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Accommodation as an expression of the right to equality: A case note on *Fugicha v Methodist Church of Kenya*

Samuel Ngure*

Abstract

The question of religious freedom in institutions of learning has been canvassed by Kenyan courts over the past decade in a number of cases. One of the common issues in most of these cases has been that of mandatory uniformity of dress and activity alike, which has been argued to be discriminatory. In the case of Fugicha*, the Court of Appeal found that reasonable accommodation of various beliefs is a requirement under the right to equality. This finding was set aside upon appeal to the Supreme Court which ruled that the issue of inequality had been introduced improperly into the case, and that the court could therefore not decide on the matter. In March 2022, the Ministry of Education issued a circular on violation of religious freedoms in schools, seemingly based on the Court of Appeal judgements in* Alliance High School *and* Fugicha*. This note reviews* Fugicha *in light of the circular, arguing that the circular gives effect to the Court of Appeal finding despite the Supreme Court having set aside that judgement.*

* LLB (University of Nairobi); LLM (Cornell University).

1. Introduction

1.1 Uniformity in schools or discrimination?

On 4 March 2022, the Permanent Secretary on the Ministry of Education in Kenya issued a circular setting out a number of 'violations of religious rights of learners' often carried out by schools.[1] As per the circular, these violations included:

a. Prohibition from wearing religious attire like hijab and turbans;

b. Forcing students to take Islamic Religious Education (IRE), Christian Religious Education (CRE), Hindu Religious Education (HRE) subjects;

c. Denying learners an opportunity to observe religious rites and prayers;

d. Failure to allocate worship rooms or spaces; and,

e. Forcing learners to participate in religious rites and activities that are contrary to their beliefs.[2]

This circular is reasonably understood – as it does not expressly state it – to be moving to implement the decisions of the Kenyan courts on the various cases that been decided on the rights and obligations of Kenyan school authorities and their students to express their religion through differential dressing in schools.

The decisions that have canvassed this question in one form or another include: at the High Court – *R v Kenya High School ex parte SMY*

1 Ministry of Education, 'Violation of religious rights in schools', MOE.HQS/3/10/18, 4 March 2022.

2 Ministry of Education, 'Violation of religious rights in schools'.

(*Kenya High* case),[3] *Nyakamba Gerara v AG,*[4] *J.K. v Rusinga School*[5] (*Rusinga* case) *Seventh Day Adventist Church v Minister for Education*[6] *(Alliance High School HC Case)* and *Methodist Church v TSC* (*Fugicha* HC case).[7] Of these cases, those appealed to the Court of Appeal were *Seventh Day Adventist Church v Minister of Education*[8] *(Alliance High School* case) and *Fugicha v Methodist Church in Kenya*[9] (*Fugicha* case). Since then, *Fugicha* is the one case that has been appealed to the Supreme Court.[10]

The rules on school uniform, and other rules in schools requiring uniformity are usually aimed at creating a conducive learning environment in schools.[11] They also create a feeling that every student is equal, no matter their race, social class, even physical or mental ability.[12] However, are there situations where the strict and unbending enforcement of rules on school uniforms may produce discriminatory effects? This was the question in the case of *Fugicha*, which was decided by the Court of Appeal in 2016. The facts of this case, as per the record of the Court of Appeal judgment, present a very contentious situation where indelicate treatment of school rules can foment disputes.

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3 *Republic v Head Teacher Kenya High School & another ex-parte SMY,* Miscellaneous Civil Application 318 of 2010, Judgement of the High Court at Nairobi (2012) eKLR.

4 *Nyakamba Gekara v Attorney General & 2 others*, Petition 82 of 2012, Judgement of the High Court at Nairobi (2013) eKLR.

5 *JK (suing on behalf of CK) v Board of Directors of Rusinga School & another*, Petition 540 of 2014, Judgement of the High Court at Nairobi (2014) eKLR.

6 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 Others,* Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2014) eKLR.

7 *Methodist Church (suing through its registered trustees) v Teachers Service Commission & 2 others* (2015) eKLR.

8 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR.

9 *Mohamed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others*, Civil Appeal 22 of 2015, Judgement of the Court of Appeal at Nyeri (2016) eKLR.

10 *Mohamed Fugicha v Methodist Church in Kenya (through its registered trustees) & 3 others*, Civil Application 4 of 2019, Ruling of the Supreme Court (2020) eKLR.

11 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR para 18.

12 *Republic v Head Teacher Kenya High School & another (ex parte SMY),* Miscellaneous Civil Application 318 of 2010, Judgement of the High Court at Nairobi (2012) eKLR.

Here, it seems external interference by county education officials and a deputy governor sought to force the hand of the administration of a school sponsored by the Methodist Church to allow Muslim students in the school to wear a hijab under their school uniform. The Methodist School, not to be undone, adopted a hard-line stance against the ham-fisted request. Some student unrest ensued, and dialogue between the two recalcitrant sides failed. The county education official once again resulted to bullying tactics, issuing a directive requiring the school to allow students to wear hijabs.

The school, at first instance, filed suit at the High Court in Meru against the county education official, among others, claiming that the rule to give special treatment to some students was discriminatory against other students. A parent countersued the school, seeking a determination that it was the school's rules on uniformity that were discriminatory. The High Court ruled in favour of the school. Dissatisfied, the parent appealed to the Court of Appeal. The Court of Appeal in its consideration took the opportunity to provide the most thorough examination so far of the rules as regards school uniform.

We surmise that the thoroughness of the Court of Appeal's examination may have been incentivised by the fact that at the time of examination, various high courts in Kenya had determined matters relating to religion and uniformity in schools in Kenya. For example, in the earlier cited cases, the restrictions promoting uniformity were upheld in the *Kenya High, Rusinga,* and *Nyakamba Gerara* cases, notably at the High Court, while the Court of Appeal struck down these restrictions in the *Alliance High School* case and in *Fugicha*. Some scholars had already opined that some variance in determination had been exposed by the various High Court pronouncements. For example, Mukami Wangai has theorised that the varying decisions reflect a struggle in establishing the type of secularism that Kenya aspires to in the 2010 Constitution.[13]

[13] Mukami Wangai, 'Religious pluralism in practice: defining secularism in Kenya's headscarf cases', 3 *Strathmore Law Journal* (2017) 177, 183.

For reasons that will be apparent (the maxim *res ipsa loqitur* applies here), the Supreme Court's judgment will be parsed later. The majority Supreme Court's judgment, in view of the policy direction by the Ministry of Education – which we surmise is clearly influenced by the Court of Appeal judgment in *Fugicha* – becomes superfluous in light of its apparent reticence. While this piece does not seek to take an in-depth analysis of the Supreme Court judgment, Walter Khobe's critique of the position taken by the majority Supreme Court bench as 'formalism' is enlightening, and arguably, spot on.[14] This piece will instead shine a light on an important proposition in law adopted by the Court of Appeal in *Fugicha* – that of accommodation as an expression of equality under Article 27 of the Constitution of Kenya.

2. *Fugicha* at the Court of Appeal

The Court of Appeal's examination in *Fugicha* is outlined below and answers the following questions:

a) Does differential treatment automatically constitute discrimination?

b) Can neutral rules produce disparate impacts?

c) Is reasonable accommodation a legal requirement or a matter of choice?

d) In what circumstances, if any, is reasonable accommodation required?

Lastly, and most interestingly, below I outline how despite successful appeal in the Supreme Court against the Court of Appeal's decision in *Fugicha,* the pronouncements of the Court of Appeal still represent the current law on rules of uniformity. This has been shown through other courts upholding the same position, and the *Fugicha* approach when it comes to constitutional imperatives as to equality and non-discrimination becoming the dominant position in law.

[14] Walter Khobe, 'Justice JB Ojwang' and the case of the hijab: A celebration of a dissent', *The Platform*, 28 January 2019.

2.1 Differential treatment does not constitute discrimination

The mere fact that students are treated differently does not, in and of itself, mean that there is unconstitutional discrimination. Here, the Court of Appeal rejected the arguments that making even slight accommodations for some students is in effect discriminating against all other students. In *Fugicha*, the Court of Appeal approved a 2011 statement by the High Court that '…mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause.'[15] The 'equal protection clause' referred to here is Article 27 of the Constitution, which prohibits discrimination of all forms.

The Court of Appeal further hearkened to the words of Justice Albie Sachs, one of the most respected African jurists, in a 1998 South African case that stated that 'equality should not be confused with uniformity, in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across differences.'[16] In the South African case, a raft of laws criminalising sodomy were declared unconstitutional. Justice Sachs interpreted the laws criminalising sodomy to rules requiring sameness. While the South African case seems to be far removed from the cases on school uniform, the Court of Appeal seems to agree with the South African Court that rules that require sameness are patently discriminating – in effect, *uniformity* is not *equality*.

2.2 Neutral rules may produce disparate effects

The Court of Appeal in *Fugicha* appreciated the importance of rules on uniformity in creating governable schools. In fact, the Court of Appeal warned that in no way should it be considered to be advocating for a 'free-for-all' through the complete abolition of rules that created uniformity in schools. 'It is not every fanciful, capricious or whimsical

[15] *Federation of Women Lawyers FIDA Kenya & 5 Others v Attorney General & another*, Petition 102 of 2011, Judgement of the High Court at Nairobi (2011) eKLR.

[16] *National Coalition for Gay and Lesbian Equality v Minister for Justice* [1998] ZAAC 15.

request for exemption that will be countenanced or granted.' In fact, the Court found that school uniforms, in particular, frequently were the perfect representation of equality in schools.

However, in limited circumstances, the Court of Appeal noted that even where rules are applied equally across all who are governed by them, they may in fact result in discrimination. In reaching this conclusion, the case of *Sarika*[17], decided by the Queen's Bench, was heavily relied on. A Welsh Girls High School had excluded a student who wore a bangle that symbolised her Sikh faith. The school's contention was that the bangle violated the school's uniform policy as regards jewellery. The school's policy was that 'jewellery often poses a health and safety hazard to school activities.'[18] The Queen's Bench here cited, with approval, the South African Constitutional Court's in the case of *Pillay*.[19] Here, a rule that was interpreted to restrict a girl from wearing a nose ring, despite the ring's significance to her Tamil-Hindi culture was held to be discriminatory, rejecting contentions that it was necessary for 'uniformity and acceptable convention among students.'

The Queen's Bench in *Sarika* then went further and looked at the concept of disparate impact. Here, it found that those whose culture was not affected by the requirement for uniformity would have no interest in the affording of a particular interest for a small group. They remain unaffected, whether the advantage is granted or not. In essence, the granting of reasonable, limited exemptions to school uniform rules for people to whom it is essential for religious or cultural purposes, does not affect the status quo of the majority of the student population. Conversely, the Queen's Bench found that the denial of the exemption would have an inordinately high impact to the person who does not get to enjoy their religious or cultural expression, even if only in a limited fashion.

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17 *Watkins-Singh, R (on the application of) v Aberdare Girls High School & Anor* [2008] EWHC 1865 (Admin).

18 *Watkins-Singh, R (on the application of) v Aberdare Girls High School & Anor* [2008] EWHC 1865 (Admin) para 11.

19 *MEC for Kwazulu-Natal, School Liaison Officer and others v Pillay* CCT 51/06 [2007] ZACC.

The Court of Appeal in *Fugicha* found that the same approach was to be appreciated in the Kenyan context. While students who are not affected by a school uniform exemption that is reasonable and limited on the basis of faith or culture, those who would be denied such an exemption suffer an odiously disproportionate impact.

2.3 Accommodation is the essence of the respect for equality

The Court in *Fugicha* expressed concern on the lack of appreciation for other faiths expressed by the school sponsors – the Methodist Church. Here, what could be only described as loose and unsupported statements about the effects of granting exemptions were especially troubling to the Court. The Court was far from persuaded that the granting of small, reasonable exemptions, such as the wearing of *additional* clothing or items would result in chaos and in ungovernable schools. It was similarly concerned by statements suggesting that the freedom of commerce and choice of school – *if you don't like it, go somewhere that would give you the freedom you desire* – or simply stating that it was impossible to cater to everyone's desires, were overly dismissive, callous, and in blatant disregard of a school's function.

This is especially in view of the fact that religious observances were unlike mere choices of style that were not inexorably linked to someone's spiritual wellbeing. In saying this, the Court of Appeal in *Fugicha* distinguished its holdings from the holdings of the lower court (the High Court), in the *Rusinga* dreadlocks case, where, while the parents were stated to be adherents of the Rastafari religion, the child in question – in the view of the Court hearing the matter – was never claimed to be an adherent.[20]

Once again, as a starting point, the Court of Appeal relied on holdings from the Queen's Bench in *Sarika*. In *Sarika*, the Court found that such statements arose out of a disregard for what level of importance

[20] *JK (suing on Behalf of CK) v Board of Directors of Rusinga School & Another*, Petition 450 of 2014, Judgement of the High Court at Nairobi (2014) eKLR.

someone seeking an exemption may have for the religious observance. Secondly, the English Court found that such statements also reflect a surreptitious lack of respect for religious observances of people of other faiths.

This was particularly worrying when one considers that a school has an obligation to ensure that its students are taught the value of tolerance of other people's religious beliefs and cultures, and secondly, that they respect those religious beliefs and cultures.[21] The Kenyan Court of Appeal on its part related this obligation to particular requirements in the Basic Education Act. Particular to sponsor schools, as in the case of *Fugicha*, the Basic Education Act sets out that a sponsor should oversee 'spiritual development while safeguarding the denominations or religious adherence of others.'[22]

In view of the Court's dismissal of the arguments on freedom of choice and commerce above, it is important to note at this time that this view would almost certainly apply to private schools. In addition, the Court held that in view of the competitive nature of securing placement of a child in institutions of basic education, it would be 'impractical and fanciful to expect that a parent… will have a meaningful opportunity to engage in a negotiation, pre-admission, of whatever exemptions be it in uniform or other activities, that they may need for religious reasons.' As such, the Court rubbished the arguments that a parent who has signed a pre-admission contract with the school, should raise such issues of exemptions prior to admission of a student.

Other obligations of the Basic Education Act, as noted by the Court of Appeal, are more general. Of note, Section 4 of the Act requires the 'promotion of peace, integration, cohesion, tolerance and inclusion as an objective in the provision of basic education.'[23] In addition, the Court of Appeal applied the constitutional imperative, 'binding on all persons whenever any of them makes or implements public policy decisions'

21 See *Watkins-Singh v Aberdare Girls' School (Sarika* case) para 89.

22 Basic Education Act (No 14 of 2013), Section 27.

23 Basic Education Act (No 14 of 2013), Section 4 (i).

(such as being licensed to deliver basic education in Kenya), to uphold the national values of '…inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.'

The Court of Appeal then stated, emphatically so, that accommodation – reasonable accommodation – is the embodiment of the respect for equality and non-discrimination. A lack of reasonable accommodation, and hence a callous disregard for the importance held by others of their faiths and cultures, will inculcate in students a culture of intolerance and contempt for the 'other'. As such, the Court also rejected (and in effect, overruled) the holding of in the *Kenya High* case that reasonable accommodation would lead to students 'arriving in a mosaic of colour' as an unjustifiably fearful and unrealistic diagnosis.

3. The Supreme Court in *Fugicha:* Throwing out the baby with the bath water

The holding of the Court of Appeal in *Fugicha* was overturned by the Supreme Court on a technicality. This was done by a judgment in 2019.[24] The issue in the Supreme Court was whether the issues raised in a cross petition by the parent of the child were in the proper format. The Court of Appeal and the High Court found that the format, though inelegant, was acceptable and raised very important issues. On this basis, the two lower courts proceeded to decide on the merits. The Supreme Court found that the Court of Appeal took the issue of the form of cross petition too lightly. It therefore decided that the Court of Appeal should never have considered the arguments of the parent, and decided, without looking into the merits of the appeal before it, that technically, the decision of the Court of Appeal was totally defective.

The Supreme Court's determination was, to put it lightly, underwhelming. The Court chose to ignore the long-held adage that procedure is the handmaid, and not the mistress, of justice. As Collins MR so-

[24] *Methodist Church in Kenya v Mohamed Fugicha & 3 others,* Petition 16 of 2016, Judgement of the Supreme Court (2019) eKLR.

phistically continued to state, '…the Court ought not to be so far bound and tied by rules, which are after all intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case.'[25]

The Supreme Court disregarded a dispute that had been materially argued before the trial court by all parties because it had not been properly introduced.[26] The argument on discrimination was introduced into this case by an interested party, a parent, through a 'cross-petition' in the interested parties' affidavit. The use of the word 'cross petition' was an unfortunate, and ultimately innocuous choice. However, the Supreme Court pounced on this wording, stated that it created a new dispute that was not contemplated by the original parties, and stated that argumentation on discrimination could not form the substratum of the well-reasoned decisions of the two lower courts:

> [51] The interested party's case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of hijab would force them to make a choice between their religion, and their right to education: this would stand in conflict with Article 32 of the Constitution. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit, for the Muslim students to be allowed to wear the hijab, in accordance with Articles 27 (5) and 32 of the Constitution.
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> [52] The cross-petition was expressed in straight terms: 'I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and … I am also cross-petitioning that Muslim Students be allowed to wear a limited form of hijab (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with Article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under Article 27 (5) of the Constitution.'
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> [53] '… We did remark, in *Francis Karioki Muruatetu & Another v Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):
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> > …. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court.

[25] *In re Coles* [1907] 1KB para 1 and 4.

[26] *In re Coles* [1907] 1KB para 54-59.

> That stake cannot take the form of an altogether a new issue to be introduced before the Court [emphasis supplied].[27]

This last part of the Supreme Court judgment is particularly gruesome. The issue of discrimination was raised by the Methodist Church, which averred in its petition in the High Court that the accommodation of the Muslim students constituted discrimination:

> The Christian students at the school have felt that the school has accorded Muslim students special or preferential treatment and discriminated against them contrary to Article 27 of the Constitution of Kenya, 2010.[28]

This is a damning fact: the Supreme Court here essentially created its own reality in which discrimination under Article 27 was not a material dispute. Discrimination was in fact the crux of the dispute for both sides of those in dispute. The interested party in response only argued that it was not the Petitioners who were being discriminated as the Petitioners claimed, but the Muslim students who were being discriminated by the lack of accommodation.

How the Supreme Court decided that this was an introduction of a completely new dispute is unfathomable. That a single, misplaced word in an affidavit would be the basis for the avoidance of duty by the Supreme Court is worrying. What one hopes is that this will not be a trend, where the Supreme Court shirks, what in its own words, is 'an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself in the future'[29] will use what can only be pedantic technicalities to avoid providing jurisprudence to the country.

The Supreme Court decision therefore left the statements on whether rules on uniformity in schools were unconstitutional or not completely unsettled, as the Supreme Court did not bother to reconcile the positions taken by the lower courts. The dissatisfaction with this position even led to the dissent of Justice Prof JB Ojwang, who felt that

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[27] *In re Coles* [1907] 1KB para 51-53.

[28] *Methodist Church (suing through its Registered Trustees) v Teachers Service Commission, County Director of Education, Isiolo County & District Education Officer Isiolo Sub-County*, Petition 30 of 2014, Judgement of the High Court at Meru (2015) eKLR para 13.

[29] *Methodist Church v Teachers Service Commission and 2 others*, para 59.

the approach of the rest of the bench muddied the water when it came to such an important area of law. Justice Ojwang noted that the Court's insistence of on the words 'cross petition' were mere technicality drawn from the fact that affidavit was 'inelegant'.[30] Justice Ojwang's dissent provides a scathing criticism of the Court's manipulation of facts to avoid constitutional duty, as he describes how the Court closes it eyes to Article 159(2)(d) of the Constitution, and to the central issue in the dispute, argued at all levels in the lower courts – the issue of the hijab.[31] Walter Khobe's highly instructive celebration of JB Ojwang's dissent is ultimately vindicated due to the developments in law that have happened since, and provides a better and more focused criticism of the formalistic approach of the majority's judgment.[32]

4. The legacy of *Fugicha* as the current state of law

One would think that this would revert the status quo to before. This is not true, due to a rather surprising development. In the intervening time between the decision of the Court of Appeal in *Fugicha* and the technical decision of the Supreme Court, its positions were upheld in another case decided by the Court of Appeal.

In the *Alliance High School* case, rules requiring students professing Seventh Day Adventist faith to attend church on Sunday were held to be unconstitutional.[33] The Court of Appeal in *Alliance High School* upheld every principle that it had held in *Fugicha*, namely that '*equality must not be confused with uniformity*'. The Court of Appeal in *Alliance High School* also upheld the holdings to the effect that neutrality of rules could result in discriminatory effect, even citing the case of *Pillay* that was cited with approval in *Fugicha*.

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30 *Methodist Church v Teachers Service Commission and 2 others*, para 86.

31 *Methodist Church v Teachers Service Commission and 2 others,* para 81.

32 Khobe, 'Justice JB Ojwang' and the case of the hijab'.

33 *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others*, Civil Appeal 172 of 2014, Judgement of the Court of Appeal at Nairobi (2017) eKLR.

Third, the Court in *Alliance High School* was again emphatic on the principle of accommodation as the fulfilment of the principle of equality in such situations. Fourth, the Court of Appeal in the *Alliance High School* case upheld the interpretations of the Court in *Fugicha* on the Basic Education Act, and its requirements that constitutional and legislative imperatives required a school to inculcate in its students, tolerance and respect for other students' cultures and religions. The imperative to inculcate tolerance and respect would, for example, advocate for students learning about each other's religions, without giving primacy to one or the other.

The decision in the *Alliance High School* case was not appealed, and the Supreme Court has not pronounced itself on the merits of rules requiring uniformity in schools as a result. As such, the principles enunciated in the *Fugicha* case remain alive and well through their translation in the *Alliance High School* case, which remains the highest-ranking decision in the Kenyan courts on the issue of rules of uniformity in schools. As such, it binds all lower courts and has enjoyed deference in the Court of Appeal.

The *Alliance High School* case was especially instructive as the Court of Appeal directed the Cabinet Secretary Education to issue an appropriate circular or regulations within one year of the judgment of the Court of Appeal, which was issued on 3 March 2017. It seems that the Ministry of Education circular on violation of religious rights is buttressed on this judgment, though many years late.

The distinctions that exemptions must be reasonably required for religious or cultural observances in *Fugicha* have also been upheld. For example, in the *St Joseph's Ganjala* case, a claimant sought orders against rules requiring short hair for students[34] The claimant was unsuccessful because they were unable to show that their Christian faith required the keeping of long hair for women.

[34] *Republic v Secretary Board of Management St Joseph Ganjala Secondary School & another; Samia Sub County Parents Association (Interested Party) & another*, Judicial Review 1 of 2019, Judgement of the High Court at Busia (2019) eKLR.

5. Conclusion

The long and short of the foregoing is that there is now a circular from the Permanent Secretary, Basic Education, requiring reasonable accommodation for students who require it for religious reasons when it comes to rules requiring uniformity. This is based on directions of the Court of Appeal in the *Alliance High School* case, which preserved the well-reasoned decision of the same court in *Fugicha*. The requirement for reasonable accommodation is well grounded in the Constitution and in the Basic Education Act, and binds both private and public institutions which are required to inculcate in their students the values of inclusivity, tolerance and respect for other people's faiths and cultures.

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