



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.431 OF 2012

BETWEEN

**SEVENTH DAY ADVENTIST CHURCH(EAST AFRICA)
LIMITED.....PETITIONER**

AND

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

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

**THE BOARD OF GOVERNORS ALLIANCE HIGH SCHOOL.....INTERESTED
PARTY**

**THE NATIONAL GENDER AND EQUALITY COMMISSION.....AMICUS
CURIAE**

JUDGMENT

Introduction

1. This Petition concerns alleged violation of the right to freedom of religion as guaranteed under **Article 32** of the **Constitution** of Kenya for students professing the Seventh Day Adventist faith across the country.

2. The Petitioner, the **Seventh Day Adventist Church (East Africa) Limited**, (hereinafter “SDA”), is a company incorporated under the Companies Act whose objects *inter alia* are to impart moral and religious knowledge through out East Africa in accordance with the

doctrinal principles of the SDA Church and to establish, organize and promote churches, schools and other educational institutions and organizations for those purposes. It has filed this Petition in its own right under **Article 22** of the **Constitution** and on behalf of all its members under **Article 22(2)(a)** and **(b)** including students attending public schools in Kenya, whose rights under **Article 27** and **32** of the Constitution and **Section 26** of the **Education Act** it claims have been violated.

3. In its Petition dated 24th September 2012 and supported by the Affidavit sworn by Pastor Samwel Makori, its Executive Secretary, seeks the following orders;

“(a) A declaration that as a consequence of the Respondent's failure to act in accordance with their constitutional and statutory obligations, the rights under Article 32 of the Constitution and Section 26 of the Education Act of students who subscribe to the Seventh Day Adventist faith have and are being violated.

(b) An order requiring the Respondent to immediately either;

(i) Promulgate appropriate regulations under his powers under Section 19 of the Education Act prescribing the obligations of public schools to respect the rights of students under Article 32 of the Constitution and section 26 of the Education Act, describing the manner in which the obligations are to be implemented and secured as well setting up an administrative enforcement and complaints mechanism; or

(ii) Issue appropriate directions under his powers under section 27(1) of Education Act prescribing the obligations of public schools to respect the rights of students under Article 32 of the Constitution and Section 26 of the Education Act, describing the manner in which the obligations are to be implemented and secured as well setting up an administrative enforcement and complaints mechanism.

(c) Such other and or further relief as this Honourable court may deem it to grant.

(d) An order that the costs of and occasioned by this Petition borne by the 1st and 2nd Respondents.”

Case for the Petitioner

4. In its Petition, the Petitioner states that the SDA Church is a Christian denomination with a worldwide congregation of about 65, 000 churches and 17 million registered members of whom 700,000 reside in Kenya. It states that the fundamental beliefs of Adventists are

predicated upon the Bible which constitutes their only creed and hold certain beliefs to be the teaching of the Holy Scriptures. One of the 28 fundamental beliefs accepted by all adventists is the obligation to respect the Sabbath which ought to be observed by all Adventists on the Seventh day of the week, from sunset Friday to sunset Saturday.

5. Pastor Samwel Makori in his affidavit claims that as at 2009, approximately 82% of the 1, 796, 467 students in secondary schools attend public schools, and that prior to 2009/2010, the overwhelming majority of public schools accommodated the religious practices of Adventist students, and those students were allowed without much impediment to worship and fellowship so as to keep up with their religious beliefs between sunset on Fridays and sunset on Saturday (the sabbath hours).

6. He alleged that from 2011 onwards, public schools in a variety of ways have sought to restrict and in some instances, curtail the opportunities available for Adventist students to worship and fellowship during the sabbath hours. He claimed that the restrictions and curtailment came at different times and in a variety of forms. The schools involved in the curtailment of sabbath hours are stated to be; Limuru Girls High School, Kenya High School, Kagumo High School, Alliance High School, Agore Sare High School, Precious Blood, Riruta, Alliance Girls High School, Maseno High School, Kereri Girls School, Cardinal Otunga Mosochi School, Sunshine Secondary School, Siakago Boys School, Rumanthi Secondary School, Chogoria Boys School, Ciakariga Girls School, Othaya Girls School, Muthambi Girls School, Kangatu Boys School, Chania Girls High School, Njiiri Boys High School, Igumori Secondary School, Muhoho High School and Bahati Girls Secondary.

7. For instance, he has alleged that at Alliance High School, Limuru Girls High School, Kenya High School, Pangani Girls School, Siakago Girls High School, Kagumo High School, Alliance Girls High School, Agore Sare High School and Precious Blood, Riruta, students have been suspended for failing to attend Saturday classes, and the schools conduct examinations on Saturday and Adventist students would miss the exams to their detriment. Further, that the Adventist students are not exempted from cleaning duties Saturdays and those students who miss such duties, examinations and classes are suspended or given an option of leaving the school or making an undertaking that upon re-admission they would abide by the school's Saturday's program. He also stated that in schools where attendance of Adventists students on Saturday is not compulsory, they are not offered compensatory classes and make-up time for examinations that were conducted on Saturday. Another case cited by Pastor Makori was that of Agore Sare High School where students have been suspended for

promoting sabbath worship, missing lessons and examinations during sabbath hours and also for gathering together on Friday in the name of welcoming the Sabbath.

8. It was therefore Pastor Makori's position that in these schools Adventists students are being denied the right to practice their faith in accordance with the fundamental tenets of their religion. He claimed that in these high schools, adherents of other Christian faiths whose day of worship is on Sunday are given the full opportunity and facilities to practice their faith in accordance with the fundamental tenets of their respective churches.

9. He further stated that the Respondents had assured the National Assembly that the rights of the Adventist students to observe the sabbath and those of female Muslim students to wear the hijab would be protected but to date both have failed to issue a circular to that effect. As a result the harassment, intimidation, bullying and punishment of Adventist students has escalated thus amounting to the violation of the Adventists students rights under **Article 32** of the Constitution, while protecting and respecting the rights of the students professing other faiths. He also claimed that the actions of the Respondents violate the Petitioner's rights under **Article 27** of the **Constitution** as it amounted to discrimination against adherents of the SDA faith.

10. The Petitioner relied on the South African Constitutional Court case of *Christian Education South Africa v Minister for Education (CCT 4/00) 2000* where the Court held that freedom of religion includes both the right to have a belief and the right to express such belief in practice. It also relied on the case of *MEC For Education KwaZulu Natal & Others v Navaneethum Pillay & Others CCT 51 2006* where the court held a rule that prohibited wearing of studs in schools was unconstitutional.

11. It was therefore the Petitioner's case that this court ought to order the Respondents to take positive steps to ensure that the rights of the Petitioners Adventists students are protected and submitted further that the principle that the right of freedom of religion imposes a positive obligation on the state to take actions is well entrenched in constitutional jurisprudence. It referred the court to the Irish Supreme Court case of *Quinn's Supermarket v Attorney General (no citation provided)* in which the Supreme Court upheld the Ministerial Regulations on commercial trading hours which exempted Jewish Kosher shops from their ambit, because the Kosher meat shops do not open 'between sunset on Friday afternoons and

sunset on Saturday afternoons'. It was held that such legislative differentiation were not only valid, but was required for the 'freedom of practice of religion' of religious groups.

On the whole, the Petitioner prayed that its Petition should be granted as it was clothed with merit.

The Respondent's case

12. The 1st Respondent, **The Minister for Education** is *inter alia* responsible for promulgation of policies relating to public schools in Kenya. The 2nd Respondent, the **Attorney General** is the principal legal adviser to the Government and under **Article 256** of the **Constitution**, he is obligated to *inter alia* protect, uphold and defend public interest.

13. In their submissions dated 7th June 2013, the Respondents contend that people with various religious beliefs should have the same rights, and no more, as others in society including those who are not religious. And that no person or religious organization should deny other people their rights, discriminate unfairly against them, oppress or denigrate others or impose their religious views on others.

14. They further submitted that freedom of religion is one of the fundamental rights and freedoms that are not absolute. Limitation of such a freedom can therefore be qualified by reasonable and justifiable criteria in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors. They thus opined that there is need to balance between religious freedom and the right to education and submitted that the Adventist students had the right to education and if education was not to be offered on any day on account of their religious beliefs that would be tantamount to denying them the right to education which is not the case in the instant Petition. They referred the court to the US Supreme Court case of **Lemon v Kurtzman (9171) 403 US 602** where the Court held that direct government assistance to religious schools was unconstitutional. In that case, the court developed what is now known as the Lemon Test. I will discuss the "Lemon Test". Based on the lemon test, the Respondents therefore claimed that the prayers sought by the Petitioner, if granted will advance one particular religion and will not reflect a secular purpose as the declaration may result in excessive entanglement with the Adventist religion. Further, that the named and other schools are likely to face hardships in trying to accomplish their curriculum within the set school days while trying to accommodate all the religious groupings that generally exist in public schools.

15. They further submitted that **section 37(1)** of the **Basic Education Act** has prohibited school tuition and as a result, schools have to complete their syllabus within the school going days. They thus claimed that this has necessitated the need for public schools to offer classes on Saturdays or Sundays with the sole intention of advancing education. They further submitted that **section 27** of the **Employment Act** had granted an employee one day rest in a week, and that day has not been specified. They thus contend that granting of one day rest is secular. They relied on the case of *Beadle v Hillsborough County Sherriff's Department 29F. 3D 589 (11) cir (1994)* where the court held that an employee is not entitled to the accommodation of her choice but the employee merely needs to show that a reasonable accommodation was offered regardless of whether it is the accommodation that the employee suggested.

16. It was the Respondents' position that the public schools should not prefer a particular religious practice over any other and should do so by adopting a practice that is neutral and of general applicability. They relied on the case of *Hernandez v Comm'r of Internal Revenue , 490 U.S 680 (1989)* where it was held that when government entities such as public schools act in ways that are facially neutral and applicable to everyone regardless of religion, these actions are constitutionally lawful even if they happen to burden some members of some faith. They thus claimed that the Petitioner's actions of seeking to keep Adventist students away from classes from sunset Friday to sunset Saturday is excessive absenteeism from class and submitted that the Respondents have in no way failed to recognize religious freedoms of students in public schools as alleged by the Petitioner. They urged me to dismiss the Petition for these reasons.

Case for the Interested party

17. The Interested Party, the Board of Governors, Alliance High School's case is contained in the affidavit sworn on 6th June 2013 by Donald Wacieni Kaniaru, its chairman and written submissions dated the same date.

18. It is its case that under the Education Act, Boards of Governors have been granted the power to manage public schools whereas the Minister for Education promulgates the regulations relating to requisite standards of a school in order to ensure a conducive learning environment. It argues that the policies and rules devised by any Board of Governors have to balance competing interests with a view of ensuring that the religious beliefs of one group are not given preference over those of another, and the same applies in the educational needs of students.

19. In his Affidavit, Mr. Kaniaru states that the students who get admitted into Alliance High School are made aware of the school's regulations upon admission and further claims that students are required by the school's administration to undertake extra courses in addition to the minimum required of a candidate by the Kenya National Examination Council and so as to accommodate the extra courses without compromising academic standards and to cover the expansive syllabus, the school timetable extends up to Saturday morning at 11.00am. Thereafter students are at liberty to do what they wish including playing games, cleaning, prayers, reading, school trips and worship for SDA students. Students are also at liberty to wear home attire and leave the premises up to a three kilometer radius and return at 5pm for roll call.

20. He further claims that the adherents of the SDA faith (60 of them) have over the years held their Sabbath sessions on Saturdays from 11.00am. He thus contended that allowing the Petitioner's prayers would amount to introducing inequality in the School as other students will feel discriminated. He claimed that over the years and since its inception in 1926, the SDA adherents have co-existed peacefully with other students of other religions and abide by the school's rules and practices voluntarily and without dissent. Further that, it would lead to a national crisis if a certain policy is imposed nationwide since all schools have unique requirements best understood by their Boards of Governors. That the preparation of the school's curriculum should be left to the Boards of Governors as they work hand in hand with the Parents Teacher's Association in promulgating the same. It was thus his position that the introduction of changes in the curriculum and school hours would have the detrimental effect of meddling with the little time available in the tight school schedule whose consistent success over the years has largely depended on its traditions and schedule.

21. As regards the two boys who were allegedly suspended for failure to attend classes, Mr. Kaniaru stated that they have since admission refused to attend the classes despite being offered counseling and guidance by the schools Mistress and Chaplain. That their case is therefore isolated and of little relevance to the issues in contest.

22. In its written submissions filed on 7th June 2013 , the Interested Party contends that the right to religion and belief as enshrined in **Article 32** of the **Constitution** is not absolute but is instead qualified. They claimed that the right to religion raises three fundamental issues to

wit; the right to belong to a religion, the right to hold a belief and the right to manifest both the religion and the belief.

23. It was its submission that the right to religion as provided for under **Article 32** of the **Constitution** must be read in light of **Articles 24, 43(d)** and **27** of the **Constitution** and it was its position that whereas the right to belong to a religion and hold a belief is absolute, the right to manifest it is qualified. He cited the cases of; *R (On the Application of Begum) vs Governors of Denbigh High School (2006)* which restated with approval the interpretation made in *R (Williamson) v Secretary of State for Education and Employment (2005) UKHL 15* and *Ahmed v United Kingdom (1981) 4 EHRR 126*. It also referred the court to the Kenyan cases of *Republic v Head Teacher, Kenya High School and Another ex parte SMY (Suing through her mother and next friend A B) Petition No. 318 of 2010* and *Ndanu Mutambuki & 119 Others v Minister for Education & 12 Others, Petition No. 407 of 2007*, which all espouse the position that the right to express and manifest one's religion and religious beliefs is one of those fundamental rights and freedoms that are not absolute and can be qualified under **Article 24** of the Constitution. It was also held in those cases that in a democratic society where several religions exists with one another, it may be necessary to restrict people's manifestations of religious beliefs in order to reconcile the interests of various groups and ensure that every person's beliefs are protected. That the right of religion and freedom of conscience may be limited by rules and regulations made by various organs of management to ensure order and smooth running of the state and other institutions.

24. It thus argues that the simple conclusion to be drawn from the above decisions was that, where students had voluntarily accepted to be admitted to a public secondary school, they submit to the rules which may make their freedom to manifest the religion subject to restriction as to the place and manner intended and this would also ensure the harmonious co-existence with students of other faiths.

25. The Interested Party also referred this court to the Ugandan Supreme Court case of *Demanche Sharon & 2 Others v Makerere University Constitutional Appeal No. 2 of 2004*, where the court held that the freedom of religion in learning institutions is guaranteed but must be enjoyed alongside secular goals for which the educational institutions are established. The Interested Party for the above reasons therefore urged this Court to decline the invitation to grant the orders sought.

Amicus Curiae Submissions

26. The *Amicus Curie*, **The National Gender and Equality Commission** is a constitutional commission established under **Article 248** of the **Constitution** and operationalized by the National Gender and Equality Commission(NGEC) Act No. 15 of 2011. Its main mandate under **Section 8** of the **NGEC** is to promote equality and freedom from discrimination as guaranteed under **Article 27** of the **Constitution**. It was enjoined to these proceedings on 7th June 2013.

27. In its written submissions dated 24th June 2013, the *Amicus curiae* submitted that every person has the right to freedom of thought conscience and religion. That this fundamental right is indivisible, interdependent and interrelated with other human rights as guaranteed in the Constitution and in several other international instruments ratified by Kenya. It referred in that regard to the provisions of Articles 2 and 18 of the Universal Declaration of Human Rights (UHDR), Article 13 of the International Covenant on Economic Social and Cultural Rights (ICESCR), Articles 1 18 19, 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), Articles 2 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination, Articles 2, 14 and 30 of the Convention on the Rights of the Child (CRC) and also, referred the Court to Articles 2 and 8 of the African Charter on Human and People's Rights (the Banjul Charter) and Articles 9 and 11 of the African Charter on the Rights and Welfare of the Child.

28. It was the submission of the *Amicus Curiae* that from the Constitutional provisions and the international instruments' provisions cited above, the right to freedom of conscience, religion and belief and opinion is two faceted; the right to hold religious and other beliefs and to change them which is an absolute right that shall not be limited and the right to manifest that religion or belief through worship teaching, practice observance including observing the day of worship either alone or with other people. It submitted that the second part of the right to manifest ones religion or belief is qualified and may be limited, if it is in the interest of public safety, in protection of public order, health or morals and in the protection of the rights and freedoms of others but such limitation must be justified as necessary in an open and democratic society.

29. That in determining whether the rights of the Adventists students to manifest their faith by observing the sabbath on Saturdays without being forced to attend classes and sit for exams, the *Amicus curiae* urged me to consider the decisions of other jurisdictions where this issue has arisen before. It referred me to the Canadian Supreme Court cases of; ***R v Big M Drug Mart Ltd (1985) 1 RCS 295*** which interpreted and held that, the Lords Day Act which

had set the Sunday as the day of worship infringes upon the freedom of conscience and religion as guaranteed in the Canadian Charter of Rights and Freedom. Further, that in that of *R v Edwards Books and Art Ltd (1986) 2 S.C.R 713* the Court concurred with the decision in *R v Big Mart Drug Ltd (Supra)* and went on to hold that the Retail Business Holidays Act of Ontario which set Sunday as the day of rest infringed on the rights and freedoms of religion for those retailers who close their stores on Saturday for religious reasons and who cannot qualify for exemption under the Act to open the store on Sunday.

30. The *Amicus Curiae* also referred the court to the United States of America jurisprudence on the right to manifest religion which is similar to that of Canada. In that regard, reference was made to the case of *Sherbert v Verner (1963) 374 U.S 398*, where the Appellant, who was a Seventh Day Adventist, was discharged by her South Carolina employer because she would not work on Saturday which was her Sabbath day of faith. She subsequently could not find work because she would not accept any job which required her to work on Saturday. When she filed a claim under the Unemployment Compensation Act, her application was denied on grounds that she had was ineligible for compensation as she would not accept work when offered. The Supreme Court held that the South Carolina statute abridged the Appellant's right to the exercise of her religion.

31. The *Amicus curiae* also referred the court to the European Court of Human Rights jurisprudence on the violation of the right to manifest religion and belief. They cited the decisions of; *Konttinen v Finland (1996) 87 DR 68 E Comm, Francesco Sessa v Italy, Application No. 28790 of 2008, Eweida and 3 Others v United Kingdom, Applications No. 48420 of 2010.*

32. In any event, in light of the above decisions, the *Amicus Curiae* submitted that freedom of religion can only be limited to the extent that that the imitation is justified in a multicultural, open and democratic society based on human dignity, equality and freedom taking into account all relevant factors. It submitted further that the burden of proof to justify a limitation is upon the State or the person seeking to limit the right and who is required to demonstrate that requirements of **Article 24** have been met. It thus urged the court to be guided by the principles of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized as espoused under **Article 10** as read with those principles set under **Article 259** of the **Constitution** and reach a fair determination of the issue in contest.

Determination

Principles of Interpretation

33. Having set out the parties contentions as above, I am of the view that there are only two issues for determination. Firstly, whether, the right to freedom of religion to students who profess the Adventist faith as guaranteed by **Article 32** of the **Constitution** has been violated and if so, to what extent? Secondly, whether the right to freedom of religion in the context of the Petition is absolute or it can it be qualified under **Article 24** as read together with **Article 43(d)** and **27** of the Constitution. And lastly as a corollary to the above I will determine the appropriate reliefs in this Petition.

34. From the outset, it behoves me to state that I am alive to the fact that the issues before me are heavy and I must approach them delicately for obvious reasons. I say so also because I am called upon to interpret several provisions of the Bill of Rights and while knowing very well that all human rights are of equal importance and share equal status. In a case such as the one before me, where the conflicting rights are of equal importance, I must strike a fair balance between them. I am particularly aware that the maxim, *sic utere tuo ut alienum non laedas* (exercise your own rights so as not to harm other persons) is a useful formula for resolving conflicts of rights in a constitutional context like the one before me. Balancing conflicting rights is, not always the only strategy for uncovering a fair median designed to uphold both to a limited degree. In *Christian Education South Africa v Minister for Education (supra)* Sachs J stated as follows with regard to the difficulties of a proportionality analysis in the area of religious rights;

“The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly accordingly to their reasonableness. To the extent that the two orders can be separated, with the religious being sovereign in its domain and the state sovereign in its domain, the need to balance one interest against the other is avoided. However religion is not always merely a matter of private individual conscience or conical sectarian practice. Certain religious sects do turn their back on the world, but many major religions regard it as part of their spiritual vocation to be active in the broader society. Not only do they proselytise through the media and in the public square, religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behavior from their members and bear witness to the exercise of power by state and private agencies; they promote music, art and theater; they provide halls for community activities, and conduct a great

variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the constitution. Religion is not just a question of belief or doctrine. It is part of a way of life, of a people's temper and culture.

[34] the result is that religious and secular activities are, for purpose of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and inter penetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way."

35. I agree with the learned judge and it appears that the starting point would be what we all know; the principles of constitutional interpretation. One such principle is that a broad and liberal spirit is required for constitutional interpretation. It is also essential that a constitution is not interpreted in a narrow and legalistic way but generously, and purposively, so as to give effect to its spirit, and this is particularly true of those provisions that are concerned with the protection of constitutional rights - See *John Harun Mwau & 3 Others v Attorney General and 2 Others, Petition No. 65 of 2011.*

36. There are also ample authorities for the proposition that a constitution should be interpreted as an integrated whole so that no single provision of the Constitution is segregated from others and considered alone, but that all provisions bearing upon a particular subject are brought into view and to be interpreted so as to achieve the greater purpose of the Constitution - See *Smith Dakoila v North Carolina 192 U.S. [1940] LED 448.*

37. The Constitution in **Article 259(1)** has also set out clearly the framework of applicable principles while interpreting the Constitution. This Article provides that;

***“(1) 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.

Sub Article 3 of this Article provides that;

“every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and”

38. To my mind, those are the general principles in constitutional interpretation. That I must generally apply in this judgment but I am alive to the fact that the Constitution has also set particular criteria to be adopted while interpreting the specific provisions under the Bill of Rights. I say so because **Article 20** thereof makes the Bill of Rights provisions mandatory as the same apply to, and bind, all state organs and persons. It further provides that every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right. In so far as this court's role is concerned in interpreting the provisions of the Bill of Rights, I must take into consideration the provisions of **Article 20(3)** which provide as follows;

“(3) In applying a provision of the Bill of Rights, a court shall-:

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

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

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-

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

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

39. All the above provisions find context in the decision of the Canadian Supreme Court in the case of *R v Big Drug Mart (supra)* where it held that while interpreting the Constitution, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. At paragraph 116 of its ruling, the Court stated:

“The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or

freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore.....be placed in its proper linguistic, philosophic and historical contexts.”

Balancing of Rights and Limitation thereof

40. I am duly guided and with these principles in mind, I will now proceed to determine the issues before me. But before I do so I recall that the thorny issue in this Petition revolves around the need for conflicts between different rights and freedoms that are protected under the Bill of Rights. I will spend some considerable time on this conceptual aspect for reasons to be seen later in the judgment.

41. I am aware in that regard that many constitutional systems founded on a Bill of Rights proclaim the preeminence of certain constitutional rights. To that end, in every constitutional system there is in fact a certain basic *Grundnorm* determined by the historical circumstances and political structure of the country concerned which then permeates the entire spectrum of rights protected. There are clear indications in international human rights instruments on which human rights and freedoms are founded that preference has been accorded to some rights. For example, The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both proclaim that '*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world*'.

42. The Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) has proposed that in resolving conflicts between different rights and freedoms protected by the Covenant on Civil and Political Rights, weight should be afforded to rights not subjected to limitations in the Covenant. That being so, our Constitution appears in my view to adopt the same resolution.

43. I say so because **Article 25** of the **Constitution** provides as follows;

“Despite any other provision in this Constitution, the following

Fundamental Rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus. ”

To the extent that these rights are non-derogable then it can be argued that they have preeminence of other rights and in some scholarly writings it has been argued that the right to human dignity is the bedrock of all other rights.

The Constitution has also provided for general limitations on fundamental rights and freedoms at **Article 24**, so long as those limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. But even in limitation has set the factors the Court or Tribunal ought to take into account while limiting any particular right or freedom; These are, as follows;

“(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation

(c) the nature and extent of the limitation

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose”

44. *In addition to the above, I am of the view that in resolving the problem of conflicting rights, this Court must assess the harm that would result from limiting the particular right or freedom in relation to the harm that might be caused to individuals or the community if the Petitioner's freedom or right were to be allowed to take its course.*

45. *As the Court noted in S v Manamela and Another (2000) (5) BCLR 491 (CC) that;*

“In essence, the Courts must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification

must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values protected...Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. There can accordingly be no absolute standard for determining reasonableness.”

46. I am guided and as can be seen from our Bill of Rights and specifically in the limitation Clause at **Article 24**, the constitution expressly contemplates the use of a context-sensitive form of balancing. To my mind therefore, the Court in applying the limitation clause must consider the nature and importance of the right and the extent to which it is limited, and whether such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation. With that approach in mind, I will be able to gauge whether the actions of the Respondents and Interested Party infringe on the Petitioner's fundamental rights. If the answer is in the affirmative, then I must consider whether the Respondents' actions can be justified or upheld upon the basis of the general limitation under **Article 24**.

Freedom of Conscience, Religion, Belief and Opinion

47. Freedom of conscience, religion, belief and opinion is guaranteed by **Article 32** of the Constitution which provides that;

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

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

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

(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.”

48. Over and above the above provision, the Constitution at **Article 8** states that, '**there shall be no state religion**'. To my mind and as this Court stated recently, the import of this

provision is that no religion shall have prevalence over any other and no particular one should be seen as the one each citizen is obligated to follow including on the observance of a day of worship - See *Nyakamba Gekara v Attorney General and 2 Others, Petition No. 82 of 2012*. That being so, have the Respondents infringed the rights of Adventist's Students under **Article 32**, as is claimed by the Petitioner? Our Constitution nor any International instrument define religion. However, while interpreting **Article 9** of the European Convention on Human Rights which protects the right of individuals to hold religious and other beliefs; and to practise them alone or with other people and also the right to manifest one's religion or beliefs; the European Court on Human Rights has repeated on many occasions that the State is not entitled to assess the legitimacy of the religious views or the way in which they are manifested - See *Hasan and Chaush v Bulgaria, (2002) 34 EHRR 55, Metropolitan Church of Bessarabai v Moldova (2002) 35 EHRR 305* and *Sahin V turkey (2007) 44 EHRR 5*.

49. **Article 18** of ICCPR, which is similar to **Article 9** of the ECHR has also been interpreted by the UN Human Rights Committee as protecting;

“theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or belief. The terms belief and religion are broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions” - See **General Comment 22, para 9**.

50. The meaning of religion was also considered by Dickson CJC in *R v Big M Drug Mart Ltd case (supra)* where he observed as follows;

“A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon Section 15 of the Charter (an equivalent of our Article 32). Freedom must surely be founded in respect for the inherent dignity and inviolable rights of the human person. 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, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”

I cannot offer a better definition of the main attributes of freedom of religion but as Dickson CJC went on to say in the above case, if a person was compelled by the State or the will of another to do that which he would ordinarily not have chosen to do, he is not acting of his own volition and thus

cannot be said to be truly free. He opined that one of the purposes of the Charter was to protect everyone and within reason, from compulsion or restraint. He went on to say that freedom of religion meant in a broad sense, that subject to such limitations as are necessary to protect public safety, order, health or morals or fundamental rights of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. He expressed himself as follows;

“What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of the 'tyranny of the majority’”.

Further to the above, Dr. J. N Pandey writing on the effect of **Article 25(1)** of the **Indian Constitution** (Similar to our **Article 32**) in his book entitled, **The Constitution of India** at page 197 expressed himself as follows;

“Religion is a matter of faith with individuals or communities and it is not necessarily theistic. A religion has its basis in a system of beliefs as conclusive to their spiritual well being but will not be correct to say that religion is nothing else but a doctrine of belief. A religion may only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observations, ceremonies and modes of worship which are regarded as integral parts of religion, and those forms and observances might extend even to matters of food and dress. Religion is thus essentially a matter of personal faith and belief. Every person has the right not only to entertain such religious belief and ideas as may be approved by his judgment or conscience but also to exhibit his belief and ideas by such overt acts by his religion.”

It follows that the essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses as well as the right to declare religious beliefs openly and without fear of hindrance or refusal.

51. As is now internationally perceived, freedom of religion includes two closely related but nevertheless clearly distinguishable entitlements: freedom to adopt a religion or belief of one's choice and freedom to manifest that religion or belief in worship, observance, practice and teaching. To “hold a religious belief” has been said to relate to the inner act of believing and “to manifest” has been said to relate to the external acts of giving expression of one's faith. The entitlement to hold belief is absolute in nature and cannot be subjected to limitations or suspensions – See **Johan D . Van Der Vyer in his Article 'Limitations of Freedom of Religion or belief: International Law Perspectives' in Emory International Law Review, Vol 19 page 449-538.**

Article 18(3) of the *United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* also states that the external act of manifesting one's religion or belief can be subjected to limitations only if the limitation;

(a) is prescribed by law.

(b) is necessary to protect public safety, order, health or morals or the fundamental rights of others.

52. Applying all the above principles to this case, I note that Pastor Makori, The Executive Secretary of SDA Church in Kenya stated in his Affidavit that the sabbath observance is one of the fundamental beliefs of the SDAs. He specifically stated as follows in that regard;

“the beneficent Creator, after the six days of Creation, rested on the seventh day and instituted the Sabbath for all people as a memorial of Creation. The fourth commandment of god’s unchangeable law requires the observance of this seventh-day Sabbath as the day of rest, worship, and ministry in harmony with the teaching and practice of Jesus, the Lord of the Sabbath. The Sabbath is a day of delightful communion with God and one another. It is a symbol of our redemption in Christ, a sign of our sanctification, a token of our allegiance, and a foretaste of our eternal future in God’s kingdom. The Sabbath is God’s perpetual sign of His eternal covenant between Him and His people. Joyful observance of this holy time from evening, sunset to sunset, is a celebration of God’s creative and redemptive acts. (Gen.2:1-3; Ex.20:8-11, Luke 4:16; Isa 56:5, 6;58:13,14; Matt 12:1-12; Ex.31:31-17; Eze 20:12, 20; Deut.5:12-15; Heb.4.1-11, Lev.23:32; mark 1:32)”

He further claimed that the centrality of the Sabbath and its observance by all Adventists is further explicated in a manual titled '**The Seventh Day Church Manual**' at pages 138-139, where it states the following on the sabbath keeping;

“Sabbathkeeping

“The Sabbath is a token of God’s love to humanity. It is a memorial of God’s power in the original creation and also a sign of His power to re-create and sanctify our lives (Eze 20:12,) and its observance is an evidence of our loyalty to Him and of our fellowship with Him.

The Sabbath holds a special place in our lives. The seventh day of the week, from sunset Friday to sunset Saturday (Lev. 23.32), is a gift from God, a sign of His grace in time. It is a privilege, a special appointment with the One who loves us and whom we love, a sacred time set aside by God’s eternal law,

a day of delight for worshipping God and sharing with others (Isa 58:13). We welcome the Sabbath with joy and gratitude.

“The Sabbath –oh!- make it the sweetest, the most blessed day of the whole week”. – FLB 36.

“The Sabbath ... is God’s time not ours; when we trespass upon it we are stealing from God. ... God has given us the whole of six days in which to do our work, and has reserved only one to Himself. This should be a day of blessing to us – a day when we should lay aside all our secular matters and centre our thoughts upon God and heaven.....

“We are not to teach our children that they must not be happy on the Sabbath, that it is wrong to walk out of doors. Oh, no Christ led His disciples out by the lakeside on the Sabbath day and taught them. His sermon on the Sabbath were not always preached within enclosed walls”. – HP 152.

“God’s love has set a limit to the demands of toil. Over the Sabbath He places His merciful hand. In His own day He preserve for the family opportunity for communion with Him, with nature, and with one another. “ – Ed 251.

The Sabbath hours belong to God and are to be used for Him alone. Our own pleasure, words, business, and thoughts should find no place in the observance of the Lord’s day (Is.58:13). Let us gather in the family circle at sunset and welcome the Sabbath with prayer and song, and let us close the day with prayer and expressions of gratitude for His wondrous love. The Sabbath is a special day for worship in our homes and churches, a day of joy to ourselves and our children, a day in which we can learn more of God through the Bible and the great lesson book of nature. It is a time we can visit the sick and work for the salvation of souls. We should lay aside the ordinary affairs of the six working days and perform no unnecessary work. We should not let secular media occupy our time on God’s holy day.

“The Sabbath is not intended to be a period of useless inactivity. The law forbids secular labor on the rest day of the Lord; the toil that gains a livelihood must cease; no labor for worldly pleasure or profit is lawful upon that day; but as God ceased His labor of creating, and rested upon the Sabbath and blessed it, so man is to leave the occupations of his daily life, and devote those sacred hours to healthful rest, to worship, and to holy deeds” – DA 207.

A program of activities in harmony with the spirit of true Sabbathkeeping will make this blessed day the happiest and best of all the week for ourselves and for our children – a veritable foretaste of our heavenly rest.”

53. According to Pastor Makori, The Sabbath begins at sunset on Friday evening and ends at sunset on Saturday evening. As can be seen from the Church Manual, they profess that those Sabbath hours belong to God and are to be used for Him alone. And that they should lay aside the ordinary affairs of the six working days and perform no unnecessary work. Those are the beliefs of the Adventists as regards the Sabbath and this Court cannot question the sincerity of the Petitioner's beliefs as religion is a matter of faith. It is their constitutional right to hold such belief and freedom to believe is an absolute right. At this point, I will do no better than agree with the sentiments of Lord Nicholls in *R (Williamson) vs Secretary of State for Education and Skills [2005]2 AC 246* where he expressed himself as follows;

“Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony.”

The matter before me is however not one about the right to hold the belief that Sabbath is a day set aside for God and Him alone. It is about the outward manifestation of that right in Kenya and specifically with regard to students in public schools.

54. Whereas the right to hold a religious belief is an absolute right as stated elsewhere above, the freedom to manifest one's religion or belief is not an absolute right and may be limited. What I must therefore determine now is whether the Respondents can qualify Adventist's students rights to manifest their beliefs or religion in public schools during the sabbath hours.

55. The Petitioners claimed that most of the public schools in the country have curtailed the Adventist students' right to worship and fellowship during the sabbath hours, thus violating their right to practice their faith in accordance with the fundamental tenets of their religion. In most of the schools stated elsewhere above, the Petitioner claimed that the Adventists students are made to attend Saturday classes, sit for examinations on Saturdays and are not exempted from cleaning on Saturdays and that those who do not abide by these regulations, are not offered compensatory classes or make up examinations. That they are instead suspended from school or given an option of leaving the school or make an undertaking that they would abide by the School's program. The issue therefore is whether these acts violate the SDAs students right to manifest their religion.

56. Recently this Court in the Nyakamba Gekara Case (supra) expressed itself as follows on manifestation of the right to religion;

“And on “manifestation” which is the crux of the case before me, the House of Lords in Williamson stated thus;

“when questions of “manifestation” arise ... a belief must satisfy some modest, objective minimum requirements. The belief must be consistent with basic standards of human dignity or integrity.... The belief ... must possess an adequate degree of seriousness and importance ... it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification ... Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention ...”

The authors of the Review in following the discussion above, then make a profound statement which I find attractive. They state thus;

“The holding and manifestation of beliefs may be intrinsically bound up with each other. Manifestation can occur through worship, teaching and proselytism observation by wearing symbols or special clothes, or by eating or avoiding certain foods. The right to manifest a belief is a qualified right and is subject to limitations as set out in Article 9(2). Interferences with the manifestation of belief may consist, for example, of uniform policies at work or school, or requirement to work at certain times or carry out certain tasks. Limitations on an individual's freedom to manifest his or her religion or belief are only permissible if prescribed by law and necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.” (Emphasis added) Further that Article 9 places the following obligations on the State:

“i)a negative obligation requiring the State not to interfere in the right of individuals and organisations to hold religious and non- religious beliefs.

ii)a positive obligation to secure enjoyment of Article 9 rights by ensuring they are protected in law, and there are sanctions if they are infringed, and by preventing or remedying any breach by its own agents or institutions.”

57. I reiterate the above sentiments as expressive of this Court's position on the matter. The Respondents have also claimed the freedom of religion is one of the fundamental freedoms that can be qualified by reasonable and justifiable criteria in a democratic society and that the Adventist students had the right to education and if that education was not to be offered on any day on account of their religious beliefs, it would be tantamount to denying them the right to education which is not the case in the instant Petition.

58. I must observe that in the present matter, it is clear that what is in issue is not so much whether a general prohibition of the students' rights to observe Sabbath hours in public schools can be justified, but whether such a prohibition on the religious manifestations can be justified under the limitations set by **Article 24**. To paraphrase it, the fundamental question is whether the failure to accommodate the SDA students' religious manifestations by means of exemption from Saturday classes, examinations and cleaning, can be accepted as reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality.

59. In that regard, I am in agreement with the sentiments of Sachs J *in Christian Education South Africa v Minister for Education(supra)* where he aptly, in my view, explained the nature of the right to religion and scope of its limitation. He expressed himself as follows;

'There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many, believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believers' view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.'

60. As far as the Petitioners are concerned, what is at stake is not merely a question of convenience to practice their belief, but an intensely held right to manifest that belief including not understanding any physical exertions on Saturday. The Respondents have however established that the Saturday classes are part of a process of enabling all students including Adventists right to education while the Interested Party has established that the Saturday Programme is part and parcel of the school's programme and schedule since 1926 and was designed to enable the covering of the school's programme and schedule to enable the covering of the expansive syllabus and maintain the excellent academic performance of the said school over the years.

It is instructive however that whereas at paragraph 14 of his Affidavit in support, Pastor Makori indicated that all the Adventist students in the schools named elsewhere above were suffering violations of **Article 32** the complaints in that regard were general and not one student in any of those schools was allowed to tender any evidence in that regard. Regarding the Interested Party, three parents namely Jacob Fred Otieno, Henry Lianda Muyo and Michael Moseki Matindura, swore Affidavits based on information obtained from their sons and from their own experiences with the school. What is the law regarding the rights of a child generally and to religion specifically?

61. Several international instruments deal with the rights of the child, including religious rights and freedom of opinion. The Convention on the Rights of the Child at **Article 12(1)** requires State Parties to ensure that a child who is capable of forming his or her own opinion can express those views freely in all matters affecting the child and demands that due weight be given to the views of the child in accordance with his or her age and maturity. At **Article 14(1)**, every child is entitled to enjoy the freedom of thought, conscience and religion. The child is to be protected against all forms of discrimination or punishment on the basis of among other things, his or her expressed opinions or the beliefs of his or her parents, legal guardian or family members. State Parties to this convention are instructed to secure and to respect the rights and freedoms of the child without discrimination of any kind based on among other things, the religion or political or other opinion of the child or of his or her parents or legal guardian.

62. Courts throughout the world have shown special propensity for protecting the children from injurious practices including their parent's injurious religious practices. It is also now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This principle is not excluded in cases where the religious rights of the parent are involved as Heures Dube J pointed out in the Canadian Case of **P v S 108 DLR (4th) 287 at 317;**

'In ruling on a child's best interests, a Court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent throughout his or her right to access affects the child's best interests. I am of the view, finally that there would be no infringement of the freedom of religion provided for in s. 2(a) were the Charter to apply to such orders when they are made in the child's best interests. As the court has reiterated many times, freedom of religion, like any other freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practise the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the 'parents freedom of religion.'"

63. I agree and to my mind, it is clear that the rights and freedoms of the child, are subject to three sets of limitations; firstly those applying generally to freedom of religion and belief and apply *mutatis mutandis* to freedom of the child to manifest his or her religion as regulated by the Convention on the Rights of the Child (CRC). On this limb it follows that the limitations imposed on the right of the child to religion are dictated by public safety, order, health or morals and the fundamental rights and freedoms of others. Secondly, limitations based on family values and parental interests. At the heart of the CRC, **Article 14(2)** dictates that State parties should respect the rights of parents and legal guardians to provide direction to the child in the exercise of his or her freedom of conscience, religion and belief while taking into account the evolving capacities of the child. In terms of the CRC, education must be directed toward, among other things preparing the child for a responsible life in a free society in the spirit of friendship among all peoples, ethnic, national and religious groups. **Article 29(2)** endorses the liberty of individuals and bodies to establish independent schools provided such schools uphold general educational objectives specified in the CRC and abide by the minimum standards established by the State. And lastly those limitations inherent in general legal constraints that condition implementation of the best interests of the child. It is this last limitation I find attractive to my mind in regard with the instant case and I will apply it in determining whether or not the rights of the Advenstis students can be limited.

64. Elsewhere above, I stated that I have no evidence, save what Pastor Makori stated, regarding the exact nature of limitation imposed by say Njiris boys High School or Limuru Girls School, but it was the Interested Party's position that holding a similar programme for all students in a school is crucial for attaining equality and that a standard programme is integral in public schools for maintaining order. I am aware that every year several public schools admit thousands of students from all walks of lives and of all kinds of religion and beliefs including those with no religion or belief at all. I must in that context agree with the Interested Party that it is crucial for the schools to keep and run a similar programme for the benefit of good order, certainty and uniformity.

65. If I understand the Petitioner well, it wants Adventist students to be exempted from any kind of 'work' in any school from Friday sunset to Saturday sunset so as to enable them observe the Sabbath day. Clearly, this demand has not been met positively by most of the schools cited in this judgment and many have led to suspension of some students for failure to observe school regulations in that regard.

66. Mr. Kaniaru, Chairman of the Interested Party stated that the students who are admitted into Alliance High School are made aware of the school's regulations upon admission and having been made aware of the regulations and voluntarily accepting to abide by those regulations the student is then admitted to the school. At that point parents and the student may decide not to accept the regulations and that is a matter of free choice and as this Court stated in *Nyakamba v Gekara (supra)* that;

“It must also be noted that admission to public schools such as the Kenya High School is voluntary and a parent may choose for religious and other reasons to take a willing child to another school of the same standard whose general rules are agreeable to him/her. This Court finds it difficult to regulate the way schools are ran when an alleged offending policy finds favour with 99.99% of those who are affected by it and although clothed with the right to manifest his religion, the Petitioner cannot do so in a vacuum devoid of the commensurate right to respect the same right as held by others.”

I reiterate those sentiments as also applicable to the instant case.

67. Further, Mr. Kaniaru has explained the efforts made by the Interested Party to accommodate the demands of the SDA students and the reasons why those students cannot be exempted from the academic programmes conducted on the sabbath. He explained that the programme was adopted having taken into account the historical factors of the school, the academic discipline and performance and the diversity of the students who come from diverse religious backgrounds. For those reasons, I believe that the Interested Party has made reasonable attempts to make education accessible to a large student population notwithstanding their differing religious beliefs. If the programme were to be changed to accommodate Adventist students, the School must also go on to accommodate the religious needs of other students. At the end, and if that became a policy or order of this Court, I am not sure if the public schools would have the exact formulae for doing so without causing total chaos in its programmes. I am also sure the standards of education will be negatively impacted since they would be compelled to change study times, reschedule classes, tests and

examinations in respect of various religious groups such as the Adventists, Muslims, Anglicans, Protestants, Catholics, Hindus, etc

I say this because the traditional day of rest for all Kenyans is Sunday. One can only imagine the disconnect in school programmes if Friday, Saturday and Sunday were to be allocated as rest days for each of three major religions in the Country. How would those programmes be structure? How would teachers ensure equal attention to all students at the same time? How would students receive uniformity in educational standards if, because of religious reasons they attend to their educational needs at differing times?

Suppose traditionalists, atheists and other create other days of worship and “rest” and justify it within their doctrinal and dogmatic tenets? How can a 7-day school week accommodate each without affecting all others?

68. In answer to the above questions and as can be seen from the principles established elsewhere above on the limitation of rights, my duty is limited to ensuring that the limitation imposed on the right to religion is reasonable and justifiable in an open democratic society. In that regard *R v Jakes (1986) 26 DLR 4th Edition at 227* the Court set the three components of the proportionality test as hereunder;

“There are, in my view three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objectives in question. They must not be arbitrarily, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means even if rationally connected to the objective in the first sense should impact as little as possible the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter, right or freedom and the objective which has been identified as of sufficient importance.”

69. I am in agreement and back to the instant case, I am convinced by the explanation given by the Interested Party that there has been no violation of the Adventists' students rights and that the limitations to that right are reasonable. As it can be seen from the Affidavit of Mr. Kinyaru, the Interested Party has made arrangements to accommodate the religious needs of the SDA students, by allowing them some time to manifest their religion by way of worship. At Alliance, and I have no evidence that the other schools have different programmes, SDA students have only the hours of sunrise on Saturday to 11.00 a.m. The same day to engage in limited school activities. Thereafter, they have the whole day until sunset to do all that their religion requires. I have seen that most worship services at say the Maxwell SDA Church in Nairobi start at mid-morning on Saturday, and adherents drive to the Church, fuel those cars

and engage in other necessary chores attendant to being a metropolitan. What is the difference with the very limited activities undertaken by students at Alliance?

70. Much as the above may be contrary to the principles of the Petitioner, I am satisfied that in the circumstances, the Interested Party has taken the most reasonable steps to ensure the realization of the SDA students' right to manifest their religion. I do not see how the right of these students to manifest their religion has thereby been infringed as they have not been required to give up or forgo their cardinal tenet of religious beliefs and if I am wrong, it is also true that right to manifest the belief has only been limited for a few hours and for very good reasons.

71. I say so also because, Alliance High School is neither a worship center nor a church, it is a school, whose main purpose is to impart knowledge on its students. The right to education under **Article 34(1)(f)** and **53(1)(b)** does not in any way mean the right to attend certain Public Schools or the Interested Party's school at the students' own terms. That would in my view be tantamount to affecting the autonomy and academic freedom of the schools, which this Court is unwilling to do.

72. To my mind, the right to education provided under **Article 34(1)(f)** and **Article 53(1)(b)** entails being offered the best education ever available. Indeed, it is in the best interest of the child to gain the education offered to the best of his/her ability. To gain that education, they must attend without fail all the classes offered by the schools and undertake such examination as the 1st Respondent, the Boards of Governors and the School's management may decide from time to time. I must also add that all schools mentioned in this Petition and alleged to be violating the SDA students' rights to manifest their religion are all boarding schools. I have several questions in mind, in that regard and following the question; posed earlier; what will the SDA students be doing between Friday sunset and Saturday sunset while their classmates are in class for an hour or two? Where and how will they be manifesting their religion? Will they for example interfere with the rights of other students to undertake their studies peacefully in a quiet environment? Is there anyone who will supervise them? I do not seem to have answers to these questions. Neither did the Petitioner assist the Court by offering any specific instances in answer thereof. The Petition, to that extent was general and no evidence was led as to what exactly should happen or not happen between those hours. It must be remembered that the named schools, including the Interested Party, have been in existence for many decades and students of all types of religions have co-existed peacefully by accommodating each other. If that practice has to change, the Petitioner must demonstrate that by allowing its students the right to manifest their religion in accordance with their terms, it

would not be interfering with the other students' rights to education, religion and equality and protection from discrimination. In this context, I am in agreement with the words of the Court in the case of Syndicate Northcrest v Amstem (2004) 2 SCR 551 where it was stated as follows;

“Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practise or belief that has a nexus with religion. Once religious freedom is triggered a court must ascertain where there has been non-substantial interference with the exercise of the implicated right so as to constitute an infringement freedom of religion....However, even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others, would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to underlying context in which the apparent conflict exists.”

73. I agree and to my mind, applying the proportionality test as determined in R v Jakes (supra) in the instant case, it is crystal clear to me that the freedom to manifest religious beliefs of the Petitioner students cannot be allowed in the terms they are seeking. It is not disputed however that every student has the right to hold whatever religious beliefs his/her conscience dictates. However, manifestations of such beliefs must not injure the rights of the schools they attend to impart education. And if the manifestations of those beliefs is parallel to the rights of the school to impart knowledge on its students, I believe the right of the students to manifest those beliefs must be limited and that limitation will be justifiable in a free and democratic society and for reasons stated elsewhere above in this judgment.

74. Sometime during the proceedings herein, I asked Mr. Amoko for the Petitioner whether he had read the Uganda Supreme case of Demanche Sharon (supra). He answered in the affirmative but quickly dismissed it as bad precedent. I disagree. That decision was on all forms with the present decision and I have shown above why I must agree with Odeki in the lead judgment for the majority where the learned judge held that the Respondent's policies and regulations affecting SDA students at Makerere did not violate the rights and freedoms of the Appellants.

That decision is also inline with jurisprudence other courts and in that regard Kontinnen vs Finland (supra) is important.

In that case it was held that the rights of and SDA adherent not to work on Saturday were not an infringement of Article of the European convention in Human Rights. In this case, Sabbath was on Fridays.

Further, in all the arguments made and powerful submissions by Mr. Amoko for the Petitioner, not one decision has been cited where the specific issue raised in the Petition has been determined in favour of the Adventists. This court would have done in any event done so irrespective of lack of such decisions but I have shown why it cannot.

Conclusion

75. The programmes run by the 1st Respondent in public schools are not discriminatory as they are applicable to all students from diverse religious beliefs. I have also found that the extent of interference in the enjoyment of the Advenstis rights and freedoms is minimized by the reasonable accommodation extended to the SDA students by the Inerested Party and I have seen no evidence that other schools have declined to do so. To exempt the Adventist students from the school's programmes would mean to grant them extra accommodation which would in return be cumbersome and chaotic to the Interested Party and other public schools. In my view, the explanation made by Interested Party is sufficient to establish that any infringement of the rights to religion is reasonable and justifiable in accordance with **Article 24** of the Constitution.

76. Accordingly, prayer (a) of the Petition cannot be granted and must fail.

77. But having so said, the issue in contest requires dialogue between the Petitioner (representing the Adventist) and the Cabinet Secretary for Education as well as representatives from Boards of Governors and Parents Teachers Association in the affected schools. In that regard, **Article 159 (c)** of the **Constitution** provides as follows;

“(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) ...

(a) ...

(b) ...

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3;

Looking at prayer (b) of the Petition, and noting submissions by the Respondents and Interested Party, no specific response was given to the Petitioners prayer in that regard and yet it is attractive to me if read within the context of Article 159 above and also the need to ensure that even where a party may not have succeeded in its main prayer, a Court in appropriate cases must see that a remedy is given. I say this because the issue before me has clearly shown that an existing right has been limited but the facts only show the limitations (reasonably so) as imposed by the Interested Party. I have said elsewhere above that it is unclear to me if that limitation is standard and whether in fact a policy exists across the board.

In the events, I am satisfied that prayer (b) is merited and shall be granted as prayed.

That being the case, the final orders to be granted are as follows;

- a) Prayer (a) of the Petition is dismissed.***
- b) Prayer (b) is granted in the following terms***

“An order requiring the Respondent to immediately either;

(i) Promulgate appropriate regulations under his powers under Section 19 of the Education Act prescribing the obligations of public schools to respect the rights of students under Article 32 of the Constitution and section 26 of the Education Act, describing the manner in which the obligations are to be implemented and secured as well setting up an administrative enforcement and complaints mechanism; or

(ii) Issue appropriate directions under his powers under section 27(1) of Education Act prescribing the obligations of public schools to respect the rights of students under Article 32 of the Constitution and Section 26 of the Education Act, describing the manner in which the obligations are to be implemented and secured as well setting up an administrative enforcement and complaints mechanism.

c) As to costs, let each party bear its own costs.

d) The interim orders issued earlier in these proceedings are hereby discharged.

e) Parties are at liberty to apply.

78. Finally, I would be remiss if I do not applaud the efforts of the Petitioner in filing this Petition which has immensely contributed to the growth of jurisprudence and is very timely in

relation to enforcement of the Bill of Rights under the Constitution. I must also express my sincere gratitude to all the Counsel on record as well as the *Amicus Curiae* for their industry, well articulated arguments and able presentation of their respective client's cases. If I did not refer to all the authorities cited, it is not because they were not illuminating in the determination of this case. I must also commend my Research Assistant Ms. Carolene Kituku for her in-depth research which was of great assistance to the Court and has in deed greatly enriched this judgment.

79. Orders Accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY
OF DECEMBER, 2013**

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Amoko for Petitioner

Mr. Lilan for Interested Party

Mr. Ojwang for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 3.0 Unported License](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy | Disclaimer](#)