CASE REVIEW

Reverend Ndoria Stephen v The Minister for Education & 2 Others

Amar Roopanand Mahadew

Reverend Ndoria Stephen challenged the Minister for Education, Kenya National Examinations Council and the Honourable Attorney General of the Republic of Kenya before the High Court of Kenya in October 2012 (Ndoria Stephen v Minister for Education and others, Petition No. 464 of 2012; hereafter, the Ndoria case). The crux of the matter was the hardship that children living in what are considered marginalised areas of the country – namely, the north and north-eastern regions and parts of the coast and Rift Valley – were facing in accessing education on the same basis as those in more developed parts of Kenya. The petitioner contended that this situation had arisen due to the government's allegedly discriminatory educational policies.

Accordingly, he requested that, pending the hearing and determination of the case, the Court restrain the respondents from conducting Kenya Certificate of Primary School Education (KCPE) and Kenya Certificate of Secondary Education (KCSE) examinations in 2012 anywhere in the country. The Court was also asked to order the respondents to produce the quotas and policies they were using to ensure that learners from the marginalised areas were not disadvantaged or discriminated against by the KCPE and KCSE exams. In July 2015 the Court gave its decision, one considered of essential importance in the interpretation of the right to education provided by section 43 of the Kenyan Constitution. This article outlines the main arguments of the contending parties and the rationale the Court followed in reaching its decision.

The case for the petitioner

The petitioner, Reverend Stephen, said the petition was brought on behalf of the marginalised communities of Kenya on the ground that they have been deprived of equality of opportunity due to unequal access to education and to consequent advancement in society. He argued that children coming from geographically disadvantaged and marginalised areas have been side-lined and discriminated against by educational policies that do not allow them to compete fairly with children from the rest of Kenya in securing seats in secondary schools and public universities. Consequently, these learners have been performing badly in examinations, as evidenced by several commissions set up by the government to find a solution to the problem.

The petitioner maintained, furthermore, that the Ominde Commission identified Garrisa, Mandera, Isiolo, Tana River, Wajir, Samburu, Turkana, Taita Taveta and West Pokot as regions that required a greater allocation of funds to facilitate access to education. According to him, schools in the marginalised areas were deserted because children were compelled to travel miles to reach schools, where they were without proper sanitation and access to water. He was of the opinion that requiring this category of learner to sit for the same examinations as the rest of the children in the country was discriminatory.

The petitioner illustrated the government's discriminatory practices in education by citing the fact that, whereas a countrywide teachers' strike had resulted in national examinations being

postponed by three weeks, tribal clashes in Tana River County and other areas did not result in any such postponement even though schools remained closed during the clashes. He also mentioned that many students who had been displaced after Kenya's 2008 election violence were still in camps and learning under extremely difficult conditions. Accordingly, it was discriminatory for the government to subject such learners to the same examinations that learners elsewhere in the county would be sitting.

Reverend Stephen argued that, ever since independence, the respondents had failed to devise policies and strategies to ensure that children from marginalised areas were treated fairly and on an equal footing with their counterparts in the rest of the country. He challenged the action of the government purporting to establish admission quotas to public universities and secondary schools on the basis that such a system did not benefit the affected children but instead those from districts or provinces where parents could otherwise afford to enrol their children in private schools and tuition; such parents enroled their children in the affected only in order to benefit from the quotas.

The legal basis upon which this case reposed was articles 53(1)(b), 56(b), 27, 10 and 26 of the Constitution. In terms of article 53(1)(b), '[e]very child has the right to free and compulsory basic education'. Article 56(b) in turn stipulates that '[t]he State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields'. Article 27 concerns equality and freedom from discrimination; article 26 deals with the right to life; and article 10, with national values and principles of governance.

The petitioner argued that the right under article 53 is supposed to be achieved immediately and is not subject to progressive realisation. Citing General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (CESCR), he contended that the essentials of the right to education – such as availability, accessibility and adaptability – are not to be achieved progressively but with immediate effect. In this regard, the petitioner held that teaching materials were not made available immediately in the marginalised areas at the same level as in other parts of the country. Arguing that children were being subjected to the same examinations despite significant differences in materials and facilities for education, he appealed to the Court that the national examinations should be abolished.

The case for the respondents

In their response to the petitioner's argument, the Minister for Education and the Attorney General contended that the government had undertaken various interventions to guarantee access to education for the children of the marginalised areas. They highlighted measures such as financial support, the provision of meals to encourage children to go to school, and the availing of mobile schools for pastoralist communities. Their argument, in brief, was that the government had indeed adopted policies to ensure that children sitting for national examinations from the marginalised areas do so in a conducive environment.

The second respondent, the Kenya National Examination Council (KNEC), opposed the petition and emphasised that its role is to ensure that examinations are carried out based on agreed syllabuses that are prepared by the Kenya Institute of Curriculum Development. The KNEC said that when exam papers were set after the completion of an accepted and approved syllabus, there was an assumption that children were all exposed to a conducive environment. It stated, furthermore, that it was the government's obligation to guarantee the right to education, whereas its was limited to setting examinations.

The Court's ruling

The High Court of Kenya agreed with the petitioner that in some marginalised areas access to adequate learning facilities and teaching materials is very difficult. It also noted that the respondents had not disputed the point that the Constitution provides that the right of every child to an education is to be realised immediately, not progressively, and in a way which is non-discriminatory. The Court reiterated that the central dispute in the matter before it was

the question of whether the respondents had failed to provide for equitable learning facilities to children from marginalised areas and had thus violated the constitutional provisions cited above.

The petitioner had cited the views of the Committee on the Rights of the Child and the CESCR to the effect that although the right to education is a progressive right and is subject to the availability of resources, the prohibition against discrimination and inequality is subject neither to progressive realisation nor availability of resources but applies fully and immediately to all aspects of education. It was also argued that sharp disparities in spending and allocation of funds between marginalised areas and the rest of the country infringed the provisions of the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights (ICESCR) concerning protection against discrimination.

The Court considered the reply of the respondents to determine whether there was a case of discrimination. In terms of evidence, the respondents submitted facts such as the grants offered to children from marginalised areas, namely the Pockets of Poverty Grants, Infrastructure Grants, Service Gratuity Grant and National Schools Expansion Programme. It was also noted that the Directorate of Basic Education had been disbursing funds, such as the Free Primary Education Infrastructure Improvement grants and various funds related to Emergency Response, Non-Formal Schools and Centres, Mobile Schools, Low-Cost Boarding Primary Schools and Special Needs Schools. In addition, with regard to girls from marginalised areas, the government, in collaboration with UNICEF, had allocated 60 slots to girls from the north-eastern region to enable them to study in high-perfuming schools.

In considering the petitioner's claim that the respondents' education practices were discriminatory, the judge in the case, Justice Mumbi Ngugi, held that there was no basis for alleging discrimination against the children by the government, as the petitioner's argument did not meet the legal definition of discrimination. She cited a paragraph from the case of Peter K. Waweru v Republic [2006] eKLR, where the following had been observed:

> *Under Section 82(3) of the Constitution of Kenya, discriminatory means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*

Judge Ngugi stated that it was undisputed that there had been disparities in access to education for children in marginalised areas. However, the government had reacted and taken steps in the form of the multiple policies and grants that had been cited – the petitioner's contention, by contrast, was that such policies had not been implemented and that this had led to differential access to education. The Court did acknowledge that it had only the respondents' testimony to go by as to whether the government's policies and strategies for enhancing access to education were being properly and fairly implemented. In this regard, the Court noted that it had no way of establishing whether the systems in place were indeed operated as the respondents claimed or as the petitioner alleged.

However, Judge Ngugi stated that, as provided by the Constitution, the formulation and implementation of policies fell within the province of the executive. She was satisfied by the mere fact that the respondent had averred that the government had established policies and that these were being implemented. Judge Ngugi held that she was unable to find that the state had failed in its obligations to set policies that would accord children in marginalised areas access to basic education.

She then adjudicated, as summarised below, on each of the petitioner's requests. In response to the request for a declaration that children from marginalised areas were entitled to special provisions in the admission to secondary schools and public universities, the Judge said that the respondents already had a quota system in place. The petitioner also sought a declaration that the respondents had violated the right to education of the children concerned. In reply, the Judge said there were not

enough facts before her to give such a declaration. She added that the evidence before her showed the government was taking measures such as providing grants, bursaries and mobile schools, albeit that their effectiveness had not been debated or that evidence in this regard had been adduced. The other requests – for a declaration that the respondents were discriminating against children from marginalised areas and for an order to abolish the KCPE and KSCE – were also rejected by the Court.

Concluding comments

This case provided an opportunity for the Kenyan judiciary to adjudicate on arguably one of the most important socio-economic rights there is: the right to education. The Constitution of Kenya guarantees the right to education as an enforceable and justiciable right, whereas in other constitutions in Africa this right is either presented merely as a directive principle of state policy or is simply absent (as in, for example, the Constitution of Mauritius). Be that as it may, the Court did not give full consideration to the right as one which is to be achieved progressively, as per article 2 of the ICESCR, yet which also has significant components that are subject to minimum core obligations and are therefore meant to be realised immediately. The Court was bound by the arguments and evidence produced before it, as it acknowledged in its judgment.

However, one may argue that the government's policies and strategies to enhance access to education could have been assessed in terms of their reasonableness as measures. This is the approach that the Constitutional Court of South Africa has taken in several cases, notably in the ***Grootboom*** case – where the reasonableness of a low-cost housing programme was assessed in view of progressively realising the right to housing – and in the *Treatment Action Campaign case*, in which the reasonableness of the measure of providing Nevirapine only in selected state hospitals was assessed with the aim of progressively realising the right to health.

In the same way, the measures taken by the Kenyan government could have been assessed to find out whether they are reasonable and effective enough to progressively realise the right to education of children from the marginalised areas. This argument was not advanced by the petitioner, nor did the respondents adduce evidence relating to it, as the Judge noted.

It may be argued, nevertheless, that the Court could have exercised its discretion and requested such evidence, thereby adjudicating on the matter in a way that shows judicial activism. The petitioner requested that the Court declare the government in violation of the constitutional right to education; it was thus incumbent on the Court to direct the respondents to show how effective and reasonable the measures cited were for it not to grant an order making such a declaration.

Although the Court reached a sensible judgment, in some respects, then, the Kenyan judiciary missed an opportunity to adjudicate more probingly on such an important matter as the right to education. Inspiration could have been drawn from the jurisprudence of the Constitutional Court of South Africa, as well as from the general comments and communications of quasi-judicial bodies such as the CESCR.

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References

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