which provides as follows:

1. ***Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

2. ***Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

3. ***Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

4. **….**

27. The petitioner alleges discrimination against boys because her son is not permitted to attend school while sporting dreadlocks, while girls in the school are. Ms. Mutung'a submitted that there are some three girls in the school who sport dreadlocks. I have considered the provisions of the R School's code of conduct that is challenged in this petition. It states as follows with regard to uniforms and appearance:

> ***"It is your responsibility to know the uniform guidelines and to dress appropriately. Shirts must be tucked in neatly and trousers should not be allowed to sag. Jewellery is not allowed, but girls may wear one stud on each ear lobe. <u>Boys are not allowed to keep beards and must have short, neat, well</u>***

> ***groomed hair. Hairstyles for girls should be simple and of natural colour. Hair and braids must be tied back so as to look neat and tidy. Only clear nail vanish is allowed."*** (Emphasis added)

28. Is interpreting this rule to mean that boys should not be sporting dreadlocks, while allowing girls to wear dreadlocks, discriminatory against boys?

29. The question of different treatment of boys and girls and men and women in grooming codes has been considered in other jurisdictions with legal systems similar to ours. In **Smith vs Safeway plc [1996] IRLR 456** CA**,** the court observed as follows:

> ***"If discrimination is to be established, it is necessary to show, not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other. An appearance code which applies a standard of what is conventional applies an even handed approach between men and women, and not one which is discriminatory.Rules concerning appearance will not be discriminatory because their content is different for men and women if they enforce a common principle of smartness or conventionality, and taken as a whole and not garment by garment or item by item, neither gender is treated less favourably in enforcing that principle, for example, because of the impact on comfort or health, or the degree of restriction imposed on the freedom to govern one's own appearance."*** (Emphasis added).

30. In the case of **Attorney-General of St Christopher and Nevis & Others vs Kaleel Jones** relied on by the respondents, the court applied the principle established in **Smith vs Safeway plc** and held that:

> ***"Sexual Discrimination means treating one of the sexes less favourably as distinct from treating the sexes differently. Any consideration of the issue whether a rule in a code of appearance is sexually discriminatory must begin with a consideration of the rule in the context of the whole of the provision in which the rule is contained."***

31. The Court also held that the 'hair length rule' under attack in that case, read in the context of the entire article of the code that regulated appearance,

> "***was not discriminatory and was not therefore in breach of Section 15 of the Constitution. The rule was concerned with regulating appearance in accordance with accepted conventions, which is permissible."***

32. **Attorney-General vs Kaleel Jones** related to a dispute between a school and the parents of a four year old boy who had a pony tail. When required to cut it, his parents refused, arguing that his doctor had said that he would suffer psychological trauma if his hair were cut, and filed suit alleging discrimination against boys. The High Court found in their favour, and the Attorney General appealed. In reversing the decision of the lower court and upholding the school rules which required that boys should have short hair, the Eastern Caribbean Court of Appeal applied the reasoning in **Smith vs Safeway PLC** and held that a code of conduct which applies a conventional standard of appearance is not, of itself, discriminatory.

33. The court further observed at paragraph 22 that:

> ***"One of the most fundamental propositions that Smith vs Safeway confirms is that any consideration of the issue whether a rule in a code of appearance is discriminatory must begin with a consideration of the rule in the context of the whole of the provision in which the rule is contained. As Phillips L J stated, a sensible approach would be to look at the overall effect of the rules and not to single out any one aspect of them."***

34. Finally, at Paragraph 24, the court stated as follows:

> ***"It is inescapable, in my view, that by failing to consider the rule in which hair length is mentioned in the context of this comprehensive treatment on appearance the judge erred in a fundamental way in coming to his conclusion. The judge simply ignored the other rules relating to appearance that placed restrictions on the appearance of both boys and girls***

> ***including one rule that restricted girls alone. The judge, therefore, made no examination of the provisions of the code on appearance, and therefore no comparison, to see if one sex was treated less favourably than the other. He made no assessment of whether Article 3 achieved an even handed approach in the treatment of the sexes, which would make it not discriminatory."***

35. The court came to the conclusion that had the High Court considered the entire article in the school's code, he would have appreciated that the rule he focused on was part of a rule regulating hair styles for boys and girls:

> ***"The rule prohibited "stylish" haircuts and hairdos and contemplated that the way boys present a stylish appearance is by their haircut while girls present a stylish appearance by their hairdos. On my reading, it was merely an elaboration of the rule that boys will not be tolerated with stylish hair cuts to add, as the rule did, that boys must cut their hair short. On this analysis, it was not, therefore, that boys were singled out because of their sex for a requirement that they must cut their hair short. It was because long hair is conventional for girls, but is stylish for boys, that the rule required boys to cut their hair short."***

36. Applying the above reasoning, I find that the respondents have concluded and applied in their grooming code the view that for girls to sport braids or dreadlocks is conventional. It is not for boys. The respondents have different hair style requirements for boys and girls: "***Boys are not allowed to keep beards and must have short, neat, well groomed hair. Hairstyles for girls should be simple and of natural colour. Hair and braids must be tied back so as to look neat and tidy."***

37. The respondents have imposed grooming standards for both boys and girls, though differently, based on the school's consideration of what is conventional for the different sexes. In my view therefore, there is nothing discriminatory about the requirement that boys should not wear dreadlocks. The petitioner may be unhappy about the respondents' insistence on applying certain standards, conventions, and social norms with respect to the grooming and appearance of the students attending their school. However, it is my view that the school is entitled to insist upon observance of the grooming rule with respect to hair by students enrolled in the school.

38. Before concluding on this point, let me address myself to the contention by the petitioner and submissions be her Counsel that she did not know that she would be required to cut off the minor's dreadlocks, or that there was a code of conduct with respect to appearance; and that this information was not communicated to her in writing until four days before the re-opening of the school in September. She avers at paragraph 5 of her further affidavit as follows:

> ***"THAT my response to the contents to paragraph 14 (i) to (vi) is that in as much as the code of conduct of the 2nd Respondent is enforced once the child transitions to preparatory school, the Respondents has not provided or availed any evidence to this Honorable Court that the said code of conduct was communicated to the Petitioner either orally or in writing."***

39. The question is whether the petitioner is being truthful when she makes this averment. I have considered the respective averments of the parties, and I note from the documents annexed to the affidavit of Mrs. Nelly Omino that the petitioner had signed the code of conduct which required students, and in the case of the minor, required her to affirm that ***"I understand my place as a member of R School Community is based upon my readiness to adhere to these requirements. I hereby agree, if admitted to follow this Code of Conduct."***

40. The petitioner also affirmed, by signing the "**Declaration by the Parent or Guardian"** contained at paragraph 6 of the **Registration Form for Admission** that ***"I will ensure that my child has read the school rules and abides by them. I will also accept any rules or regulations as may be reasonably introduced from time to time by the school."***

41. Clearly therefore, the petitioner was fully aware of the requirements of the school's code of conduct. Indeed, she confirms this when she avers that she had asked CK's teachers on or about July 2014 whether he would be allowed into prep school with his dreadlocks, to which she had received an answer in the negative. This averment is contained at paragraph 6 of her affidavit sworn in support of the petition on 10th July 2014 where she avers as follows:

> ***"THAT on or about 3rd July 2014, during my son's kindergarten school's graduation, I raised the issue with my son's teachers, Ms. Emily and Mrs. Omino. They both informed me that it was a school requirement that I should cut his hair before he resumed school in September 2014."***

42. The petitioner cannot therefore be heard to argue that the school had not communicated to her that the minor would not be allowed in preparatory school with dreadlocks. As she deposes in her affidavit, she was aware that the code is enforced once a child transits to preparatory school, and had signed the code when the child was first admitted to the school. However, nothing turns on this point so I will say no more about it.

Violation of the Right to Education

43. The petitioner alleges that her son's right to education guaranteed under Article 43 has been violated by the respondents excluding him from school while others in his class are going on with their studies. It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realisation of the rights set out in Article 43. However, there is no obligation placed on a private entity such as the respondent school to provide such right; and further, as I understand it, the respondents have not expelled the minor but have only insisted on his compliance with their grooming code.

Violation of the Right to Culture

44. The petitioner alleges violation of her son's right to culture guaranteed under Article 44 of the Constitution. The relevant provision in Article 44 is in the following terms:

1. ***Every person has the right to use the language, and to participate in the cultural life, of the person's choice.***

2. ***A person belonging to a cultural or linguistic community has the right, with other members of that community—***

a. ***to enjoy the person's culture and use the person's language;***

45. The petitioner's claim with regard to culture is premised on the contention that the minor's father is of Jamaican descent, that the minor visits Jamaica regularly, and that it is the culture of Jamaica to sport dreadlocks.

46. It is accepted that dreadlocks may be part of certain cultures, and as such, one cannot be compelled to remove them as this would be in violation of their right to enjoy an aspect of their culture. This was accepted by the court in the South African Supreme Court of Appeals decision in **Department of Correctional Services and Another v Police and Prison Civil Rights Union (POPCRU) and Others (CA 6/2010) [2011] ZALAC 21; (2011) 32 ILJ 2629 (LAC)** in which the court accepted that to dismiss some of the respondents, who wore dreadlocks as an expression of their cultural practices and beliefs pertaining to the calling and traditions of Xhosa spiritual healing, was unfair and violated their constitutional rights.

47. However, the court observed in that case that:

> ***"In order to establish religious or cultural discrimination in this case, it was incumbent on the respondents to show that the appellants through their enforcement of the prohibition on the wearing of dreadlocks interfered with their participation in or practice or expression of their religion or culture."***

48. Similarly, the petitioner in this case had an obligation to demonstrate how the wearing of dreadlocks was part of Jamaican culture. This was not done. Apart from the bare allegation that the minor's father is of Jamaican descent and that the minor visited Jamaica regularly, no attempt was made to place before the court any evidence that could lead to the conclusion that dreadlocks were part of the minor's culture and should therefore be protected under Article 44. Certainly, to argue that the fact, without more, that one's father is of a particular nationality and that one visits his or her father's country of origin amounts to belonging to a particular culture and entitles one to constitutional protection of the right to that culture is to stretch things somewhat.

49. In closing on this issue, I must observe, as submitted by the respondents' Counsel, that the petitioner has not asserted that the minor practices the Rastafarian religion, and that therefore there is violation of his freedom of religion and belief guaranteed under Article 32 of the Constitution.

50. Had she so argued and presented evidence in support, then there would have been a basis, on the persuasive authority of decisions such as **Dzvova vs Minister of Education, Sports and Culture and Others (2007) AHRLR 189 (ZwSC 2007)**, to find that there was violation of the minor's rights under Article 32. In that case, the Supreme Court of Zimbabwe declared that expulsion of a Rastafarian child from school on the basis of his expression of his religious belief through his hairstyle is a contravention of section 19 and 23 of the Constitution of Zimbabwe. A similar finding was made in relation to dismissal from employment of Rastafarian correctional officers who refused to shave their dreadlocks in **Department of Correctional Services and Another vs Police and Prison Civil Rights Union (POPCRU) and Others (supra).**

51. What appears to be the case in the matter before me is that the petitioner has made a choice of hairstyle for her son for fashion rather than religious or cultural reasons. She has the right to make this choice. However, while the wearing of dreadlocks for cultural or religious reasons is, in my view, entitled to protection under the Constitution and should be accorded reasonable accommodation, the sporting of dreadlocks for fashion or cosmetic purposes is not, and an institution such as the respondent school is entitled to prohibit it in its grooming code.

52. For the above reasons, I find no merit in the petition. It is hereby dismissed, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 7th day of October, 2014.

MUMBI NGUGI

JUDGE

Ms. Mutung'a instructed by the firm of John Mburu & Co. Advocates for the petitioner

Mr. Amoko instructed by the firm of Oraro & Co. Advocates for the respondents