IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
JUDICIAL REVIEW CASE NUMBER 55 of 2019

BETWEEN
THE STATE
AND

THE ATTORNEY GENERAL	**1ST RESPONDENT**
THE MINISTER OF EDUCATION	**2ND RESPONDENT**
THE EDUCATION DIVISION MANAGER (SOUTHERN REGION)	**3RD RESPONDENT**
THE HEADMASTER, BLANTYRE GIRLS PRIMARY SCHOOL	**4TH RESPONDENT**

EX PARTE:

MAKEDA MBEWE (A minor through his father and next friend WISDOM MAHARA MBEWE)	**1ST APPLICANT**
THE REGISTERED TRUSTEES OF THE CENTRE OF HUMAN RIGHTS EDUCATION, ADVICE AND ASSISTANCE (CHREAA)	**2ND APPLICANT**

CONSOLIDATED WITH

JUDICIAL REVIEW CAUSE NO. 48 OF 2017

THE STATE
AND

THE ATTORNEY GENERAL	**1ST RESPONDENT**
THE MINISTER OF EDUCATION	**2ND RESPONDENT**
THE EDUCATION DIVISION MANAGER (EASTERN REGION)	**3RD RESPONDENT**
THE HEADMASTER, MALINDI SECONDARY SCHOOL	**5TH RESPONDENT**

EX-PARTE:

ISHMAEL NANSOLO (A minor through his father and next friend ALI M NANSOLO)	**3RD APPLICANT**
HUMAN RIGHTS COMMISSION	**1ST AMICUS CURIAE**
LOST HISTORY FOUNDATION	**2ND AMICUS CURIAE**

CORAM : HONOURABLE NTABA, J.
: Ms. C. Chijozi, Counsel for the Applicants
: Counsel for the Respondents, Absent
: 1st Amicus Curia, Absent
: Mr. B. Matumbi, Counsel for 2nd Amicus Curiae
: Mr. D. Banda, Court Clerk and Official Interpreter

Ntaba, J

JUDGMENT

1.0 THE APPLICANTS' CASE

1.1 The 1st Applicant, Makeda Mbewe,is a girl who brought an application for judicial review against the decision of not being registered and enrolled at Blantyre Girls Primary School whilst the 3rd Applicant, Ishmael Nansolo, is a boy who brought an application for judicial review against the decision of not being registered and enrolled at Malindi Secondary School. Notably, these two Applicants being minors sued through their fathers – Wisdom Mahara Mbewe and Ali M Nansolo. The Applicants brought these judicial review applications separately and which leave was duly granted by Justice Kapindu on 27th November, 2017 in the Nansolo matter and this Court on 13th January, 2020 in the Mbewe matter. The two Courts in granting leave also granted the 1st and 3rd Applicants injunctions allowing them to be registered and enrolled into Blantyre Girls Primary School as well Malindi Secondary School. The matters were then consolidated and continued before this Court. The Applicants' judicial review is based on the following decisions or policy made by the Respondents–

1.1.1 the decision of the 2nd, 3rd, 4th and 5th Respondents not to allow the 1st Applicant to register and enroll at Blantyre Girls Primary School on the ground that she has dreadlocked hair;

1.1.2 the decision of the 2nd, 3rd, 4th and 5th Respondents not to allow the 3rd Applicant to register and enroll at Malindi Secondary School on the ground that he has dreadlocked hair;

1.1.3 the policy of the 2nd Respondent that all learners in Government Schools should have trimmed hair including Rastafarian children,

1.2 The Applicants prayed for the following reliefs –

1.2.1 a declaration that the policy of the 2nd Respondent requiring the 1st and 3rd Applicants and all other Rastafarian Children to have short hair is contrary to sections 4(1)(a)(b) and 5(2)(i) of the Education Act 2012;

1.2.2 a declaration that the policy of the 2nd Respondent requiring that the 1st and 3rd Applicants and all Rastafarian Children to cut their hair for them to be allowed in Government Schools is unlawful and unconstitutional on the ground that it violated their rights to religion, education and not be discriminated against on the grounds of religious affiliation as provided in the Constitution of the Republic of Malawi sections, 20, 25 and 33;

1.2.3 a declaration that the 2nd Respondent's policy prescribing that the 1st Applicant and all Rastafarian children should cut their hair for them to be allowed into Malawi Government Schools is an unreasonable and unjustified limitation on the right to education as provided in sections 25 and 44 of the Constitution;

1.2.4 a like Order to Certiorari quashing the 2nd, 3rd, 4th and 5th Respondents' decision not to allow the 1st Applicant to register and attend Blantyre Girls Primary School respectively on the ground that she has long, dreadlocked hair;

1.2.5 a like Order to Certiorari quashing the 2nd, 3rd, 4th and 5th Respondents' decision not to allow the 3rd Applicant to register and attend Malindi Secondary School on the ground that he has long, dreadlocked hair;

1.2.6 a like Order to Mandamus directing the Respondents to abolish the said policy on the ground that it is unlawful, unconstitutional, unreasonable and unjustified; and

1.2.7 costs of this action.

1.3 The Applicants supported their application with sworn statements as well as skeleton arguments highlighting the law and facts for which the Court should rely on. The Applicants submitted that they have sufficient interest to challenge the 2nd Respondent's policy requiring that all persons who enroll in their schools should have short hair despite the religious requirements regarding such hair and exclusion of persons with long and/ or dreadlocked hair from their schools is in accordance with the said Respondents' constitutional and statutory law duties. They also argued that they are directly affected by impugned policy in that, they were not allowed to attend Blantyre Girls Primary School and Malindi Secondary School unless if she or he cut their dreadlocked hair. Further in terms of the 2nd Applicant who are a human rights organization that is representing 73 parents of the Rastafarian children who also lodged a complaint with the organization, that their children have been denied admission and enrollment into government schools on the basis that they have long

or dreadlocked hair. The Applicants also argued that judicial review was the only avenue for them as under the law they had no alternative remedy having already engaged the 3rd, 4th and 5th Respondents to reconsider their policy and allow the Applicants to attend the said schools.

1.4 The Applicants argued that their position is supported by the Supreme Court of Appeal decision in ***Civil Liberties Committee v Minister of Justice and Registrar General***[1999] MSCA 12 which also positively cited the English case of ***R v Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Business Limited*** (1982) AC 617, where Lord Diplock held that *locus standi* should be considered in the factual and legal context of the whole case. They also cited the English case of ***R v Secretary of State for Foreign and Commonwealth Affairs Ex parte World Development Movement Limited*** (1995) 1 WLR 386 where the court considered various factors in establishing whether a sufficient interest was present, including the importance of vindicating the rule of law; the importance of the issue raised; the likely absence of any other responsible challenger and the nature of the breach of duty against which relief was sought. It was their contention that the Constitution also specifically entitles them, the right to seek relief from the courts where their rights have been violated as provided in section 15(2). This position is also supported by section 41(2) of the Constitution which provides that every person shall have access to any court of law and any other tribunal with jurisdiction for final settlement of legal issues and section 41(3) provides that every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him by this Constitution or any other law. They also highlighted that section 46(2) of the Constitution which provides that any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened, shall be entitled a) to make application to a competent court to enforce or protect such a right or freedom also applied to them. Accordingly, the Malawi Supreme Court of Appeal case of ***Attorney General v Malawi Congress Party and Others***[1997] MWSC 1 was cited especially where Mtegha JA, referring to the above sections, held that *locus standi* is a jurisdictional issue. It is a rule of equity that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in a sufficient close relation to it so as to give him a right which requires protection or infringement of which he brings the action. It was therefore, their contention that they have the required *locus standi* because they are directly affected by the actions of the Respondents which are the subject of this judicial review and have a direct personal interest in the relief which is sought. In addition, the Applicants and many other children of the Rastafarian Religion are at risk of being denied their right to education if the policy of the 2nd Respondent is to continue.

1.5 A further argument was made that the Respondents owe public law duties especially under the Constitution, namely –

1.5.1 to ensure that all persons, including the 1st Applicant and all Rastafarian children are entitled to education pursuant to section 25 of the Constitution;

1.5.2 to ensure that their policies do not discriminate against any person on the ground of religion as prescribed in section 20 of the Constitution;

1.5.3 to ensure that their policies do not unreasonably and unjustifiably infringe and limit their right to freedom of religion as provided in section 33 of the Constitution.

1.6 The Applicants also highlighted that the Education Act also puts on the Respondents, a number of duties -

1.6.1 to promote the education for all people in Malawi irrespective of race, ethnicity, gender, religion, disability or any other discriminatory characteristic under section 4 of the Education Act;

1.6.2 to ensure that the national goals of education in Malawi are adhered to and upheld in Malawi by promoting equality of educational opportunity by identifying and removing barriers to achievement under section 5 of the Education Act

1.7 The Applicants argued that this matter was appropriate for judicial review because it falls into the ambit of Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter referred to as 'the CPR') which provides that judicial review shall cover the review of a law, an action or decision of the Government or a public officer for conformity with the Constitution; or decision, action or failure to act in relation to the exercise of a public function in order to determine - its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened. In ***S v Director of Public Prosecutions and Others, Ex parte Chilumpha,*** Miscellaneous Civil Cause No. 315 of 2005 (HC)(PR), the judges described judicial review as a procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals, or other persons or bodies which perform public duties or functions whilst ***In the Matter of the Removal of Mac William Lunguzi as Inspector General of Police,*** Miscellaneous App. 55 of 1994 (HC)(PR), the court held that judicial review is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power. Interestingly, the South African Constitutional Court in ***Pharmaceutical Manufacturers Association of SA and Another; In re Ex Parte President of RSA*** 2000 (2) SA 674 (CC) confirmed that the control o public power by the courts through judicial review is a constitutional matter and that powers conferred by legislation have to be exercised within the ambits of fundamental rights and the rule of law.

1.8 The Applicants further argued that the case of ***S v Attorney General, Ex parte Suluma and Others***, Miscellaneous Civil Apl. No. 49 of 2006 (HC)(PR), noted that three (3) grounds for judicial review were whether the mandate of the public authority was exceeded, and the act was ultra vires, whether the power was exercised in an unreasonable manner and whether proper procedures were followed. In addition, the ***Chilumpha*** case added that judicial review also applies if the public authority - had no jurisdiction to act or acted ultra vires its powers; did not follow the rules of natural justice where such rules apply; made an error of law on the face of the record; and/or displayed unreasonableness in the Wednesbury sense in the conduct of the proceedings or the making of the decision. The case also stated -

> *"The question we however need to ask ourselves is whether this violation is amenable to judicial review. To the extent that the decisions to arrest and initiate criminal proceedings against the applicant were based on evidence obtained in breach of applicant's right under section 21 aforesaid, we are of the conviction that it raises the question of reasonableness, in the Wednesbury sense, of those decisions. The Wednesbury principle explains that decisions of persons or bodies which perform public duties or functions will be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision (See **Associated Provincial Picture House Limited v Wednesbury Corporation** (1948) 1 K.B. 223). In the case at hand, we take the view that had the respondents directed their minds to the manner in which the tape recordings were obtained and the law as stipulated in section 21 of the Constitution, they could not have reached the decisions to arrest and institute criminal proceedings. We therefore find that the respondents did not only violate the applicants' constitutional right to privacy but also acted unreasonably."*

1.9 The Applicants stressed that the Constitution is the supreme law of the land. Any exercise of public power which contravenes provisions of the Constitution is unreasonable and ultra vires. Furthermore, that section 15(1) provides that the human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter. The case of ***The State ex parte Muluzi and Another*** No. 2 of 2009 (HC)(PR), that it is appropriate for the High Court in a judicial review to consider whether violations of the Constitution have occurred -

> *"Because the Constitution is supreme everything else derives from it and must conform to it. The courts therefore, have, invariably, to concern themselves with examination, to some degree, of whether or not the Constitution is followed. In this respect the courts have gone ahead to decide whether or not an act or action by Government was Constitutional or not. This is clear from the declarations made **in the Matter of the Removal of Mac William Lunguzi as Inspector General of Police and***

> ***in the Matter of Judicial Review*** *(Misc. App. 55 of 1994),* ***The State, the Minister of Transport and Public Works Ex-parte Minibus Owners Association of Malawi*** *(Civil Cause 297 of 2007) and also* ***The State, The Minister of Finance and the Governor of the Reserve Bank of Malawi Ex-parte Golden Forex Bureau and Others*** *(Civil Cause 16 of 2007). In this respect therefore, we do not think we are constrained from examining the determination by the respondent as to whether or not, it conforms to the Constitution."*

1.10 Sections 12 and 44 of the Constitution provide a useful structure within which to measure whether any limitation of rights through any action passes constitutional muster. The Applicants further argued that it is accepted that the Constitution should be interpreted in a generous and broad fashion as opposed to a strict, legalistic and pedantic one and in a manner that gives force and life to the words used by the legislature, avoiding at all times interpretations that produce absurd consequences. The Applicant submitted that the failure by the Respondents to register and enroll her and him into Blantyre Girls Primary School and Malindi Secondary School or any other Government School because he could not cut his hair based on his religious beliefs, the Respondents in doing so, did not act in a manner that was reasonable and necessary in an open and democratic society. The Applicants further argued that the 2nd Respondent's policy was vitiated in law and warranted the intervention of the court because it violated the Applicants as well as all Rastafari children by denying them their right to religion, education and not to be discriminated against on the ground of religion affiliation as such contrary to the Constitution and Education Act.

1.11 The Applicants argued the instruction that they should cut their hair for them to be allowed into Blantyre Girl Primary School and Malindi Secondary School respectively or any other Malawi Government Secondary School was unlawful and unconstitutional on the ground that it violates the right to religion, education and not to be discriminated against on the ground of religious affiliation as provided in the Constitution of the Republic of Malawi sections 20, 25 and 33. Firstly, the right to freedom of religion was discussed by the UK House of Lords in ***R v Headteacher and Governors of Denbigh High School*** [2006] UKHL 15. The case related to a child who was suspended for wearing a jilbab. The court held that any sincere religious belief must command respect, particularly when derived from an ancient and respected religion. The main questions for consideration are, accordingly whether the respondent's freedom to manifest her belief by her dress was subject to limitation… and, if so, whether such limitation or interference was justified. Furthermore, in the case of ***Department of Correctional Services v Police and Prison Civil Rights Union (POPCRU) and Others*** (2011) 32 ILJ 2629 (LAC) where the court when considering the dismissal of the respondents on the basis that they refused to cut off their dreadlocks on religious grounds, the court stated that without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection and the impact of the limitation is profound. It also stated that a policy is not justified if it restricts a practice of religious belief. Interestingly, the case of ***J.K (Suing on***

behalf of CK) v Board or directors of R School & another Petition NO. 450 of 2014 eKLR, the High Court of Kenya, held that the wearing of dreadlocks for cultural or religious reasons is entitled to protection under the constitution and should be accorded reasonable accommodation, while the wearing of dreadlocks for fashion or cosmetic purposes does not.

1.12 In ***Prince v President, Cape Law Society and Others***[2002] ZACC 1 the South African Constitutional Court took judicial notice the fact that Rastafarianism is a religion is not in dispute. Rastafarian religion has been in existence for more than seventy years. Although it is said to have its origin in Jamaica, its origin is also linked to Ethiopia. It originated as a black consciousness movement seeking to overthrow colonialism and white oppression. Over the years, it has spread to other countries, including our own. It also stated that dreadlocks are one of the most visible marks of Rastafarian religion. Rastafarians claim that their dreadlocks originated from the same source as the Nazarite Vows that note that "in accord with God, the Nazarite grows out their hair and makes sure 'no razor comes upon his head. The most important purpose of dreadlocks for Rastafarians is aligned to the notion of divinity dwelling within them – symbolizing a more spiritual self-declaration. Another purpose is that they visibly demarcate in-group and out- group distinctions, thereby acting as part of their external appearance representing the boundary of group membership. Dreadlocks also reflect the defiance of Rastafarians against the values of the dominant order ("Babylon"). Hair became sacralized through the biblical story of Samson and was incorporated into Rastafarian ideology in the late 1940s and early 1950s. According to the Bible, Samson was a Nazarite who had "seven locks". Rastafarians point out that these "seven locks" could only have been dreadlocks, as it is unlikely that seven strands of hair were meant. In Rastafarian ideology, to cut one's dreadlocks would be to cut off one's strength, a notion in keeping with the biblical tale of Samson. Rastafarians interpret this as they should not shave, cut their beards or hair, or cut their flesh in any way. Those who cut their hair or any part of their body are treated with disdain because they are perceived as having abandoned "their faith and culture. In buttressing the importance of a religious practice and the Court stated that -

> *"it is undesirable for courts in South Africa to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice." Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith."*

1.13 The test formulated by Gubbay CJ in In ***re Chikweche*** 1995 (4) BCLR 533 (ZS) requires courts to look at a belief which is sincere and based on personal morality,

and which extends to conscientiously held belief, whether grounded in religion or a secular morality. The court answered the following 3 questions in affirmative in a case relating to Rastafari admission as a legal practitioner were whether the source of the applicant's constitutional claim is a recognized religion; whether the practice sought to be protected is a central part of the religion and whether the applicant's belief in the religious practice is sincere. It was their argument that in the matter herein they were refused permission to attend school and had to go to court to be granted an order to be allowed in school is an indication of the sincerity of the belief. The Applicants sure had to endure trauma in exercising his belief and sustaining his refusal to cut his dreadlocks as noted in the case of ***Lerato Radebe and 3 Others v Principal of Leseding Technical School and 5 Others*** [2013] ZAFSHC 111 where the Free State High Court held that a policy that a learner may only attend school if she cuts her dreadlocks violated the learner's right to freedom of religion. Accordingly, the 2nd Respondent's policy violates the Applicants' right to freedom of religion by not allowing them to be registered and enrolled at Blantyre Girls Primary School and Malindi Secondary School respectively unless they cut their hair, which would result in them departing from a practice that is protected and central to their religion.

1.14 In terms of the right to education, it is guaranteed under section 25(1) of the Constitution which incidentally mirrors Article 17(1) of the African Charter on Human and Peoples' Rights and was ratified by Malawi in 1990 and is part of Malawi's national law pursuant to section 211(2) of the Constitution. Furthermore, this right to education is re-iterated in Article 11(1) of the African Charter on the Rights and Welfare of the Child, which Malawi acceded to in 1999. The African Charter on the Rights and Welfare of the Child goes on to state that education should be directed to, amongst other things, fostering respect for human rights and fundamental freedoms" and "the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups. The Applicants also highlighted Article 18(4) of the International Covenant on Civil and Political Rights which state that States Parties undertake to have respect for the liberty of…legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. In ***ON & 13 Others v Child Protection Team***, Miscellaneous Civil Cause No. 116 of 2016, (HC)(MZ)(Unrep) the High Court stated at page 14 para 6.1 that -

> "While the Constitution of the Republic of Malawi protects the right to education as a fundamental right in Section 25, it also provides for the promotion of education and the eradication of illiteracy in Malawi in various other sections and incorporates the right to education as part and parcel of the right to development. Education is very important and under Section 13(f) of the Constitution of the Republic of Malawi, it is provided that the State shall promote the welfare and development of the people of Malawi by adoption and implementation of policies and legislation aimed at achieving, among other things, education".

1.15 Malawi's current Education Act, passed in 2012, provides that the Minister of Education has a duty under section 4(1) (a)to promote education for all people in Malawi irrespective of race, ethnicity, gender, religion, disability, and any other discriminatory characteristics. Further, section 4(2)(b) of the Education Act places a duty on the Minister to have regard in particular, to the general principle that in so far as is compatible with the provision of efficient instruction and training and the avoidance of excessive public expenditure, students are to be educated in accordance with the wishes of their parents. Section 5 of the Education Act provides for the national goals of education in Malawi, which include to, "develop in the student, an appreciation of one's culture and respect of other people's culture" and to "promote equality of educational opportunity for all Malawians by identifying and removing barriers to achievement". Further under section 76(2), the national curriculum is to "promote respect for human rights" and "promote unity in diversity through a flexible framework which allows for the accommodation of cultural differences and needs". The Education Act accordingly requires that the government's policies accord with the values of diversity and ensuring equal access to education. The Education Act accordingly provides a guideline on the content of the right to education. In the present case, the Respondents' refusal to register and enroll the Applicants on basis that they refused to cut their dreadlocks on religious grounds, is contrary to the spirit of the Education Act 2012, which promotes unity in diversity through a flexible framework under section 76(2). It is therefore argued that the 2nd Respondent's policy of keeping short or trimmed hair in all government schools should be flexible enough and make exceptions and allow students who cannot trim their hair on religious grounds be registered and enrolled in any government school. The failure to do, infringes on the right to education. The Applicants also argued that National Education Policy of 2013, provides under paragraph 2.3. the policy objectives and it states inter alia that, the objective of the policy is to create an enabling environment for the expansion of equitable access to education for all Malawians. The Policy makes an emphasis on 'all' which indicates the spirit of inclusiveness as emulated in the Education Act itself. It is therefore argued that the failure by the Respondents, to register and enroll the Applicants on the basis that they could not cut their dreadlocks, runs contrary to the objectives of this policy because they were excluded and therefore denied their right to education.

1.16 Section 20(1) of the Constitution guards against discrimination and provides for equality protection against such. The High Court in ***Somanje v Somanje and Others,*** MSCA Civil Appeal No. 29 of 1999 observed that the right to equality under the law is an absolute right. This right cannot be limited or restricted in terms of section 44(2). Section 44(1) (g) specifically lays down that there shall be no derogation, restrictions or limitations with regard to the right to equality and recognition before the law. Section 20 should be read with section 23(1) which further provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them. The South African Constitutional Court in ***MEC for Education: Kwazulu-Natal and Others v Pillay Sunali***, CCT 51/06, held that where the ground of discrimination is religion or culture, the comparator is those learners

whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised. The norm embodied by the Code is not neutral but enforces mainstream and historically privileged forms of adornment… at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them. O'Regan J in this case held that the correct comparator is those learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied the exemption.

1.17 The Applicants herein have not been accorded an exemption to pursue their cultural or religious practice as such this results in unfair discrimination. In ***Malawi Congress Party and Others v Attorney General & Another*** 1996 MLR 244, the High Court considered at length, how equality is a fundamental right provided under our Constitution in section 20(1) where it was stated -

> *"…a law which results in unequal treatment between the citizens of the land will be arbitrary…the purpose of equality before the law provisions is that those who are similarly placed in society will be dealt with similarly by Government action. This is far from suggesting that, in its formulation or application of the laws, Government cannot classify persons. The equality before the law provisions in our Constitution prohibits impermissible criteria for classification or a classification arbitrarily used to burden a group of individuals …"*

1.18 In ***President of the Republic of South Africa and Another v Hugo*** (CCT11/96) [1997] ZACC 4, the Court at par 41, noted that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. Whilst the ***Lerato Radebe*** case held that a policy that a learner may only attend school if she cuts her dreadlocks, discriminates unfairly against her on the basis of her religion. The Respondents' conduct towards the Applicants further violates their constitutional rights to equality, dignity, education and the freedom of religion, opinion, expression, association and culture. The concept of reasonable accommodation was discussed in the ***Pillay*** case where it stated that -

> *"At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot confirm to certain social norms." "Our society which values dignity, equality and freedom must therefore require people to act positively to accommodate diversity."*

1.19 Furthermore, Langa CJ in the ***Pillay*** case stated that reasonable accommodation is, in a sense, an exercise in proportionality that will depend intimately on the facts.

Reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalizing effect on certain portions of society. It was the Applicants submission that they have not been reasonably accommodated because the Education Policy marginalizes Rastafarian's by requiring them to cut their hair if they are to be admitted into public schools. This is evident considering Langa CJ words when he noted that, the impact of the discrimination on the person's right to express his religion and culture, which is central to the right to freedom of expression, will be a relevant consideration in the determination of whether the discrimination was fair. It was their submission that the impact of the policy in this case which is discriminatory in nature is that the Applicants right to Education has been infringed as such, creating no future for a child whose only way of Education was by going into a public secondary school. They stressed that at the core of the right not to be discriminated against is the right to dignity as guaranteed by section 19(1) of the Constitution.

1.20 The right to dignity is an important one and has received significant emphasis in regional law as noted in ***Purohit and Another v The Gambia*** (2003) AHRLR 96) where the African Commission on Human and Peoples' Rights held that human dignity is an inherent basic right that all human beings are entitled to without discrimination. The African Commission also emphasized in the case of ***Doebbler v Sudan*** [2003] ACHPR 42 that inhuman and degrading treatment includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience. Therefore, the Respondents in forcing the Applicants to cut their dreadlocks, which is against the fundamental part of their religious belief, in order to attend school, is degrading and violate their right to dignity.

1.21 The Applicants stated that the said policy should be declared unlawful and unconstitutional because firstly, it is unjustifiable and unlawful limitation to the right to religion as it forces the Applicant and other Rastafarian Children to choose between the right to education and the right to freely practice their religion, furthermore, it is not reasonable, recognized by international and national human rights standards and is not necessary in an open and democratic society. Additionally, the policy requiring that the Applicants should cut their hair for them to be allowed into Blantyre Girls Primary School and Malindi Secondary School respectively or any other Malawi Government Secondary School is unlawful and unconstitutional on the ground that it violates the right to religion, education and the right not to be discriminated against on the ground of religious affiliation as provided in the Constitution of the Republic of Malawi Sections 20, 25 and 33. Arguably, that the policy requiring that the Applicants should cut their hair for them to be allowed into Blantyre Girls Primary School and Malindi Secondary School respectively or any other Malawi Government Secondary School is an unreasonable and unjustified limitation on the right to education as provided in sections 25 and 44 of the Constitution. In advancing this argument, the Applicants reminded the Court of section 11(2) that in interpretation, a court must - promote the values which underlie

an open and democratic society; take full account of the Malawian constitution's fundamental principles and human rights; and where applicable, have regard to current norms of public international law and comparative foreign case law. Additionally, as per section 14 of the Constitution which states that courts shall be entitled to have regard to [principles of national policy contained in section 13] in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution. The said section 13 states in relevant part that the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals– to devise programmes in order to promote national goals such as unity and the elimination of political, religious, racial and ethnic intolerance and to encourage and promote conditions conducive to the full development of healthy, productive and responsible members of society.

1.22 Whilst the 2nd Respondent's policy has clearly been applied over many years and many Rastafari children have been denied access to education as a result, there remains a question as to whether the policy amounts to a law of general application that would fall within the ambit of section 44. It is submitted that in the absence of the State showing the existence of a written policy promulgated under legal authority, the policy would not pass this test in the limitations analysis. The over breadth of such a policy which operates without any exemptions would further make the policy fall foul of being of general application. The Supreme Court of Canada in ***R v Safarzadeh-Markhali*** [2016] 1 SCR 180 noted –

> *"Over breadth allows courts to recognise that the law is rational in some cases, but that it overreaches in its effect in others… For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the specific individual."*

1.23 The Applicants submitted that there is no connection between cutting one's hair and the education system. Arguably, the policy does not fall within a law of general application and therefore does not pass the test under section 44. If the court decides that it is a law of general application, the court can only consider a proportionality analysis for those rights which are derogable. Taking into account the proportionality test articulated in the Canadian case of ***R v Oakes*** [1986] 1 SCR 103 as consisting of three components - the offence must be rationally connected to its objective and not be arbitrary, unfair or based on irrational considerations; the offence, even if rationally connected to the objective, should impair "as little as possible" the right or freedom in question; and there must be proportionality between the effects of the offence which are responsible for limiting the right or freedom, and the objective which has been identified as of "sufficient importance" to warrant overriding a constitutionally protected right. The Applicants herein understood that in a challenge against the constitutionality of a governmental act or rule, the burden initially rests on the applicant but later shifts to the state once a *prima facie* case has been made.

The State can only validly limit the fundamental rights of persons, if it is reasonably justifiable and proportionate to do so within the circumstances. Moreover, the State must provide evidence to justify the limitation of the right of any person and that there is no alternative or lesser means than the limitation of the right. Currie and de Waal, in analyzing the South African Constitution's limitations clause, noted that - It is not simply a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the rights-holder. If rights can be overridden simply on the basis that the general welfare will be served by the restriction, then there is little purpose in the constitutional entrenchment of rights. The reasons for limitation of a right need to be exceptionally strong. A Kenyan case is illustrative, ***Obondo Victor and 7 others v Law Society of Kenya*** Petition NO. 522 of 2014 eKLR, stated at page 11 that freedom of religion is also triggered when a petitioner demonstrates that he or she sincerely believes in a practice that has a nexus with religion but, it is not judicious of any Court to determine the validity of the belief in question. However, once an allegation of religious freedom is made, the Court must ascertain whether there has been an interference with the exercise of the right to religion so as to constitute an infringement on the same under Article 32 of the Constitution. Once such infringement has been established, the Court must move a step further and determine whether such an infringement is in any way reasonable and justified. This is because the ultimate protection of the right to freedom of religion must be measured in relation to other rights; with the view of underlying the context in which the apparent conflict arises. The Court also stated that further and generally so, in resolving the conflict between different rights, a Court will be guided by the proportionality test. Interestingly, the ***Fugicha*** case at page 30 noted that -

> *"In a free and democratic society, it is woefully insufficient for school administrators to adopt absurd inflexibility when it comes to enforcement of school rules to govern various aspects of life. The absurdity springs from an imposition and execution of a policy of uniformity that fails to have in contemplation and take into account individual difference and circumstances that may present a compelling case for exemption. This is more so… when the exemptions are sought on the foundations of freedom of religion and the right to non-discrimination, be it direct or indirect."*

1.24 The ***Fugicha*** case also further went on to quote the Canadian Court of Appeal case of ***R v Videoflicks*** 1984 48 O.R.(2d) 395 at page 28, which held that [The Constitution] determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are recognized as permissible exceptions to otherwise justifiable homogenous requirements. The Applicants argued that the Respondent has invited this Court to consider the question whether or not the current conduct of refusing children of Rastafari religion and belief are rational and adopt the rationality as outlined in the South African case of ***De Beer & Others v Minister of Cooperative Governance and Traditional Affairs*** [2020] ZAGPPHC 184, where the Court stated that the rationality test is concerned with the evaluation of the relationship between means and ends, in particular whether the means employed are rationally related to the purpose for which

the power was conferred. The Court in that case stated that if a measure is not rationally connected to a permissible objective, then that lack of rationality would result in such a measure not meeting the limitation test. The Applicants argued that they have discharged the burden to show that the 2nd Respondent's policy is unreasonable an unjustifiable limitation of their right to education as such the Respondents must therefore show to this Court how such limitation of the Applicants' right to education is reasonable, recognized by international human rights standards and necessary in an open and democratic society. It was their submission that failure to do so would mean that the 2nd Respondent's policy negates Applicants' right to education and therefore falls short of section 44 of the Constitution. Furthermore, the 2nd Respondent's policy falls short of the guiding principle of access, equality and liberalization as provided under section 4(2)(a) of the Education Act, where it excludes Rastafarian children from being registered in enrolled in any government school on the basis that they refuse to cut their dreadlocks. Therefore, by the 2nd Respondent adopting such a policy that excludes Rastafarian Children from being registered and enrolled in government schools fails in its duty under section 4(1)(a) which requires them to promote education for all. Lastly, the policy also goes against the goals of education in Malawi under section 5(2)(i) of the Education Act. Therefore the 2nd Respondent's policy is contrary to sections 4(1)(a)(b) and 5 (2)(i) of the Education Act.

1.25 The Applicants therefore prayed that this Court declare that –

1.25.1 the 2nd Respondent's policy that all learners in Government Schools have to have short hair is unlawful and unconstitutional to the extent that is does not exempt learners who cannot comply with the policy on religious grounds as it violates the right to religion, education and not to be discriminated against on the ground of religious belief;

1.25.2 the decision of the 2nd, 3rd and 4th Respondents not to allow the Applicants to register and enroll into Blantyre Girls Primary School and Malindi Secondary in Zomba on the ground that she and he have long dreadlocked hair is unlawful and unconstitutional;

1.25.3 the 2nd Respondent's policy is an unreasonable and unjustified limitation on the right to education as provided in sections 25 and 44 of the Constitution;

1.25.4 the 2nd Respondent's policy is contrary to sections 4(1)(a)(b) and 5(2)(i) of the Education Act; and

1.25.6 the policy of the 2nd Respondent unlawful and unconstitutional.

2.0 THE RESPONDENTS' CASE

2.1 The Respondents have not submitted any response to the main judicial review except to make numerous requests for adjournments to settle the matter or a

preliminary objection on 17th February, 2023 requesting that the matter should not proceed. The Court therefore did not have any substantial arguments before it in terms of the judicial review except the argument by the Respondents that the Ministry of Education has never made any decision pertaining to the matter forming the basis of this judicial review proceeding. Secondly, they argued that there was no alleged government policy, purportedly denying the Claimants herein, or any other student their right to education on the basis of their religion does not exist anywhere in the policies of the Government of Malawi and the Ministry of Education in particular. It was their view that there is no policy and/or decision by the government that can be the subject of judicial review proceedings. The State also argued that in the absence of the alleged policy and/or decision the present proceedings hang in a balance (their own words) and is without a legal basis. They further highlighted that the present judicial review proceedings were irregular as the alleged policy does not exist. They prayed that the proceedings be dismissed.

2.2 The Respondents also argued that Order 19 rule 20 of the CPR sets the parameters for every judicial review and it was their contention that the order demands the existence of law, decision and policy among other requirements as such the absence of these means that there is nothing to review and such procedure cannot be sustained. It was their contention that Order 19 requires that the applicant not only tell but show the Court the law, decision or policy which is subject of the review. They contended that the application is based on a hypothetical question that there is a policy by the Government of Malawi that bars students to attend school based on their religion and/or on the facts that they have dreadlocks.

3.0 AMICUS CURIAE

3.1 The 1st Amicus Curiae, the Human Rights Commission were not present, nor have they ever filed any submissions on the case. The second Amicus Curiae, the Lost History Foundation joined the Applicants by arguing that the ban against the wearing of dreadlocks is an affront to Constitutionally guaranteed rights as such they also seek the Court's intervention to protect the Claimants rights and make sure they enjoy the rights. They added that on top of being a human rights issues, the crux of the matter deals with anti-African policies and positions which must not be allowed to prevail in the country. The submitted that the Applicants claim must be allowed in entirety on the grounds proposed by the Applicants and also on the grounds contained in the Amicus Curiae submissions which appear hereunder.

3.2 The proscription against dreadlocks is a symbol of cultural/religious imperialism in which only symbols of Christianity or other religions are accepted while symbols of Rastafari faith that is deeply rooted in African culture, are regarded as "unacceptable". There is no legal or other justification for treating dreadlocks the symbol of the Rastafari faith as a rejected expression of Africanness or African identity and accommodate symbols of other religions from outside Africa in schools such as wearing of hijabs, wearing of rosaries etc. This cultural/religious imperialism must be called out for what it is and must come to an end. They also

argued that there is no scientific proof that the wearing of dreadlocks has any negative impact on learning by the children, their peers or the education system at all. The ban on deadlocks in schools is based on a wrong perception that dreadlocks are a symbol of waywardness. The ban is therefore perpetrated by a false sense of uprightness supported by western imperialist ideals. This false narrative which instills damage to the African pride must be called for what it is and must end.

3.3 Physical colonization ended and so must all other forms of colonization such as mental, social, cultural and spiritual colonization which are in this case manifested by the unfair rejection of one of the main symbols of Africanness of African Identity: the wearing of dreadlocks and keeping hair natural. Erasure of Africanness or African identity in any form (among others through the banning of dreadlocks in schools), should not be an additional cost to accessing education at a public school in Malawi. In African societies before the advents of slavery and colonialism by Europeans, hair was perceived as being more than just aesthetic. Hair in African societies formed part of people's sense of identity. Wearing of dreadlocks was one aspect of African hairstyles for various reasons. Throughout the ages: from the ancient Nile Valley (ancient Egypt also called Kemet) civilizations to the migrations of Bantu people southwards passing through the Congo into the territory called Malawi today and beyond, hair in general and dreadlocks in particular had spiritual, social, cultural and aesthetic significance among Africans. For instance, there are many sculptures and drawings in ancient Egypt depicting some pharaohs and nobles in dreadlocks as per Exhibit AC 1 which is an image from a sarcophagus of an African princess called Kawit of ancient Egypt (2050BC) showing a deceased noble having the locks being repaired/done as noted in Exhibits AC 2 and AC 3.

3.4 Interestingly, the research by Lost History Foundation on African spirituality among various ethnic groups in Nyasaland before colonialism, indicates that despite ordinary people wearing dreadlocks as a form of hairstyle, those particularly assigned spiritual roles in societies, were individuals who sometimes never cut their hair and kept dreadlocks. Further it confirms that just as it is in Rastafari faith today, dreadlocks have had a spiritual significance in African culture as originally practiced by our ancestors before Europeans and Arabs arrived to conquer and invade the kingdoms of our ancestors that sprang in this territory called Malawi. Further that throughout the ages: before slavery and colonialism, for both African men and women, hair in general and dreadlocks were intricately connected to cultural identity, spirituality, character make up, and notions of beauty. It is in this regard that dreadlocks have always been part of Malawi's cultural heritage. Therefore, since dreadlocks are part and parcel of Malawi's cultural heritage, the government should in fact be at the fore front in promoting dreadlocks. The resistance to dreadlocks within the Ministry of Education, highlights the extent to which African identity continues to be conceptualized within the prism of colonial ideology that is harmful to African people as illustrated in the subsequent points.

3.5 LHF also highlighted that from the end of colonialism in Malawi and beyond, dreadlocks in particular and hairs of the African people in general, are perpetually

regarded with disdain and simply seen as not beautiful and undesirable. They also stated that when Africans were first enslaved by Europeans, the thickness of their hair was used as a justifiable reason by the Europeans for the pending forced subordination. To dehumanize and break the African spirit, Europeans shaved the heads of enslaved Africans upon arrival on the shore of the Americas. This was not merely a random act, but rather a symbolic removal of African culture. The shaving of the hair represented an erasure of any trace of African identity and further served to dehumanize the Africans being brought into bondage in America. Therefore, colonial ideology also immensely devalued the natural African hairstyles like dreadlocks and instilled inferiority complex among the Africans. The colonial state rightly understood dreadlocks as symbols for a call to return to the African past. Hence the growing of dreadlocks by Africans was perceived as a sign of rebellion such that some had their hair pulled out while physical assaults for wearing dreadlocks were common among Africans during the colonial era. Notably, during colonialism, the British writers and colonial administrators, classified African hair as closer to sheep wool than human hair. This entails that during slavery and colonialism, the Europeans deemed African hair as unattractive and did not even consider it to be human hair in the first place. Whilst, during slavery and colonialism, African hair and beauty in general were therefore racialized and European features were depicted as the accepted standard of beauty. This meant that tightly coiled tresses or dreadlocks were considered deplorable when pitted against the long, straight European hair that was considered beautiful and attractive. It was their submission that with the unspeakable bandage of the Africans by Europeans during slavery and colonialism, came the oppression of the African hair and beauty.

3.6 Accordingly, since history shows a common trend of repressing African hair as a legacy of slavery and colonialism. For instance, even after colonialism, most African women started to seek straighter, silky hair (as opposed to natural hairstyles such as dreadlocks) to fit into western defined beauty. They stated that post-colonial theorists like Franz Fanon have stressed that the impact of colonialism therefore runs deep. Fanon argued that discourses of kinky and inferior black bodies were an integral part of the colonial project that sought to deny the humanity of the colonial subjects. Trivializing African languages, religions and systems of knowledge was intended to undermine the confidence of the Africans. The "civilising mission" of Christianity and colonialism left many Africans convinced that their own traditions (including natural hair styles like dreadlocks) were infinitely inferior to those that were being introduced by the colonialists. Therefore, the legacy of slavery and colonialism is not only restricted to oppression and exploitation in political and economic sense. It also led to the imposition of beauty standards that reject and exclude distinguishing features of being an African. Such a Eurocentric beauty standard, poses a huge negative impact on Africans' positive self-identity and their perceptions of their African beauty. For instance, most African females are socialized that they have "nappy" or "bad hair" and that any natural African hair styles such as dreadlocks are "unacceptable" thus they begin to internalize self-hatred. The banning of natural African hairstyles like dreadlocks in schools or workplaces therefore reinforces the self-hatred among African females. As a result

of the reinforcement of self-hatred, African females resort to have their hair straightened, relaxed, or chemically altered because of the societal pressures that remind them that their hair in its natural state such as dreadlocks, is not acceptable or presentable in society. This is problematic as far as African identity is concerned because African women are constantly devalued based on their physical appearance and brainwashed into erasing their cultural identity.

3.7 They argued that the banning of natural African hair styles like dreadlocks in schools and workplaces pushes Africans to distance themselves from their cultural roots in general and abandon their African hair traditions in particular. Furthermore, dreadlocks seek to defy the colonial definition of blackness as inferior to whiteness and further challenge the dominant notions of being a "presentable" man or woman. Dreadlocks therefore represent a connection to Africa identity and a rejection of western imperialism which is attributed to the damage of the African pride. Dreadlocks therefore represent a renewed sense of pride in African physical characteristics and blackness, which ties in with a conviction about keeping things natural. They provided information that when Rastafari faith emerged in the Island of Jamaica in the early 1930s, the first individuals to be called Rastafarians like Leonard Howell, Joseph Hibbert, Robert Hinds, Archibald Dunkley and others did not wear dreadlocks. From inception in the early 1930s, most Rastafarians were not dreadlocked until the 1950s when dreadlocks were embraced into the Rastafari faith as a bold expression of rejecting the oppressive euro-centric standards. Hence, to most the Rastafarians who started to grow locks from the 1950s, dreadlocks radically symbolized fearlessness and resistance against colonial oppression and Europeans values. Furthermore, dreadlocks were also embraced by the Rastafarians in the 1950s as symbols of African pride and identity. The adoption of dreadlocks by Rastafarians in the Island of Jamaica in the 1950s, was therefore a strong ideological statement in favour of African identity within the broader spectrum of African culture from ancient times.

3.8 A further argument was made that since the transition to multiparty democracy in Malawi (1992-1994), dreadlocks have gradually become common amongst some African men and women in the public. There are artists like Bon Kalindo, Dan Lufani, Keturah, Wendy Harawa, Ben Mankhamba, Eric Paliani, Code Sangala, Sam Simakweli and many others who have worn dreadlocks. Dreadlocks have also been popular amongst renowned sports men and women such as Ernest Mtawali, Peter Mgangila, Andrew Chikhosi, Tabitha Chawinga. They also added that some attorneys, lecturers and researchers have also been growing locks (either currently or at some point in the immediate past). The list includes attorneys like Prof. Mwiza Nkhata, Dr. Chikosa Silungwe to mention a few or lecturers/researchers like Dr. Franz Amini, Dr. Wesley Macheso or medical doctors like Dr. Yoram Makanjila, Dr. Pembo Nyangulu. Notable these people may not be Rastafarians by faith. Nonetheless, it can be interpreted that by wearing dreadlocks, in a way they expressed a rejection to uphold the colonial verdict that African hair is inferior or that Africans have to embrace European values of what is proper and acceptable as

far as hair is concerned. It can also be interpreted that they are determined individuals who are at peace with the texture of their hair as Africans.

3.9 They concluded that it is not an exaggeration to conclude that those who grow dreadlocks (whether Rastafarians or not) glorify their dreadlocks as a bold statement regarding their appreciation of natural African hair above all African identity. Dreadlocks are not new as far as African culture in general and the history of Malawi are concerned. Our ancestors in the country (and way before they migrated to Malawi) had been cultivating dreadlocks since time immemorial. Critics of dreadlocks who are quick to associate dreadlocks with "decadent foreign influences" are not only wrong but also ignorant of the African history and heritage. They highlighted that as a nation, we hurt the spirits of our men, women, girls and boys with messages that they are inferior when we reject any aspect of their natural physical beings as Africans such as natural hair including dreadlocks among others. It is crucial that as a society, we send the message to African women, men, boys, and girls that they are worthy of admiration and respect in their natural states such as dreadlocks. Hair in general and dreadlock therefore play a crucial role in identity formation that should not be ignored. In conclusion they prayed that the Court should set aside the ban on wearing dreadlocks in schools based on the human rights arguments of the Claimants and also on the basis of the African Pride.

4.0 THE LAW AND FINDINGS

4.1 Firstly, let me address something in terms of the conduct of this case. This Court once again finds itself having to comment on the conduct of the Attorney General. This Court wants to stress how abhorring the conduct of the Attorney General has been through its numerous counsel that have been handling this case since its inception. The office of the Attorney General is the highest office of the Malawian Bar as such is held in the highest esteem. Furthermore, the Attorney General is a public office tasked with also protecting and promoting the rule of law even when it is defending the three arms of Government, that is, the Executive, Legislature and Judiciary. It is therefore incumbent upon the said office and its officers to ensure that as officers of the Court that the highest standard in litigation is maintained. Furthermore, that they offer the Courts, the best possible defence which does not erode the trust of society in the Courts but also offers the Court assistance in determining the matter. The words of the Court of Appeal in ***County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others***, Civil Appeal No. 17 and 18 of 2015 or 2015 eKLR offers this Court assistance and maybe should also be words that the Attorney General take into consideration. The words, ***counsel, as officers of the court, should be candid and state the correct position of the law even when it affects their clients' cases. They should not approbate and reprobate.*** **(bolded and underlined for emphasis).** It is this position that the Attorney General should take with the courts especially noting his Constitutional position but more so as the Head of the Bar, that is, to be an exemplary office of the court.

4.2 This Court is highlighting its concerns in terms of the Attorney General because in this particular case, the Court noted that the dodgy manner in which this matter was defended amounted to the Attorney General defending an illegality. This Court reminds the Attorney General that it cannot abrogate its duty to defend and enforce the Constitutionality. Furthermore, the Attorney General is duty bound not to defend and enforce constitutionally objectionable policies and conduct as that portrayed by the 2nd, 3rd, 4th and 5th Respondent. It should be stressed that it is this Court's considered opinion that no one natural or legal including arms of Government be it the Executive, Legislature or Judiciary have the right to disregard laws and apply laws or policies that are in their nature inconsistent with the Constitution.

4.3 This Court will start the rest of its determination by stressing and underlining that Malawi is bound by the dictates of the Constitution as section 5 espouses that any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid. Furthermore, that this Court in interpreting is bound to ensure that the dictates of section 11 of the Constitution -

> (1) Appropriate principles of interpretation of this Constitution shall be developed and employed by the courts to reflect the unique character and supreme status of this Constitution.
> (2) In interpreting the provisions of this Constitution a court of law shall—
> (a) promote the values which underlie an open and democratic society;
> (b) take full account of the provisions of Chapter III and Chapter IV; and
> (c) where applicable, have regard to current norms of public international law and comparable foreign case law.
> (3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this Constitution.
> (4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this Constitution shall be invalid.

4.4 Pertinent to the issues herein is section 12 which sets out the Constitutional principles which sets out –

> (1) This Constitution is founded upon the following underlying principles—
> (a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
> (b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
> (c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;

(d) **the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote (my emphasis);**

(e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and

(f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.

(2) Every individual shall have duties towards other individuals, his or her family and society, the State and other legally recognized communities and the international community and these duties shall include the duty to respect his or her fellow beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance; and in recognition of these duties, individual rights and freedoms shall be exercised with due regard for the rights of others, collective security, morality and the common interest.

4.5 The essence of this matter rests on the Executive's machinations, as such it is critical that this judgment that section 7 of the Constitution is highlighted because it states that the executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi, and which promote the principles of this Constitution. This matter was brought as a judicial review not only as an administrative law issue but also as a constitutional nature as it relates to the promotion and protection of human rights. Incidentally, in terms of judicial review, the procedure and issues for consideration are provided for in Order 19 rule 20 (1) of the CPR. It is critical therefore that this Court highlights what is the purpose of judicial review, that is, what outcome is possible. ***Blantyre City Assembly v Kam'mwamba 7 Six Others*** (2008) MLR 21 Justice Kamwambe offers what the purpose of judicial review is -

> *"A decision of a public authority may be quashed where the authority acted without jurisdiction, or exceeded its jurisdiction or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or that the decision is unreasonable in the Wednesbury sense. The court does not in a judicial review application act as a Court of Appeal from the authority or body concerned. The function of the court is to see that lawful authority is not abused by unfair treatment*."

4.6 Similarly, Lord Haisham LC in ***Chief Constable of North Wales Police v Evans*** (1982) 3 All ER 141 stated that it is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the merits in question. Additionally,

Chombo J commenting on the grounds of judicial review in the case of ***State and Another v Malawi Electoral Commission*** (2004) MLR 374 said that the grounds for judicial review are numerous but there are three commonly usedclassifications. These are illegality, irrationality and procedural impropriety. Illegality refers to decisions or actions that are ultra vires the relevant legislation. Additionally, illegality also refers to decisions or actions based upon an incorrect interpretation of the law as noted in ***Re Islam (Tafazzul)*** (1983) 1 AC 688 where an incorrect interpretation of the law can in turn result into want of jurisdiction or excessive exercise of jurisdiction."

4.7 Notably, in the ***Lunguzi*** case4, Mkandawire J summed up judicial review as not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which that decision was reached. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against the abuse of power. Notably, the matter herein deals with both judicial review as it relates to administrative justice but also to constitutional rights violations. This Court is determined that the judicial review of the policy is thoroughly examined but also that the human rights violations are also properly addressed. The protection of constitutional guarantees is one of the tenets which the Judiciary is duty bound to uphold as provided in section 4 of the Constitution which states that this Constitution shall bind all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it. This provision is buttressed by section 9 of the Constitution which provides that the judiciary shall have the responsibility of interpreting, protecting and enforcing this Constitution and all laws and in accordance with this Constitution in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law. It should be stressed and emphasized that these provisions are all supporting section 15(1) of the Constitution which emphatically states that the human rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature, judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Malawi and shall be enforceable in the manner prescribed in this Chapter. It should be noted that the simple understanding of these provisions is that the fundamental principle of the Malawian Constitution is the promotion and protection of the rule of law by all without exception.

4.8 Incidentally, Justice Mwaungulu (as he then was) in underscoring the principles of constitutional interpretation in line with human rights provisions in the Constitution in ***Thandiwe Okeke v The Minister of Home Affairs and the Controller of Immigration*** Miscellaneous Civil Application No. 73 of 1997 indicated that courts must interpret the Malawi Constitution from the democratic ideal and its astute protection of fundamental human rights. It is characteristic that our Constitution,

anticipating the problems it intended to forestall and our aspirations for promoting democracy and fundamental human rights, provides notions unheard or never thought of in modern constitutional and political theory, conceptualisation and thought. This goes to its uniqueness. Remarkably, in ***The State and Malawi Electoral Commission ex parte Rigtone Mzima,*** MSCA Civ. Appeal No 17 of 2004 [see para 1 pages 5 to 6], Tembo JA said –

> *The position taken by this court on constitutional interpretation is on all fours with that taken by the Privy Council in the case of* ***Minister of Home Affairs and Another vs Fisher and Another*** *[1979] 3 All E.R. p. 21, 25-26, where the Privy Council observed, among other things that constitutional interpretation calls for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms, thus, to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.*
>
> *Besides, such position is on all fours with that taken and expressed by the Supreme Court of Ghana on the matter in the case of* ***Tuffour vs Attorney General*** *[1980] G.L.R. 637, 647-648 where the court said-*
>
> "*A written Constitution ….is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for a better and fuller life. The constitution has its letter of the law. Equally, the Constitution has its spirit … the language … must be considered as if it were a living organism capable of growth and development. A broad and liberal spirit is required for its interpretation. It does not admit of a narrow interpretation. A doctrinaire approach to interpretation would not do. We must take account of its principles and bring that consideration to bear, in bringing it into conformity with the needs of the time."*

4.9 Similar sentiments on constitutional interpretation were expressed by Kentridge AJ stated in the South African Constitutional Court case of ***State v Zuma*** 1995 (4) BCLR 401(SA) at 412 where he said that we must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination. He went further and quoted **S v Moagi** 1982(2) Botswana LR 124 at 184 by saying that a constitution embodies fundamental rights should as far as its language permits be given a broad construction. It is fundamental that a court must pay attention and critically understand the interpretation duty must involve careful determination on the language as pointed out in ***Reyes v R*** [2002] 2 AC 235 where Lord Bingham stated –

> *"A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society (see Trop v Dulles,*

above, at 101). In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in State v Makwanyane, 1995 (3) SA 391, in para. 88 –

> *"Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority.*
> *The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society."*

4.10 Turning to the issues in the case herein, it is imperative at this point the Court highlights on the issue of whether a policy was in existence or not. It should be stated that this Court determined this very issue in its preliminary determination dated on 7th March, 2023. It is therefore not necessary that this Court repeats what it stated in that ruling but serve only to highlight a couple of salient issues. Firstly, Black's Law Dictionary, Bryan Garner, 11th Edition, St. Paul, Minnessota, West Publishing Company, 2019 defines policy as the general principles by which a government is guided in its management of public affairs, or the legislature in its measures. Incidentally, a public or government policy according Anke Hassel in International Encyclopedia of the Social & Behavioral Sciences, Second Edition, 2015 is a is a set of decisions by governments and other political actors to influence, change, or frame a problem or issue that has been recognized as in the political realm by policy makers and/or the wider public whilst María del Carmen Reyes in Modern Cartography Series, 2014 says public policy expresses the goals, decisions, and actions adopted by a government for political, social, and economic management. There is an increasing need for policies to be formulated by establishing close connections with academics, the responsible politicians, and society. These definitions underlying in them is the fact that a policy does not need to be written or unwritten as underlying in the policy ideology is that allows governments to implement their plans.

4.11 Returning to the issues, section 7 of the Constitution provides that the executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution however in developing such policies, it

must bear in mind the prescripts of section 13 of the Constitution which state that the State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals— and for education under section 13(f)(iv) by promoting national goals such as unity and the elimination of political, religious, racial and ethnic intolerance and in terms of children under section 13(h) by encouraging and promoting conditions conducive to the full development of healthy, productive and responsible members of society. Conversely, the Executive is further demanded to apply these above principles by taking into account section 14 of the Constitution which states that the principles of national policy contained in this Chapter shall be directory in nature but courts shall be entitled to have regard to them in interpreting and applying any of the provisions of this Constitution or of any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution.

4.11 In the present case therefore, this policy in contention is one that requires all students in government schools to have short hair which is combed. The Court's research, it seems its origins are from the one-party era especially the repealed Decency in Dress Act as well as section 180(g) of the Penal Code which regulated peoples dressing and looks. It is said that the ideology of restricting or stopping people especially students or men from keeping long hair was to ensure that it was well-kept or neat-looking. This policy targeting Rastafarian children as well as Muslim children is unknown as to when it was officially adopted however it seems to have survived the advent of the human rights centred Constitution including the repeal of section 180(g) of the Penal Code in 2011. Incredibly, this written is unwritten however was vehemently practiced because even this judge's lived reality was that there was no dreadlocked child throughout her education in public schools from primary to secondary. This Court noted that dreadlocked children have had a time in being enrolled as noted by Danielle N. Boaz in Banning Black Gods: Law and Religions of the African Disapora, Volume 6 van Africana Religions. Penn State Press, 2021 whose writing is a global examination of the legal challenges faced by adherents of the most widely practiced African-derived religions in the twenty-first century, including Santeria/Lucumi, Haitian Vodou, Candomblé, Palo Mayombe, Umbanda, Islam, Rastafari, Obeah, and Voodoo. Her writing examined court cases, laws, human rights reports, and related materials. She further argued that these restrictions on African diaspora religious freedom constitute a unique and pervasive form of anti-Black discrimination. Interestingly on page 242 of her writings she highlights the plight of three (3) Rastafari children who were sent home from Makwapa Primary School for having dreadlocks in September 2012. This incident seemed to have sparked some disturbance in the area. Fascinatingly, Boaz highlights that at this time, the Ministry of Education through their then Public Relations Officer Lindiwe Chide confirmed that they were in support of this removal of the children because there was a policy in place that banned dreadlocks and promoted uniform appearance. Further in March 2017, this position was again in national headlines and Ms Chide again informed the public by reiterating that dreadlocks and hijabs were still banned in government schools. Interestingly, the policy direction which prohibited hijabs in government

schools was removed through a Public Affairs Committee driven agreement amongst various players including the Ministry of Education in 2021. Accordingly, this background is what made the Court conclude in its March, 2023 ruling that a policy was in existence whether written or unwritten.

4.12 Turning to the rights violation issues herein, this Court first intends to start by stating that the issue of Rastafarianism in public schools especially in terms of hair, is not a new phenomenon and its impact especially on the right to education. The Kenyan case of ***JWM (alias P) v Board of Management O High School and 2 Others*** [2019] eKLR where the father of an observant Rastafarian girl admitted to a public secondary school, brought a constitutional petition to challenge the school's decision to exclude the girl because the dreadlocks which she wore for religious reasons were in breach of school rules. The school had decided that she could only return after shaving her dreadlocks. The court was asked to determine whether that decision infringed the girl's right to education and freedom of religion, and whether that infringement could be justified as a reasonable limit to the affected rights. The Court held that the school's decision to exclude the girl was unconstitutional and, therefore, the school had to allow her to resume her studies immediately. In addition, by means of permanent injunction, the Court restrained the school administration from interfering with the girl's education on the basis of her commitment to wear dreadlocks for religious reasons. Before proceeding to adjudicate on whether the school's decision to prohibit the wearing of dreadlocks violated the right to education and freedom to manifest her religion, the Court first dealt with the question of whether Rastafari constitutes a 'religion' that warrants the invocation of legal protection under Article 32 of the Constitution. To answer that question the Court explored various definitions of religion which indicated that Rastafari did qualify as a religion. More specifically, by relying on American and Zimbabwean case law, the Court found that it is no longer contestable that Rastafari 'is a religion for purposes of constitutional protection'. This finding is significant as it affirms the status of Rastafari as a bona fide religion and, accordingly, extends legal protection to its beliefs as well as its adherents. The Court therefore following from the affirmation that Rastafari beliefs are protected and by implication can be the basis for religious freedom claims, the Court shifted its focus to the substantive question of whether the prohibition against wearing dreadlocks violated the learner's right to education and freedom of religion; and, if so, whether that prohibition was justifiable. The Court noted that it was not in doubt that the petitioner and his daughter were committed Rastafarians and that was the reason why JMW had 'never shaved her hair since birth' because doing so would go 'against their faith and religious beliefs'. The court found that the uncompromising stance taken by the school authorities that JMW must cut her dreadlocks before being allowed back to school clearly contravened her rights to freedom of religion and access to education.

4.13 Incidentally in the Zimbabwean case of ***Farai Dzvova v Minister of Education, Sports and Culture and Others*** SC 26/07 (2007) ZNSC 26, the applicant and father of six-year-old successfully challenged the decision of the Ruvheneko Government Primary School to expel the child from the school on account of his Rastafarian

(Rastafari) dreadlocks. He argued that the school's decision to expel on account of his Rastafari dreadlocks violated section 19(1) of the Constitution of Zimbabwe. The Court unanimously decided and Cheda, J ruled that the expulsion from the school because of the child's expression of his religious belief through wearing dreadlocks was a contravention of section 19 of the Constitution of Zimbabwe. This judgment confirmed the provisional order and decision of the High Court to allow his enrolment into the school. Whilst ***Tyron Iras Marhguy v Board of Governors Achimota Senior High School the Human Rights Court One*** (2021) JELR 107192 (HC), a Ghanaian case where Gifty Adjei Addo, J held that failure to admit two students because of their dreadlocks, which was a manifestation of their religious right, was a violation of their human rights, particularly the rights to education and dignity.

4.14 The facts in this matter are in tandem with these cases above, in that the Applicants herein being Rastafarian children were denied access to education, a right which is guaranteed to them under section 25 of the Constitution. Furthermore, this denial of enrolment into government schools which are free to everyone especially primary school also constituted discrimination because that exemption was based on a ground which the Constitution had protected. Section 20 of the Constitution clearly states that discrimination of persons in any form is prohibited, and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition. Interestingly, the children herein had every justification to claim discrimination on the basis of religion especially taking into account, other students like muslim children are allowed to practice their religion despite the policy of neat, short and comber hair by the wearing of a hijab. The South African Constitutional case of ***Pillay*** held that the school had unfairly discriminated against Sunali Pillay by refusing to grant her an exemption. The Court ordered the school to revise its code of conduct, in consultation with parents, learners and teachers, to allow more clearly for religious and cultural exemptions. The Court emphasised that diversity is not something to be feared, or even only tolerated. It is to be celebrated as a general rule, the more learners feel free to express their religions and cultures in school, the closer will they come to the society envisaged in the Constitution. The display of religion and culture in public is not a "parade of horribles" but a pageant of diversity which will enrich our schools and in turn our country.

4.15 Arguably, the ***Pillay*** case stresses on the dimensions of diversity because the matter herein did not only rest on education but also religion and all other ancillary issues. This Court in considering this matter finds that hair, whether natural or styled, is not an aberration that should be tamed and controlled but something that schools should welcome and celebrate. This Court is not advocating for unruliness, but it is advocating that the same standard for neatness can be attained even with dreadlocks. This Court like in the ***Pillay*** case is stating that the legitimacy of a code of conduct should reflect the culture and experiences of the entire school community which includes Rastafari children. Therefore, it is this Court's considered view that school codes of conduct but more so national policies on education should celebrate diversity

and be conscious of their potential to exclude, particularly in relation to hair, but also be more comprehensively inclusive. Incidentally, this position is supported by section 4(1)(a) of the Education Act passed in 2012 which provides that the Minister of Education has a duty to promote education for all people in Malawi irrespective of race, ethnicity, gender, religion, disability and any other discriminatory characteristics. Further as section 4(2) of the Education Act by ensuring in the exercise and performance of all the duties and powers conferred and imposed upon the Minister by this Act, the Minister shall have regard - (a) to the general guiding principles of access, quality, relevance, efficiency, **equality, equity, liberalization**, partnership, decentralization, transparency and accountability; and b) in particular, to the general principle that, in so far as is compatible with the provision of efficient instruction and training and the avoidance of excessive public expenditure, **students are to be educated in accordance with the wishes of their parents** (**emphasis intended).** Therefore, taking into account the evidence in this matter, this Court finds that the Respondents seriously failed in their constitutional obligations as well as their own statutory obligations of their main governing legislation.

4.16 Turning to what the country envisages of the kind of education system, Malawi shall have as section 5(1) of the Education Act sets, that the purpose of education in Malaŵi shall be to equip students with knowledge, skills and values to be self-reliant, and to contribute to national development. Furthermore, in section 5(2) that the national goals of the education system in Malaŵi shall be to - (a) promote national unity, patriotism and a spirit of leadership and loyalty to the nation; (d) develop in the student, an appreciation of one's culture and respect of other people's culture and (i) promote equality of educational opportunity for all Malaŵians by identifying and removing barriers to achievement. It is critical that a comprehensive look at the Education Act in its essence is based on the spirit of diversity, equity, inclusion and tolerance because even the national curriculum is to espouse all these issues as stated in section 76 -

> 1) The Minister shall promote the development of a national curriculum for schools and colleges that is comprehensive, balanced, flexible, integrated, diversified and relevant to the needs of the student and society.
> (2) The national curriculum shall—
> ..(f) promote moral and ethical behaviour;
> (h) promote respect for human rights;
> (i) promote unity in diversity through a flexible framework which allows for the accommodation of cultural differences and needs;
> (3) The national curriculum shall provide a general education based on positive values and attitudes, and academic and vocational skills.

4.17 Additionally, the Education Act accordingly requires that the government's policies accord with the values of diversity and ensuring equal access to education and arguably, this Act provides on how the right to education will be promoted and protected. Therefore, this Court was surprised and shocked that in 2017, it was dealing with such a case of such obvious human rights violations in the education sector at a time where the Constitution adopted provided for a robust Bill of Rights.

Worst still that this state of being, had been in existence since 1994. What was more shocking was to also review the statements provided in this case from a parent and Rastafari children apart from the Applicants. Further, the Court took judicial notice that over the years there have numerous reports of schools refusing registration of Rastafari children with dreadlocks, students wore hijabs until 2021, or students with long hair for religious reasons.

4.18 It should be noted that the emerging legal position regionally as well as internationally is that the right to education should not be superseded by contradictory policies and actions by schools. Particularly in jurisdictions with religious and fairly conservative societies, the sight of individuals with long hair worn in dreadlocks evokes mixed reactions. For some it recalls memories of valiant freedom fighters while for others, it brings dread as they regard dreadlocks with dread for its close association with organized criminal gangs. Yet for others, dreadlocks are considered a counterculture statement by the urban youth, probably influenced by reggae music, harbouring a sense of being trifled with, and protesting a seemingly unjust socio-economic system that has given them short shrift. For the most part, however, dreadlocks have long been regarded as suspect, disreputable and an outward sign of misguided rebellion. Indeed, even as attitudes have begun changing in recent years, dreadlocks continue to be resisted and restricted in the workplace and in schools, a practice similarly observed in other jurisdictions like in the South African case of ***POPCRU*** where the court held that the employer unfairly discriminated against prison officials on the grounds of religion and culture when they were dismissed for refusing to cut their dreadlocks for religious and cultural reasons. The essence of this problem does not seem to turn on whether the act is regulated in the Education Act or a policy statement but that it is a discriminatory practice that extends beyond education to all other spaces like the workplace.

4.19 The discriminatory issues whether based on stereotypes or biases, what is evident is that there have been gross violations of Rastafarians and some of the roots are as argued by the Lost History Foundation based in history. In Decolonising the Mind: The Politics of Language in African Literature, James Currey Ltd / Heinemann, June 26, 1986 where Ngugi wa Thiong'o described that European colonialism in Africa led to a system of cultural alienation in which the colonised reject their local languages and traditions, and in which the imperialist tradition is maintained by the native ruling classes through a culture of 'parrotry', which is enforced on the 'restive population' through institutions such as the police and the judiciary. He further wrote that imperialism was a cultural bomb that annihilates a people's belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities and, ultimately, in themselves. It is trite that rastafarians keep dreadlocks as a visible mark of their religion and they grow their hair into dreadlocks as part of the Nazarite Vow. Further it is stated that all Rastafarians take this vow as commanded by the Bible in Chapter 21 verse 5 of Levictus that is they shall not make baldness upon their head, neither shall they shave off the corner of their beard nor make any cuttings in their flesh. Similarly, as per book of Numbers, Chapter 6, verse 5 which prescribes that they shall not cut our hair but must let it grow long. It is

therefore inevitable that who cut their hair are treated with contempt as they are perceived to have abandoned their faith and culture.

4.20 It is good that courts have been more proactive in recognizing the human rights violations however this position was not always like so. For instance, in the ***J.K.*** case where, Mumbi Ngugi, J rejected a claim by the mother of a 6 year-old kindergarten pupil that a school's refusal to allow him to sport dreadlocks was contrary to the school's Code of Conduct was discriminatory. The Judge held that the petitioner had not asserted that the minor practices the Rastafarian religion, and that therefore there was violation of his freedom of religion and belief guaranteed under Article 32 of the Constitution. She opined that it appeared to the court that the petitioner had made a choice of hairstyle for fashion rather than religious or cultural reasons. She has the right to make this choice. However, while wearing dreadlocks for cultural or religious reasons is, in any view, entitled to protection under the Constitution and should be accorded reasonable accommodation; the sporting of dreadlocks for fashion or cosmetic purpose is not, and an institution such as the respondent is entitled to prohibit it in its grooming code.

4.21 It should be noted that the above sentiments that dreadlocks are for cosmetic rather than religious reasons in the ***J.K*** case reflected an entrenched perception that wearing dreadlocks were and/or are not an expression of religious belief. Media reports indicate that discrimination and perceptions of discrimination against Rastafarians is prevalent, making it difficult for them to live out their faith by wearing dreadlocks in the workplace or in school. Discrimination against Rastafarians, though not always apparent, is embedded in the appearance and grooming regulations of most employers and schools which prohibit dreadlocks. Numerous surveys of religious movements, freedom and discrimination indicate that Rastafari adherents face the dual hardships as well as not being recognized officially as a religious minority. Further they are facing varying degrees of prejudice and hostility from both state actors and the mainstream faiths due to entrenched stereotypes and biases of uncleanliness, criminality to mention a few. Therefore, it is good to note the statement of the High Court in ***Mohamed Fugicha v Methodist church in Kenya & 3 others*** (2016) eKLR at 22 which held that it is thus clear to us that all persons, those in authority more so, must approach the issue of religious belief with a measure of deliberate caution and circumspection. A person's religious convictions need not make sense to us in order for us to accord them the necessary respect and space for them to flourish. An issue that may appear trifling to one may be of monumental value to another in the realm of religious beliefs. Their validity and the right of their holders to hold religious beliefs are not dependent on general acceptance or a majority vote. They are personal to the individual in accordance with their own inner light and must be respected because they are clear, not to the observer but to the believer.

4.22 To this end, the Constitution of Malawi sufficiently provides for discrimination and more so has the Education Act as such it is safe for this Court to conclude that Education policies should consistently provide for the protection of these

constitutional rights. While the Act may provide umbrella provisions, it is the policies that may be able to provide further specifics. It must also be acknowledged as noted by the circumstances of this case but also the cases from other jurisdictions that leaving the issue to be regulated purely by policy statements is not advisable. Fundamentally, it should not take courts to intervene in order to stop discriminatory practices which were outlawed in the first place. It is incumbent upon all duty bearers to ensure that they avoid discriminatory application of policies. Legislative provisions which provide for protection of the religious and cultural rights of Rastafari students must always be upheld by all those charged with the duty to educate or otherwise.

4.23 At this point, it is critical that the Court highlights the Applicants' experiences due to the 2nd Respondent, the Ministry of Education policy that learners in Government Secondary Schools keep trimmed, short and kempt hair at all times. The Applicants were all minors from the Rastafarian faith, and one of the core tenets of their faith is that they observe the Nazerite prescription which borders on not cutting hair but letting it grow. In terms of the 1st Applicant who is a child of a Rastafarian. She on 20th September, 2019 at the age of 8, undertook entrance exams for enrolment at Blantyre Girls Primary School, which she passed however when her mother on 24th September 2019 went to pay for her school fund, she was informed that she could not be accepted at the school because there were issues that needed to be addressed by the Headmistress. On 26th September, 2019, the mother was informed that the school policy does not allow children with dreadlocks to be admitted into the school. They went to complain to the District Education Manager's Office in Blantyre and met with Mr. Khumbanyiwa who advised that she had a right to be enrolled however the Headmistress still refused to enrol. They engaged Legal Aid Bureau who convened a meeting at the District Education Manager's Office on 19th November, 2019 where the Headmistress and Chairperson for the School Committee and members of the DEM's office were in attendance but the Headmistress and School Committee vehemently refused to enrol and allow her to attend classes. Interestingly, they stated that they would only reconsider after they convene a parent's meeting or after the conclusion of the Ali Nansolo Case which was pending before this court. In receiving this decision, they decided to take the matter to court. Notably, after being admitted and enrolled following, the injunction, the 1st Applicant experienced a number of issues namely – after being enrolled in Standard 5 and missing a whole term and few weeks of the second term, the 4th Respondent failed to provide makeup classes as directed. Further on 5th February 2020, the 4th Respondent alleged that she had stolen MK500.00, a pen and a small toy from her friend and that the school was going to take a disciplinary action against her. Furthermore, on 10th February, 2020, the 4th Respondent issued a transfer letter based on a request by the father which was not true and the Transfer Letter was marked Exhibit AP 1. It was the 1st Applicant's contention that 4th Respondent was finding all means to remove her from the school. This behaviour by the 4th Respondent was appalling and in this Court's opinion very inexcusable especially noting that the 1st Applicant had to then be enrolled at Chichiri Primary School, which is quite a distance comparing to Blantyre Girls Primary School which was a walking distance from Ndirande township where she resides. In terms of

the 3rd Applicant who in 2017 who passed his Primary School Leaving Examination at Bwaila Primary School within the city of Zomba and was selected to Malindi Secondary School, which is a Government Secondary School and on reporting was informed by the 4th Respondent's, Headmaster denied him to register unless he cut his hair otherwise, he would not be allowed to attend school there. The 4th Respondent then directed the 4th Applicant's father to the 3rd Respondent who advised him that since he was dissatisfied with his decision, he should take it up with the Division Manager. Interestingly they were also directed to another office in the Ministry, all of which proved futile. Disgruntled with the lack of urgency the Respondents had treated the matter with and lack of response, the 3rd Applicant sought leave from this Court to apply for judicial review of decision which had impacted his right to education and the freedom to practice of his religion.

4.24 The lengths that the Applicants, their parents as well as Rastafari children undergo to be educated in public schools which are funded by taxes paid by their parents leaves a lot to be desired especially noting from the conduct of 2nd Respondent and their schools. The Court during the preliminary objection hearing also received another sworn statement filed in this Court by Mr. Ali Nansolo as a Rastafari parent as well as Chairperson of the Rastafarian Education Committee and was adopted as such this Court takes judicial notice of especially in terms of the issues they raised. The statement stated that there have been several reports of Rastafari Children that have been denied admission into Government Schools and a list of some of the cases of children reported were exhibited and marked as AP 2. Further it was noted that a number of the children in the list who had been refused admission were later admitted into the schools because of the injunction that was granted by this Court in 2020. The reports also stated that some of the Rastafari Children had to cut off their dreadlocks for them to be admitted into the Government Schools because their parents could not afford to take them to private schools which most are forced to attend due to the lack of admission into the 2nd Respondent's schools. This Court on reviewing the evidence produced in this matter came to the conclusion that the totality of the evidence presents that the 2nd Respondent breached its own overall duty and ensure the promotion of education for all people in Malawi irrespective of their race, religion, disability or any other discriminatory ground. This breach is evident by the fact that the Applicants had submitted before Court that they were unable to conform to the 2nd Respondent's policy because his Rastafarian faith, whose core tenet is the observance of the Nazerite prescription which requires that they not cut their hair but keep it long.

4.25 The right to education is directly guaranteed in Malawi's Constitution and that additionally Article 11(1)(e) of the African Charter on the Rights and Welfare of the Child provides that the education of the child shall be directed to fostering respect for human rights and fundamental freedoms. Furthermore, Article 29(1)(c) of the Convention on the Rights of the Child states that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations

different from his or her own. Further the International Covenant on Civil and Political Rights in Article 18(4) adds that States Parties must undertake to have respect for the liberty of legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. The CESCR General Comment No. 13 on the Right to Education (Art. 13) states that the right to education inures to all persons and comports equal opportunity for all and access without discrimination. It is a fundamental right for all people, women and men, of all ages, throughout our world that ought not be denied anyhow. The Human Right Committee in ***Waldman v Canada*** Communication No. 694/1996, actually stated that the substantive part of the right to education borders on the ability to receive an education. This requires that there be available functioning educational institutions and programs, acceptable teaching methods, curricula in terms of form and substance to recipients, education be accessible to all without discrimination both in law and fact. Furthermore, General Comment No.13 provides that the right to education also includes the liberty of parents and guardians to have their children educated in conformity with their wishes and convictions. This is also provided for in section 4(2)(b) of the Education Act Malawi 2012. Thus, for the right to education to be enjoyed holistically there is need to ensure that all barriers to its access are removed and policies and plans of actions developed in the education aim at strengthening respect for human rights and the prohibition of discrimination.

4.26 In the present case therefore, a policy which runs counter to the promotion of education of children of Rastafarian faith like the Applicants herein because of dreadlocked hair whether long or short is not only discriminatory but also unreasonable. In ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** (1948) 1KB 223, Lord Greene stated that the presumption of statutory power must be exercised reasonably. If the executive exercises a power unreasonably, the courts can intervene and declare such decision or policy unlawful, quash it so that it has no legal effect, and order the executive to act (or not act) in accordance with the law. The need for public authority to exercise reasonableness in decision or policy making goes back centuries. The ***Rooke***'s case 5 CO. Rep 99b, decided in 1598, concerned the power of the Sewers Commissioners to levy charges for the repair of riverbanks. The Commissioners charged one nearby landowner for the repair of an entire section of bank. His neighbours were equally vulnerable to flooding, and thus benefited from the repairs without bearing any of the cost. The court held that the Commissioners' decision was arbitrary and unlawful. According to Chief Justice Coke, although the Commissioners had an apparently unbounded discretion under the statute, 'their proceedings ought to be limited and bound with the rule of reason and law'. In 1891, in ***Sharp v Wakefield*** AC 179, Lord Halsbury stated forcefully the connection between reason and law: when it is said that something is to be done with the discretion of the authorities…that discretion is to be done according to the rules of reason and justice, not according to private opinion: …according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

4.27 Additionally, Lord Greene in the ***Wednesbury Corporation*** case further stated that a decision will be regarded as legally unreasonable firstly if it falls outside the boundaries of the 'area of decisional freedom' defined by the statute. He described such a decision as 'so unreasonable that no reasonable authority could ever have come to it' for instance, the firing of red-haired teacher, because she has red hair. Thus, a decision might be unreasonable because the court cannot see how the decision-maker arrived at it. The decision lacks an 'evident and intelligible justification. In addition, a decision might be unreasonable because it is disproportionate. A decision that gives excessive weight to a factor of minor importance or little weight to a very important factor, or obviously exceeds what is necessary for the purpose it serves, may be unlawful as a consequence. Notably, in ***Minister for Immigration and Citizenship v Li*** [2013] HCA 18, Chief Justice French described this notion as taking a sledgehammer to crack a nut. Lastly, the fact that a decision is inconsistent or discriminatory may also point towards its unreasonableness. It should be noted that Justice Hayne in ***Li*** also commented that unreasonableness may be found where decisions are partial and unequal in their operation as between different classes. The facts in this matter clearly illustrate all these issues which these judges have echoed above.

4.28 In the case at hand, the 2nd Respondent's duty is to promote education for all by devising policies and plans that seek to remove barriers to access to education in order to promote equality of educational opportunity in Malawi. Thus, even though the 2nd Respondent has the discretion to come up with policies in the conduct of his duties, such discretion ought to be exercised according to law, that is both the Constitution as well as the Education Act. The 2nd Respondent is statutory mandated to promote education for all irrespective of race, ethnicity, religion or any other discriminatory grounds. Therefore, to have a policy intact whose execution disproportionately targets a group of people and in this case, children of Rastafarian faith is contrary to the dictates of section 4(1)(a) of the Education Act as it denies such children as the Applicant a chance at getting an education. Furthermore, the policy by the 2nd Respondent gives excessive weight to a factor of minor importance than is necessary. The overall duty and purpose of 2nd respondent is the promotion of education for all that respects human rights and fundamental freedoms. To deny one a chance at getting an education from a government secondary school on grounds that he or she keeps long dreadlocked hair on account of religion equals giving excessive weight to a factor of minor importance. It is like the example that Lord Greene gave in the ***Wednesbury*** case of firing a red-haired teacher because of she has red hair. It is utterly unreasonable and a disproportionate use of one's discretionary power when the said hair has no interference at all with learning. It therefore against this background that this Court finds the 2nd Respondent's policy on the keeping of short, trimmed hair when it comes to Rastafarian children such as the Applicants against the Education Act as well as a violation of constitutionally guaranteed rights.

4.29 With regards the right to freedom of religion as provided in section 33 of the Constitution, this Court takes cognizance of the sentiments by the African Commission in the case of ***Hossam Ezzat & Raina Enayet (represented by Egyptian***

Initiative for Personal Rights & INTERIGHTS) v The Arab Republic of Egypt Communication No. 335/07 where it stated that freedom of religion is two-fold. There is the right to hold a belief, which is the "forum internum" and then there is the manifestation of the belief, "forum externum". The forum internum is absolute and cannot be limited whilst the forum externum is qualified. These sentiments were also espoused in ***R v Head Teacher and Governors of Denbigh High School*** (2006) UKHL 15 which concerned a pupil who was suspended for wearing a jilbab (a longer loose muslim gown) at school in accordance with her Muslim faith as opposed to the school's required uniform style. The school being patronized by a diverse and multicultural community instituted a policy that every pupil put on the same styled uniform to promote a sense of communal identity and avoid manifest disparities of wealth. Lord Nicholls of Birkenhead on Appeal held that any sincere religious belief must command respect, particularly when derived from an ancient and respected religion. The main questions for consideration are, accordingly whether the appellant's freedom to manifest her belief by her dress was subject to limitation… and if so, whether such limitation or interference was justified.

4.30 Similarly, in the present case, the question to be asked is; whether the Applicant's freedom to manifest their beliefs and keep their Nazarite Vows of growing their hair in dreadlocks is subjected to a reasonable justification. Looking at the fact that the Respondent's never tried to defend the matter at the substantive level, it can be deduced considering the nature of government primary and secondary schools that the aim for the policy of short, trimmed hair is not rooted in uniformity alone but has other considerations which like avoid disparities of wealth in pupils but does so at the expense of other fundamental rights held by the students. Incidentally, this Court had to look at dissenting opinions like Human Right Committee in the case of ***K.S. Bhinder v Canada***, CCPR Communication No. 208/1986 which held the view that a policy maker must always be willing to reasonably accommodate minorities unless doing so leads to undue hardships or the sentiments in the ***PPCRU*** case which concerned the dismissal of the respondents on the basis that they refused to cut off their dreadlocks on religious grounds, where the Supreme Court of South Africa said that without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society. It is a palpable invasion of their dignity which says their religion or culture is not worthy of protection. Nevertheless, the circumstances in the matter herein as noted by the evidence as well as the law, the policy herein cannot meet the standards set by the Constitution as well as the Education Act.

4.31 In **re Chikweche**, (1995) 4 BCLR 533 the Zimbabwean Supreme Court stated that before holding that a policy discriminates against one's manifestation of religion and hence unlawful and unconstitutional, three questions ought to be answered in the affirmative, these include - whether the source of the applicant's claim is a recognized religion; whether the practice sought to be protected is a central part of the religion or whether the applicant's belief in the religious practice is sincere. Rastafarianism is a recognized religion and in the ***Prince*** decision, the South African Constitutional Court took judicial notice of the same as well as that the practice sought to be

protected, the keeping of dreadlocked hair is a key tenet of the Rastafarian faith and the applicant's belief in the practice is here.

4.32 The Court appreciated the holding in ***Fugicha*** that courts should be cautious in determining religious believe claims because as it further held that students do not abandon their constitutional rights when they enter the school and regain them when they leave, nor can the same rights be contracted away through the signing of admission letters in the name of education. Accordingly, it is this Court's considered view that a policy that a learner of Rastafarian faith may only attend school if he or she cuts his or her dreadlocks is a violation of his or her freedom to hold and manifest his religion. This Court wants to conclude by highlighting the tenets found in section 12 of the Constitution -

> (1) This Constitution is founded upon the following underlying principles—
> (a) all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with this Constitution solely to serve and protect their interests;
> (b) all persons responsible for the exercise of powers of State do so on trust and shall only exercise such power to the extent of their lawful authority and in accordance with their responsibilities to the people of Malawi;
> (c) the authority to exercise power of State is conditional upon the sustained trust of the people of Malawi and that trust can only be maintained through open, accountable and transparent Government and informed democratic choice;
> (d) the inherent dignity and worth of each human being requires that the State and all persons shall recognize and protect human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote;
> (e) as all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society; and
> (f) all institutions and persons shall observe and uphold this Constitution and the rule of law and no institution or person shall stand above the law.

4.33 In conclusion, this Court reminded itself including all other duty bearers especially the Executive that the Constitution remains the supreme law of the land as per section 5 and the values of the Malawian Constitution which every Malawian hopes for except this to be the position. This Court in determining this matter further reminded itself again that the protection and promotion of the right to equality and non-discrimination is fundamental and should be closely guarded by all. The Court also noted that the right to dignity should always be maintained for everyone because it sets the clear message that everyone's equal and self-worth is important. Additionally, that the freedom of religion is one that must be enjoyed by those seeking to practice their religion in Malawi. Moreover, that this Court in determining this matter placed heavy reliance on the Constitutional values in coming to its decision and that where there have been violations, the significance of the impact of those violations on the person's life especially the full enjoyment of

rights afforded to them must always be taken into account and highlighted where possible.

5.0 CONCLUSION

5.1 Taking all the above matters into consideration, this Court is in agreement that the Applicants had a significant number of their rights enshrined in the Constitution violated by the Respondents including statutory rights provided for in the Education Act.

5.2 This Court further finds that the said **policy** (***written or unwritten*** (**my emphasis**) by the 2nd Respondent and its consequent application constitutes an unjustifiable limitation on the rights contained in the above sections 44 of the Constitution of the Republic of Malawi. Furthermore, that policy fails to ensure the promotion and protection of rights of Rastafari children to be protected from discrimination and treated equality as enshrined in section 20 of the Constitution.

5.3 It is imperative that at this point, this Court stresses that its role in Malawian society is to uphold the rule of law but more so to promote and protect human rights. This Court therefore remains vigilant and be diligent in its scrutiny of cases where human rights violations are alleged. Courts should be critical and not sanction or encourage illegality perpetrated by those public offices that violate human rights of persons whom they are bound to protect. The Court hereby grants the Applicants the orders as prayers as follows –

5.3.1 the decision of the 2nd 3rd, 4th and 5th Respondents not to allow the 1st Applicant not to register and enrol at Blantyre Girls Primary School and Malindi Secondary School on the ground that she and he have dreadlocked hair is illegal and unconstitutional;

5.3.2 the decision of the 2nd, 3rd, 4th and 5th Respondents not to allow the 3rd Applicant not to register and enroll at Malindi Secondary School on the ground that he has dreadlocked hair is illegal and unconstitutional; and

5.3.3 the policy of the 2nd Respondent that all learners in Government Schools should have trimmed hair including Rastafarian children is unlawful and unconstitutional on the ground that it violates their rights to religion, education and equality and not to be discriminated against on the grounds of religious affiliation as provided in sections 20, 25 and 33.

5.4 The Applicants reliefs are hereby granted as follows -

5.4.1 a declaration that the policy of the 2nd Respondent requiring the 1st Applicant and all other Rastafarian Children to have short hair is contrary to sections 4(1)(a)(b) and 5(2)(i) of the Education Act 2012;

5.4.2 a declaration that the policy of the 2nd Respondent requiring that the 1st and 3rd Applicants and all Rastafarian Children to cut their hair for them to be allowed in Government Schools is unlawful and unconstitutional on the ground that it violated their rights to religion, education and not be discriminated against on the grounds of religious affiliation as provided in the Constitution of the Republic of Malawi sections, 20, 25 and 33;

5.4.3 a declaration that the 2nd Respondent's policy prescribing that the 1st and 3rd Applicants and all Rastafarian children should cut their hair for them to be allowed into Malawi Government Schools is an unreasonable and unjustified limitation on the right to education as provided in sections 25 and 44 of the Constitution;

5.4.4 a like Order to Certiorari quashing the 2nd, 3rd, 4th and 5th Respondents' decision not to allow the 1st Applicant to register and attend Blantyre Girls Primary School on the ground that she has long, dreadlocked hair;

5.4.5 a like Order to Certiorari quashing the 2nd, 3rd, 4th and 5th Respondents' decision not to allow the 3rd Applicant to register and attend Malindi Secondary School on the ground that he has long, dreadlocked hair;

5.4.6 a like Order to Mandamus directing the Respondents to abolish the said policy on the ground that it is unlawful, unconstitutional, unreasonable and unjustified; and

5.4.7 costs of this action.

5.5 This Court in ordering costs understands that such is rare in judicial review cases. Police in Malawi continue to not reform despite the numerous resources that have been sunk into trainings, behaviour change, awareness, policy and legislative reforms. This Court reminded itself that the Applicants had to undertake litigation of this nature in order to protect their rights. Furthermore, costs are being awarded because the Respondents refused to have amicably settled this matter despite their own admission that they thought this was a matter which could have been settled without litigation. This Court finds it critical that the office of the Attorney General be reminded of its primary duty that its behaviour does not undermine the rule of law especially noting that it is the same laws which have empowered it.

5.6 In light of the foregoing, I would make the following additional declarations –

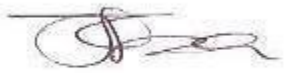
5.6.1 the Executive through the Ministry of Education immediately remove the policy which bans the registration and enrolment of Rastafarian children unless they have cut their dreadlocks;

5.6.2 the Executive that policy development remains their role in Government but that such policies are to be developed in line with the Constitution of the Republic of Malawi and cannot therefore abrogate rights and freedoms that have been guaranteed thereunder. It is imperative that the Ministry of Education issue a directive to all Government schools that Rastafarian children from henceforth should not be stopped from registration and enrolment. This said directive should be issued no later than 30th June, 2023 and a copy be filed with the Court; and

5.6.3 at this point, it became imperative that the final order also be addressed towards the Headmaster or Headmistress of the Blantyre Girls Primary School whose conduct towards the 1st Applicant can only be described as unconscionable. The Court wants to remind the said person that they are a public servant as such duty bound to the law especially the Constitution and Education Act. Their conduct in this matter where there were Court orders directed to them for compliance was tantamount to contempt. Further, their conduct is also conduct liable to litigation if the 1st Applicant so wishes. This Court issues a warning to the said officer that they are not above the law and that their deplorable conduct should not be repeated.

I order accordingly.

Delivered this 8th day of May, 2023 in Zomba.



Z.J.V. Ntaba
Judge