IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: OTHMAN, C.J., MSOFFE, J.A., KIMARO, J.A., MASSATI, J.A. And MANDIA,J.A.)

CIVIL APPEAL NO 3 OF 2012

ZAKARIA KAMWELA AND 126 OTHERS.....APPELLANTS

VERSUS

THE MINISTER OF EDUCATION AND VOCATIONAL TRAINING..... 1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Nyerere, J. And Aboud, J.)

dated the 2nd day of December, 2010
in
Miscellaneous Civil Application No. 14 of 2009

JUDGMENT OF THE COURT

11th June, & 12th July, 2013

OTHMAN, C.J.

One of the paramount questions for determination in this appeal is the constitutionality or otherwise, under Articles 19(1) and 29(1) of the Constitution of the United Republic of Tanzania, (Cap 2 R.E. 2002) (the Constitution), which respectively, guarantee the right to freedom of conscience and religion and the protection of fundamental rights and duties, of a Circular issued by the Commissioner for Education , which compelled 127 Secondary and Primary School students, believers of

Jehovah's Witnesses, a Christian religious sect, to sing the National Anthem during the school assembly.

The appeal before us is directed against the Judgment and Decree of the High Court (Nyerere, J; Aboud J.), which on 2/12/2010 dismissed the petition by the Appellants, Zakaria Kamwela and 126 others that was instituted under sections 4, 5 and 6 of the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2002 and Article 26(2) of the Constitution.

At the hearing of the appeal, on 11/6/2013, the Appellants were represented by Dr. Saudin Mwakaje and Ms. Rachel van Witsen, learned Counsel. The first and 2nd Respondents, who resisted the appeal, as they did with the petition at the High Court, were represented by Mr. Nixon Ntimbwa and Mr. Mark Mulwambo, respectively, Principal and Senior State Attorneys. Professor Chris Maina Peter and Professor Abdallah Saffari appeared as *amicus curiae*.

The main background facts leading to the appeal were these. The appellants consist of 127 pupils from Shikula Secondary School and a number of other Secondary and Primary Schools in Mbozi District, Mbeya Region. As religion, all the students belonged to Jehovah's Witnesses. They consistently desisted from singing the National Anthem, "*Mungu Ibariki Africa, Mungu Ibariki Tanzania*" (ie. God Bless Africa, God Bless Tanzania) during the morning school assembly, as this was against their

Bible trained conscience, a fundamental religious belief held by all Jehovah's Witnesses. They attended the school assembly, but stood by quietly and respectfully, when other students sang the National Anthem. They neither caused any disturbance during the singing, nor did they show any disrespect to other students who sang the anthem.

The Shikula School Board expelled five (5) of the students on 30/6/2007 for their refusal to sing the National Anthem. The 122 other students were also subjected to disciplinary measures by their schools for the same reason. Their appeal to the Regional Education Appeal Board, was dismissed on 12/10/2007 on the ground that refusal to sing the National Anthem was a breach of the Constitution; that it was against Education Circular No 4 of 1998 ("**NYIMBO ZINAZOJENGA HISIA ZA KITAIFA**" (i.e. SONGS WHICH BUILD NATIONAL CONSCIOUSNESS) (the Circular) issued on 6/6/1998 by the Commissioner for Education (the Commissioner) and that they had categorically refused to sing the National Anthem.

On 30/10/2007, the Appellants further appealed to the Minister responsible for National Education (the Minister). On 24/6/2008, the Deputy Principal Education Officer of the Ministry of Education informed them that it had been decided that they be re-instated to their respective schools on condition that each one of them agrees to sing the National

Anthem, daily at school and signs a special form to the effect that he or she will do so, before being re-admitted.

Undisuaded, on 6/11/2008 they sought audience to see the Prime Minister. They were advised by the Prime Minister's Office on 11/11/2008 that should they consider themselves aggrieved by the decision of any Educational authority, redress should be sought from the Court. On 19/3/2009, they instituted a petition at the High Court seeking, mainly, the following reliefs:

(i) *a declaration that the decision of the Minister for National Education dated 24/6/2008 violated Articles 13(4) and 19(1) and (2) of the Constitution;*

(ii) *a declaration that the Education Circular dated 6/7/1998 issued by the Commissioner for Education compelling them to sing the National Anthem, despite their genuine, conscientious religious objections contravened Articles 19(1) and 29(1) of the Constitution;*

(iii) *a declaration that their expulsion and objections for not singing the National Anthem constituted in itself a violation of Articles 19(1)-(2) and 29(1) of the Constitution and,*

(iv) an order directing the 1st Respondent to allow them to return to their respective schools, without any imposed conditions.

The majority Judges in the High Court (Nyerere, J, Aboud, J.) dismissed the petition in its entirety, principally holding that neither the Circular nor the decision of the Minister contravened the Appellants' right to freedom of religion under Article 19(1) of the Constitution.

Shangwa, J., on the other hand, in his dissenting opinion, held the contrary position. He opined that forcing the Appellants, whose religious belief does not allow them to sign the National Anthem, was an infringement of Article 19(1).

Hence this appeal.

Considering the Appellant's sixteen grounds of appeal, the well researched written submissions and the oral arguments, we are of the settled view that this appeal can be exhaustively attended to by considering two critical issues.

The first pertinent question to be answered by the Court is whether or not the Appellants were *prima facie* entitled to the enjoyment and guarantee of the right to freedom of religion enshrined in Article 19(1) of the Constitution.

The learned majority Judges found out that it was "undoubted" that the Petitioners were faithful Jehovah's Witnesses. They additionally found that their refusal to sing the National Anthem was based on the fact that it was against their Bible trained conscience. However, they held that the Appellants had failed to show clear evidence as to *how* the National Anthem had offended their freedom of religion. The majority Judges were of the decided view that the National Anthem was not a prayer; and only if it had been one, would the Appellants have been entitled to seek "refuge" under Article 19(1). They concluded that the Appellants were not entitled to the protection of the right to freedom of religion under Article 19(1).

Dr. Mwakaje and Ms. van Witsen forcefully submitted that the right to freedom of religion is a right that all Tanzanians are entitled to, under Article 19(1). Citing **Dibagula v. The Republic** (2003) AHRLR 274 (CAT); **Julius Ishengoma Francis Ndyanabo v. Attorney General**, (2004) T.L.R. 14 and **R.v. Big M Drug Mart Ltd.** (1985) 1 SCR. 295, para. 117, they pressed the point that fundament rights enshrined in the Constitution should not only to be broadly and generously interpreted, but must also be jealously protected by the Court as the guardian of the Constitution and not by the Executive or the Legislature.

Relying on **Julius Ishengoma Francis Ndyanabo's case** (*supra*, p. 17) and **Charles Obbo v. Attorney General** (2000) UGCC 4, they submitted that the onus of proof was on Petitioners to establish that their right to freedom of religion under Art 19(1) had been violated by the 1st Respondent. That in considering whether this had been occasioned, it was first necessary to determine if the Appellants' refusal to sing the National Anthem was based on their religious belief. The learned majority Judges, they submitted, fell into grave error in inquiring into the *validity* of the Appellants' religious belief, rather than carefully assessing the *sincerity* of their religious belief. By doing so, the majority embarked on a theological inquiry. The determination of the Appellants' sincerity of religious belief involved a secular judicial determination; not a theological inquiry.

Furthermore, Dr. Mwakaje and Ms. Van Witsen cogently submitted that what attracts an individual's protection to the right to freedom of religion under Article 19(1) is the Appellants' sincerity of belief; not the attractiveness of that belief. The undisputed facts of the case showed that the Appellants had refused to sing the National Anthem because of their sincerely and conscientiously held religious belief. That sincerity of belief was further evidenced by their refusal to compromise on the

Circular or to act contrary to their religious conscience, resulting in denial of their right to education.

They placed reliance on **Bijoe Emmanuel and Others v. State of Kerala and Others**, 1987 AIR (SC) 748, para 19-20; **Syndicat Northcrest v. Amselem** (2004) 2 S.C.R. 551, paras; 43, 52; **Regina v. Secretary of State of Education and Employment and others**, ***ex parte* Williamson and others**, (2005) UKHL 15, para. 22; and **West Virginia State Board of Education v. Barnette,** 319 US. 624(1943), pp. 642-643.

Opposed, Mr. Ntimbwa and Mr. Mulwambo submitted that the role of the majority Judges under Art 107A(2)(e) of the Constitution was to do justice without being unnecessarily curtailed by legal technicalities. While it was a fact that a person has the right to believe in a certain way in order to exercise his right to freedom of religion under Article 19(1), when his or her way of practicing his religion is in issue, as was the case at hand, then courts of law had the power to inquire. The majority Judges were therefore entitled to inquire as to *how* the National Anthem offended the Appellants' religious belief. They correctly did not see *how* the National Anthem operated against the Appellants' religious belief. To have done otherwise as the Appellants demand, is to ask the High Court

to decide out of thin air. The Court never crossed the threshold of theological reasoning.

Mr. Ntimbwa and Mr. Mulwambo contended that it was not enough to earn the protection of the right to freedom of religion under Article 19(1) for the Appellants to assert that they quietly and respectfully stood by as other students sang the National Anthem and they did not sing it. As the National Anthem was secular, it could not have offended the Appellants' religion or any other religious belief. Also drawing support from **Syndicat Northcrest's case** *(supra)*, they conceded that sincerity of belief was the applicable test.

Supporting the appeal, Professor Saffari lucidly submitted that contrary to what the learned majority Judges had found out as the basis of the Appellants' religious belief on the singing of the National Anthem, they had exhibited empirical evidence on the existence of the genesis of their genuinely and sincerely held religious belief that if they sang the National Anthem they will not go to heaven. The majority Judges had not sufficiently exercised their minds on the relevant Biblical verses or Encyclopaedic sources, which formed the genesis of that belief. The High Court's misdirection on this very issue was fatal to the correct determination of the case.

Professor Saffari further submitted that the learned majority Judges found out that the National Anthem is not a prayer; however the Appellants, because of their religious belief, think otherwise. On this score, the majority erred in holding that the National Anthem is not a prayer in the Appellants' minds and religious beliefs. Had this been correctly decided, the Appellants could have sought "refuge" under Article 19.

Professor Peter, also fully supporting the appeal, succinctly submitted that what was protected under Article 19(1) was belief based on religion. Once it is established that the religious belief is genuine and conscientiously held, as part of the profession or practice of religion, then it is sufficient to warrant protection under Article 19(1). He relied on **Syndical Northcrest's case (*supra*); Secretary of State for Education and Employment and others, *exparte* Williamson's and others case (*supra*), and Multani v. Commission Scolaire Marguerite-Bourgeoys** (2006) 1.S.C.R. 256.

In resolving the controversy before us, it is necessary, we think, to preface and to re-emphasized what the Court stated in **Julius Ishengoma Francis Ndyanabo's case** (*supra*, p.29):

" ***the provisions touching fundamental rights have to be interpreted in a broad and liberal***

manner, thereby jealously protecting and developing the dimensions of those rights *and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the well and dominant aspirations of the people prevail.* ***Restrictions on fundamental rights must be strictly construed****." (Emphasis Added).*

In our considered view, this remains the correct and proper approach.

Other Commonwealth jurisdictions have taken a similar position. In **Hunter v. Southam Inc.** (1984)2 S.C.R. 145, the Supreme Court of Canada stated that the basic approach to be taken by the Court in interpreting the Canadian Charter of Rights and Freedoms (Constitution Act, 1982) should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the protection accorded therein (See also, **R.V. Big M Drug Mart Ltd.** (*supra*, paras. 116-117).

We fully endorse that view.

First and foremost, it should be borne out that the United Republic of Tanzania (Tanzania) is a secular State (Art 3(1) of the Constitution).

The founder of our Nation, Mwalimu Julius Kambarage Nyerere eminently stated:

> *"Nchi yetu haina dini". Watu wetu wana dini, wengine wanazo dini na wengine hawana."*
>
> *[i.e. Our country has no religion. Our people have religion, some have a religion and others do not have one.] (**Nyerere, J.K., Nyufa**, Dar es Salaam: Mwalimu Nyerere Foundation, 1995, pp. 27-28).*

This view was reinforced by Mzee Ali Hassan Mwinyi, the former President of Tanzania this way:

> *".....Serikali ya Taifa letu haina dini yake rasmi.*
>
> .....
>
> *Katika misingi hiyo hiyo, hatuna dini inayojulikana kwamba ni dini ya Rais, ...Wananchi wa Tanzania wenyewe, na kwa hiari yao wenyewe, ndio wenye dini yao...Misingi hiyo ndiyo iliyotuwezesha kujiepusha na ubaguzi wa dini katika nchi yetu na hivyo kuimarisha umoja wetu. Misingi hiyo pia imeimarisha uhuru wa kila Mtanzania kufuata dini aipendayo yeye mwenyewe."*

*(**Mwinyi Ali Hassan, Uhuru wa Kuabudu,***

Peramiho Printing Press, 1987, pp.10-12).

Furthermore, Article 19(2), of the Constitution, in its English translation provides:

> *"19 (2) The **profession of religion, worship** and propagation of religion **shall be free and a private affair of an individual,** and the affairs and management of religious bodies shall not be part of the activities of the State authority. (Emphasis added)*

Each and every person in Tanzania has the right to enjoy the fundamental rights engraved under PART II, BASIC RIGHTS AND DUTIES, of the Constitution and expressly provided for under Articles 12 to 28. The right to freedom of conscience and religion is enforceable under Article 26(2) of the Constitution, read together with sections 4, 5 and 6 of the Basic Rights and Duties Enforcement Act, Cap 3 (R.E. 2002).

The right to freedom of conscience and religion that each and every person enjoys is plainly set out in Article 19(1) which in its English version reads:

> *"19(1) **Every person has the right to the freedom of conscience, faith** and choice in matters*

of religion, including the freedom to change his religion or faith." (Emphasis added)

The right to freedom of conscience and religion under Article 19(1) mirrors both Article 18(1) of the International Covenant on Civil and Political Rights (1966), which Tanzania acceded to on 11 June 1976 and Article 8 of the African Charter on Human and Peoples Rights (1981) (Banjul Charter), of which Tanzania is a State Party. As can be appreciated from the above, it is not only our own Constitution that guarantees to every person the right to freedom of conscience and religion, but our international legal obligations also require us to do the same.

The Constitution is silent on the National Anthem. The National Emblems Act, Cap 10, R.E. 2002 which provides for the National Flag and the Coat of Arms as National symbols also contains no provisions on the National Anthem. It is the Appellants' position that the National Anthem in itself does not offend their religion, Jehovah's Witnesses. They neither seek to challenge its salutary purpose nor its contents or words. Ms. van Witsen submitted that the Appellants' conduct in not singing the National Anthem was not the lack of respect for Tanzania, its National Anthem or National symbols. The clear-cut and precise point they urge, is that it is the singing of the National Anthem that is against

the tenets of their sincerely and conscientiously held religious belief, guaranteed under Article 19(1).

That clarified, given that the appeal centres on the right to freedom of religion, it is helpful, we think, that we should examine, albeit briefly, the meaning of the expressions "religion", "religious belief" and the concept: religious freedom. "The chief function in law of a definition of religion", said the court in **Church of New Faith v. Commissioner of Pay Roll Tax (Vic)**, (1983 HCA 40, para. 7)

> *"is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint".*

Our Constitution does not define the word "religion". The Interpretation of Laws Act, Cap 1 R.E. 2002 also does not. Of interest, section 2(1) of the Law of Marriage Act, Cap 29 R.E. 2002 gives as the meaning of religion, "any system of belief which is divided into denominations, sects or schools, any such denomination, sect or school and includes any non-denominational body or other association of a religious nature".

A further appreciation of the above expressions, can also be browsed from case law.

In **R. V. Big M. Mart Ltd's Case** (*supra*), the Canadian Supreme Court (para. 94) observed:

> *"The essence of the concept of freedom of religion is* ***the right to entertain such religious beliefs as a person chooses*** *the right to declare religious beliefs openly and without fear of hindrance or reprisal and* ***the right to manifest religious belief by worship and practice*** *or by teaching and dissemination". (Emphasis Added)*

In **Christian Education South Africa v. Minister of Education** (2000) ZACC 11; 2000(10) BCLR 1051, para. 36, the Constitutional Court of South Africa stated:

> *".....****freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to the sense of themselves, their community and their universe.*** *For million in all walks of life, religion provides support and nature and a framework for individual and social stability and*

growth. ***Religious belief has the capacity to awake concepts of self- worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.*** *(Para. 36) (Emphasis Added).*

In Syndicat Northcrest's case (para. 39) (*supra*) the Supreme Court of Canada again opined:

"Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to invoke the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected with an individual's spiritual faiths and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith". *(See also,* ***Church of New Faith case*** *(supra, para. 14) (Emphasis added)*

In the **Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** (1954) INSC 46, AIR 1954 SC 282, the Supreme Court of India stated:

> ***"Religion means "a system of beliefs or doctrines which are regarded by those who profess that religion as conductive to their spiritual well being"....*** ***"A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well".*** *(See also,* ***S.P. Mittal v. Union of India & Others,*** *AIR 1983 S.C.1) (Emphasis added).*

In the **Commissioner of Police and Others v. Acharya Jagdishwaranda Avadhuta & Another** ([2004] INSC 155, para. 25), again the Supreme Court of India remarked:

> ***"What is Religion. Religion is a social system in the name of God laying down the Code of Conduct for people in Society.***
>
> .....
>
> ***Essentially, Religion is based on "Faith"....***
>
> *Faith in Religion influences the temperament and attitude of the thinker.*

Religion includes worship, faith and extends to even rituals. Belief in religion is belief of practice a particular faith, *to preach* ***and to profess it. Mode of worship is integral part of religion".*** *(Emphasis Added).*

Having closely reconsidered the issues raised, we would agree with Dr. Mwakaje and Ms. van Witsen that the learned majority Judges seriously misdirected themselves in questioning the *validity* of the Appellants' religious belief. The generous and purposive approach they were enjoined to take at the threshold, was to satisfy themselves on the material available, whether or not the Appellants' religious belief was genuinely, sincerely and conscientiously held, as part of the profession or practice of their religion. With respect, this line of inquiry was not satisfactorily pursued to its proper conclusion.

In **Bijoe Emmanuel's case** (*supra*, para.4), the Supreme Court of India, explained it thus:

"The question is not whether a particular religious belief or practice appeals to our reasons or sentiments but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. *Personal*

views and reactions are irrelevant. ***If the belief is genuinely and conscientiously held, it attracts the protection of Article 25****, but subject to the inhibitions contained therein". (Emphasis Added).*

To a significant extent, Article 25(1) of the Constitution of India mirrors Article 19(1) of our Constitution.

Similarly, the Supreme Court of Canada in **Syndicate Northcrest's case** (*supra*, para. 53) stated:

"Assessment of sincerity is a question of fact that can be based on several non-exhaustive criteria, including the credibility of a claimant's testimony, as well as an analysis of whether the alleged belief is consistent with his or her other current religious practices*. .....*

Religious beliefs, by their very nature, are fluid and rarely static. A person's connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perceptions of religious objection emanating from such a relationship, may well change and evolve over time. Because of the vacillating nature of religious belief, ***a Court's***

inquiry into sincerity, if anything, should focus *not on past practice or past belief but* ***on a person's belief at the time of the alleged interference with him or her religious freedom****". (See also at paras: 42, 45).*

In Secretary of State for Education and Employment and others, *ex parte* Williamson's case (para. 22), the House of Lords in England and Wales had this to say:

"Freedom of religion protects the subjective belief of the individual.....religious belief is intensely personal and can easily vary from one individual to another. ***Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seen to some, however surprising****" (Emphasis Added).*

In **Multani v. Commission Scolaire Margurite-Bourgeoys** (*supra*, para. 35) the Court explained:

"What an individual must do is show that he or she sincerely believes that a certain belief or practice is required by his or her religion. The religious belief must be asserted in good faith

and must not be fictitious, capricious or an artifice". *(Emphasis added)*

We find persuasion in that approach, which we are prepared to accept. That route, we wish to add has been followed by the Supreme Courts of Canada (**Syndicat Northcrest's case; Multani v. Commission Scolaire Margurite-Bourgeoys** (*supra ;* India (**Bijoe Emmanual's case** (*supra*); Uganda (**Sharon and Others v. Makerere University**, (2006) UGSC 10 and the House of Lords (**Secretary of State for Education and Employment and others, *exparte* Williamson's case** (*supra*, para. 22).

Having closely considered the matter, we entertain no doubt that a generous and purposive interpretation of the right to freedom of religion under Article 19(1) of the Constitution calls for it to be judicially determined from the platform of a believer's sincerity and conscientiousness of his or her religious belief and conviction. Belief in religion, as a matter of consciousness and personal faith also involves among other things an individual's nexus or relationship with the Divine, Supernatural Being, Transcendent Order, Controlling Power, Thing, Doctrine or Principle. Moreover, the protection afforded by Article 19(1) and (2) goes to religious belief and its manifestation or practice.

At the High Court, it was, therefore, inept for the Respondents to label the Appellants' refusal to sing the National Anthem against their religious belief, as nothing but "anarchic behaviour". We respectably also say so, because there was no evidence that the Appellants had in any way disrupted the school assembly or shown any disrespect to other students who sang the National Anthem.

In our settled view, going by the approach distilled above, would also be consistent and in consonant with what the Court observed in **Dibagula v. The Republic** (2003) AHRLR 27A (CAT) when dealing with, among other issues, a question touching on fair trial and the right to freedom of religion under Article 19(1) of the Constitution. The Court stated:

> *"Is Jesus Christ the Son of God? Millions of persons would sharply disagree as to the correct answer to this question. Some would entertain no doubt whatsoever than an answer in the affirmative is the correct one; to others, 'No' would, without the slightest doubt, be the correct answer. Whichever is the correct answer; the question is purely a religious one and therefore, cannot fall for determination by a*

court of law. It is not, therefore, one of the questions which the instant appeal can possibly answer".

Having closely revisited the matter, we are of the considered view that once the majority Judges had correctly found out that it was "undoubted" that the Appellants were faithful Jehovah's Witnesses and that their refusal to sing the National Anthem was grounded on their Bible trained conscience, they seriously misdirected themselves when they delved into an inquiry on the *validity* of the Appellants' religious belief. With respect, this question should not have energized the High Court in the way it did.

We would agree with Dr. Mwakaje and Ms. van Witsen that the crucial question of emphasis was not *how* the National Anthem offended the Appellants' freedom of religion. The high or secular purpose of the National Anthem as an expression of nationalism or patriotism was not at all at challenge. On the contrary, what was to have been the trial Courts' central focus of analysis was the Appellants' religious belief. Whether they harbored a genuine, sincere and conscientiously held belief that singing the National Anthem was against their religious conviction. In dealing with the right to freedom of religion, the above test is most essential. This the Respondents conceded. With respect, it could not have been a mere technicality of the law, as they unattractively argued.

We would equally agree with learned Counsel for the Appellants and Professor Saffari that there was ample and sufficient evidence that the Appellants had a sincere and conscientiously held belief that singing the National Anthem was against their religious conviction. (See, also **Encyclopaedia Britannica (Macropaedia)** Vol II, page 538; **Bijoe Emmanuel's case** (*supra*) pp 750-751 and authorities cited therein; **Adelaide Company of Jehovah's Witnesses Incorporated v. The Commonwealth** (1943, 67 C.L.R. 116). The Appellants had also sufficiently shown that this was an essential part of the practice of their religious faith.

The devoutness and deep-rooted nature of the Appellants' religious belief can also be traced from the uncontroverted fact that some of them never sang the National Anthem during the morning school assembly throughout the whole of their primary school education, having completed their formal elementary education as Jehovah's Witnesses (See, para. 3 of the Affidavit of Zakaria Kamwela).

Furthermore, the sincerity and conscientiousness of their religious belief could also have been evaluated from another established fact. The Appellants were prepared to suffer illiteracy and for some even to forfeit their primary education, compulsory under s. 35(1) of the National Education Act, Cap 358 R.E. 2002 (the Act), rather than yield to the

compulsion of singing the National Anthem, against their genuine and conscientiously held religious conviction. For some of the students, like Zakaria Kamwela, Tamaini Kamwela, Musa Mlawa, Upendo Njole and Sahari Nyausa this sacrifice has even lasted over six (6) years!

Dealing with almost a similar issue, in **Bijoe Emmanuel's case** (*supra*, p. 749), the Court stated:

> *"We are afraid* ***the High Court*** *misdirected itself and went off at a tangent. They* ***considered in minute detail, each and every word and thought of the National Anthem and concluded that there was no word or thought in the National Anthem which could offend anyone's religious belief. But that is not the question at all. The objection of the petitioners is not to the language or the sentiments of the National Anthem: they do not sing the National Anthem, wherever, 'Jana Gana Mana' in India, 'God save the Queen' in Britain, the Star-spangled Banner in the United States and so on.....***

In the end, we find persuasion in the submission by Dr. Mwakaje and Ms. van Witsen that the Appellants' *prima facie* right to freedom of

religion under Article 19(1) was triggered by what they had sufficiently established. In our considered view, they were more than entitled to seek "refuge" thereunder. They were entitled to enjoy the right to freedom of conscience and religion, guaranteed under Article 19(1), subject to legitimate limitations or derogation.

Giving the matter further scrutiny, it is on record that the Appellants' religious belief was also erroneously rejected by the learned majority Judges for another reason. They opined:

> *"we are of also the considered view that in any case, accepting the religions sentiments of one religion group would mean do away with the declaration that Tanzania is a "secular" State. The impact would be to accept all other sentiments that will subsequently be presented to Court by other religious bodies on several issues whole list is endless."*

With respect, the majority Judges again misdirected themselves on the matter. Tanzania as a secular State guarantees the right to freedom of religion embodied in Article 19(1). What was at issue was the Appellants' religious belief. Not the beliefs of any other religious groups. Moreover, there was no evidence before the Court of any other religious belief, than that of the Appellants'.

The inevitable question that follows second, is whether or not the Circular was legally and validly issued and if so, whether or not it infringed the Appellants' right to freedom of religion under Article 19(1).

Dr. Mwakaje and Ms. Van Witsen submitted that the Circular purportedly issued under Section 5(f) of the National Education Act was not made under the authority of the law. Also, it did not amount to delegated legislation within the terms of Article 97(5) of the Constitution. That the powers of the Minister under section 5(f) thereof were subject to the provisions of 'any other written law', which included Article 19(4).

Learned Counsel for the Appellants resourcefully submitted that the Circular was also not validly issued by the Minister who had the power to make regulations under Section 61(o) of the Act prescribing the conditions of expulsion or exclusion from schools, of pupils on grounds of discipline. The Circular, they emphasized, was issued by the Commissioner who was not referred to under section 61(o). To the effect that the Circular resulted in denial of the Appellants' right to education, a highly prized possession, on religious grounds, it was also *ulta vires* section 57(2) of the Act, which stipulated that no person may within Tanzania, be denied opportunity to obtain any category, nature or level of education for reasons of religion. The Circular was thus in conflict with the National Education Act itself.

Resisting, Mr. Ntimbwa and Mr. Mulwambo submitted that the Circular which had existed since 6/7/1998 without any challenge by the Appellants, was lawfully issued under section 5(f) of the Act. They agreed with learned Counsel for the Appellants that only proper regulations made in accordance with the procedure set out for delegated authority had the force of law. The Circular they added, was made under the Minister's delegated authority. All students were required to obey it as a matter of school law. By disobeying the Circular, the Appellants breached a public order emanating from the Act.

The Respondents submitted that the Circular did not offend any religion as it was directed to all pupils in all schools and not to the Appellants only. The intention of the Circular was to foster public good for the National Anthem as a symbol of nationhood. That as singing the National Anthem was in public interest, then the Appellants' refusal to do so violated Article 30(1) of the Constitution, which bars anyone from acting against public interest.

Relying on Articles 3(1) and 19(2) of the Constitution, Mr. Ntimbwa strenuously submitted that Tanzania is a secular state that separated religious matters from state affairs. That at school, a secular institution involving the affairs of the State, the Appellants were required to comply with the Circular and to sing the National Anthem. Outside the school,

they were free to privately practice their religious belief. During school time, secular affairs prevailed over religious beliefs. As such, the Circular neither offended any religion nor interfered with the Appellants' religious belief in school.

Questioned by the Court, Mr. Ntimbwa conceded that the Circular did not provide for any punishment in case of non-compliance by a student in singing the National Anthem.

Professor Peter submitted that under the Act, the Minister was empowered to issue regulations. Under Section 61(2), he could delegate those powers to the Commissioner. In the instant case, there was no evidence that the Minister had delegated his authority to the Commissioner to issue the Circular. It could thus be safely concluded that the Circular was just a letter. It was not strictly speaking a by-law validly made by the relevant authority under the Act. That even if the Minister had delegated his powers to make regulations under the Act to the Commissioner, it was still necessary, under section 61 (3), to have gazetted the Circular for it to have any legal effect. This, it appears, was not done.

Professor Peter went on to add that as the very Education authority that issued the Circular, i.e. Commissioner, had no powers to do so under the Act, it was a nullity and had no legal effect. Nobody had

a duty to comply with it. The Appellants could not have been expelled or suspended for allegedly disobeying an order whose legal value is suspect.

On his part, Professor Saffari was of the view that only to the extent of the Circular having been issued, it was lawful. The Circular, he submitted, had the force of law in terms of the doctrine of delegated authority in Administrative Law, as it was made by the Commissioner on behalf of the Minister who had such powers vested in him under section 61 of the Act. However, he immediately distanced himself from the Circular by indicating that it did not specify therein that refusal to sing the National Anthem attracted expulsion or suspension from school. The Circular, as a limitation on the Appellants' right to freedom of religion under Article 19(1) was also unnecessary to ensure discipline or promote nationalism or to protect public interest. It was, he submitted, arbitrarily made and irrational. Article 30(2) of the Constitution could not save it.

Given that the Circular is at the heart of the controversy, it is imperative that we quote it in full:

JAMHURI YA MUUNGANO WA TANZANIA

WIZARA YA ELIMU NA UTAMADUNI

Anwani ya Simu: "ELIMU"
DAR ES SALAAM
Telex: 42741 Elimu Tz
Simu: 110146/9, 110150/2
Fax: 113271
Unapojibu tafadhali:
Kumb. Na ED/OK/C.2/4/59

S.L.P. 9121
DAR ES SALAAM

Tarehe: 6/7/1998

Makatibu Tawala wa Mikoa
Makatibu Tawala wa Wilaya
Wakuu wa Shule za Sekondari
Wakaguzi Wakuu wa Shule wa Kanda
TANZANIA BARA

WARAKA WA ELIMU NA. 4 WA MWAKA 1998
NYIMBO ZINAZOJENGA HISIA ZA KITAIFA
[EDUCATION CIRCULAR NO 4 OF 1998
SONGS WHICH BUILD NATIONAL CONSCIOUSNESS]

Nidhamu ya wanafunzi wengi katika shule na vyuo imepungua. Ni jambo la kawaida kwa wanafunzi walio wengi kutoheshimu Viongozi, watu wazima ama hata walimu wanaofundisha. Mwalimu anaweza kupita kundi la wanafunzi akiwa amebeba mzigo asitokee hata mmoja wao kumpokea. Aidha kiongozi wa ngazi za juu anapotembelea shule anaweza kupita kundi la wanafunza wamekaa wanaongea wakaendelea kukaa kama kwamba aliyepita ni mwanafunzi mwenzao. Vitendo vya namna hii vinaonesha utovu wa nidhamu na ukosefu wa heshima miongoni mwa vijana wetu. Hali hii haikuwepo miaka ya nyuma.

Zipo sababu nyingi zinazochangia watoto kuwa na heshima na nidhamu. Mojawapo ya sababu hizi ni kuimba nyimbo zinazojenga Uzalendo. Baadhi ya nyimbo hizo ni Wimbo wa Taifa, TAZAMA RAMANI UTAONA NCHI NZURI NA TANZANIA NAKUPENDA KWA MOYO WOTE.

Ili kujenga uzalendo na kurudisha nidhamu na heshima kati ya vijana wetu mnaagizwa kuhakikisha wanafunzi wote wanafundishwa nyimbo hizi na kuziimba wakati wa sikukuu za kitaifa. Aidha, Wimbo wa Taifa ni sharti uimbwe kila siku za kazi asubuhi na wakati wa mkusanyiko kabla ya kuingia darasani.

Umesainiwa na
A. S. Ndeki
KAMISHNA WA ELIMU (Emphasis Added)

The learned majority Judges found out that the Circular was issued by the Minister under section 5(f) of the Act and was enforceable in law. On his part, Shangwa, J. did not question the legality of the Circular.

Now, section 5(f) of the Education Act provides:

> *"5. For the purposes of discharging his responsibility under this Act, the Minister may-*
>
> *(f) subject to the provisions of this Act, and of any other written law in that behalf, do any other act or thing which in his opinion is designed to or may further the promotion of education, having regard at all times to the national interests and the interests of the people of the United Republic."*

The duties of the Commissioner are provided for in section 8 of the Act, which reads:

> *8.(1) Subject to the provisions of this Act and to any directions and instructions given to him by or on behalf of the Minister, the Commissioner shall be responsible for the general management and administration of all schools.*
>
> *(2) Notwithstanding the provisions of subsection (1), non-government schools shall be managed and administered in accordance with the directions of the Commissioner.*

The Circular requires very close scrutiny. It is clearly visible on its face that it was not issued and signed by the Minister. It is common ground that the Minister has full capacity to delegate his functions and powers to make regulations under the Act to the Commissioner. Taking the scheme, purposes and objects of the Act; sections 5, 8 (1) and 61(2) read together may be taken to be the statutory basis that supports a delegation of authority vested in the Minister. As proposed by Professor Saffari, so does the principle governing the delegation of administrative authority in Administrative Law. Going by the record, no evidence was afforded that the Minister had delegated his powers to make regulations on the singing of the National Anthem and disciplinary measures resulting thereof, to the Commissioner. The Circular, therefore, could not have amounted to a valid regulation and one that was properly issued under section 61(o) or 61(v) of the Act. Worst still, we are not persuaded that the Circular was published in the *Gazette*, as is required by section 61(3).

Even assuming that the Commissioner, being the person responsible under section 8(1) and (2) of the Act, for the general management and administration of all schools, had independent or original authority to issue the Circular, in our respectful view, as an administrative or ministerial instruction, that communication could not

have had any force of law or be held to amount to a regulation properly issued under Rule 61. If anything, it was a mere administrative Circular. Moreover, it could not in Law be equated to a bye-law arising out of the Act. Mr. Ntimbwa was candid enough to admit that save for a delegation of power by the Minister, the Commissioner, by his own authority, could not make regulations under the Act. In these circumstances, in our considered view, the Circular, could not lawfully serve as a legal restraint on the Appellants' exercise of their right to freedom of religion under Article 19(1).

In so far as the right to freedom of religion and the Circular are concerned, the facts in this case are not too remote from those in **Bijoe Emmanuel's case** (*supra*, pp. 752-755). There, the Director of Public Instruction, Kerala had issued two Circulars which among other matters, had directed pupils to sing the India National Anthem in all schools during the morning school assembly. The Appellants therein, who were faithful Jehovah's Witness were expelled from school for not singing the song because of their genuinely and conscientiously held religious belief. The Supreme Court of India found out that the Circulars did not have the force of a statute and were mere departmental instructions. It held that the Circulars could not be invoked to deny a Citizen the fundamental

rights under Article 25(1) of the Constitution of India. We find that decision persuasive.

A much closer examination of the Circular in the instant case, startlingly reveals that it was not even addressed to the Heads of Primary Schools or School Committees established under section 40 of the Act. Bearing in mind, it remains unanswered how it could have been used as the lead legal instrument for the imposition of disciplinary measures (suspension or expulsion) against 102 of the 127 Appellants, who were primary school students at the material time. The Circular was only directed to Heads of Secondary Schools, Regional and District Administrative Officers and Zonal School Inspectors. No clarification or explanation was offered by the Respondents, as to the basis of its application to Primary Schools, which were not its addressee.

That apart, in our respectful view, the Respondents' argument that the Appellants were required to abandon their religious belief or faith during school hours and resuscitate them once outside the school is misconceived. First, the Appellants' religious belief was not part of any school instruction. Second, Article 19(1) and (2) of the Constitution not only protects every person's religious belief, but also its manifestation or practice. Third, secularism and religion are not necessarily incompatible or always in competition. "Secularism is neither Anti-God nor Pro-God; it

treats alike the devout, the agnostic and the atheist". (Justice H. K. Khanna, cited in **Santosh Kumar and Others v. The Secretary, Ministry of Human Resources Development and Another**, AIR 1995 SC 293, para. 17).

In so far as the right to freedom of religion and the School as an educational institution are concerned, we find relevant the cautionary words of the United Nations Human Rights Council's Special Rapporteur on the Right to Freedom of Religion or Belief, who stated:

> *"Freedom of religion or belief and school education is a multifaceted issue that entails significant opportunities and far-reaching challenges. The school is the most important formal institution for the realization of the right to education. It provides a place of learning, social development and social encounter. At the same time, the school is also a place in which authority is exercised and some persons, including members of religious or belief minorities, may find themselves in situations of vulnerabilities. Given this ambivalence of the school situation, safeguards to protect component of*

freedom of religion or belief which enjoys an absolute guarantee under international human rights law.

*With regard to the freedom to manifest one's religion on belief, both the positive and the negative aspects of that freedom must be equally ensured, i.e. the freedom to express one's conviction as well as the freedom not to be exposed to any pressure especially from State institutions, to practice religious or belief activities again one's will. (**United Nation Human Rights Council, Rapporteurs Digest on Freedom of Religion or Belief, (2011), para 57**).*

On the whole, we are not persuaded that the Circular stemmed from any lawful delegated authority by the Minister or had the binding force of law. Legally wanting, it could neither have been the legal basis for the imposition of any disciplinary action against the Appellants under section 61(o) of the Act. Significantly, it could also not by any measure, override the Appellants' entitlement to the right to freedom of religion guaranteed under Article 19(1).

With respect, the learned majority Judges seriously misdirected themselves, first, in holding that the Circular was issued by the Minister under section 5(f) of the Act; second, in its finding that failure to observe

it amounted to a breach of the law; and third, in their omission to notice that it was not even directed to Heads of Primary Schools or to the School Committees.

With the conclusion that we have arrived at, it is not necessary for the determination of this appeal to embark on a debate on the purposes or contents of the Circular. Moreover, it would be premature, if not prejudicial, for us to answer the question whether or not it was a legitimate limitation of or permissible derogation of the Appellants' right to freedom of religion under Articles 19(3) or 30(2) of the Constitution, on grounds of national cohesion or interest, patriotism, secularism or public peace.

Mindful of the depth of the parties opposing submission on the extent of or limitation to the right to freedom of religion; the scholarly opinion of Professor Saffari and Professor Peter and recognizing the importance in Tanzania, a secular State, of every person's right to freedom of religion under Article 19(1), we are constrained to make the following observations.

It is common ground that the fundament rights and duties enshrined in Articles 12 to 28 of the Constitution, including the right to freedom of conscience and religion under Article 19(1) are not absolute (See also, **Prince v. President of the Law Society of Good Hope**

(2000) ZACC 28; **Ross v. Brunswick School District No 15** (1996) 1 S.C.R. 825, para. 72; **Charles Onyango Obbo's case** *(supra))*. The right to freedom of religion can even conflict with other constitutional rights (See, **Multani v Commission Scolaire Marguerite-Bourgeoys** (*supra*, para 30).

In **Julius Ishengoma Francis Ndyanabo's case**, we plainly stated:

> *"Fundamental rights are subject to limitation. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitation must not be arbitrary, unreasonable and disproportionate to any claim of State interest: See, Pumbun's case. Under the Constitution, an individual's fundamental right may have to yield to the common veal of society."*

In **Kukutia Ole Pumbum and Another v. Attorney General and Another** (1993) T.L.R. 159 (CAT) we held that:

> *"A law which seeks limit or delegate from the basic right of the individual on grounds of public interest will not be declared unconstitutional if it satisfies two requirement: (a) that it is not arbitrary; and (b) and*

the limitation imposed by such law is not more than is reasonably necessary to achieve the legitimate objective".

Having deliberated on the appeal, we could not have failed to notice that by the purported Circular, the Respondents attempted to set up limitation or derogation of the right to freedom of religion under Article 19(1) on grounds of national interest or cohesion.

Dr. Mwakaje and Ms. van Witsen submitted that where a Respondent believes that a limitation or derogation of a fundamental human right under Articles 12 to 28 of the Constitution is justified in the national interest, as the Respondent have tried all along, to urge, the Constitution itself and the law provides for the mechanism for the same to be judicially examined by a Court of law and a determination made on the basis of evidence. The onus is on the party relying on a limitation or derogation of a fundamental right to justify the same (See, **Julius Ishengoma Francis Ndyanabo's case** (*supra*) p. 17). We fully agree.

The nervous system of this Constitutional litigation does not only centre on the right to freedom of religion. It also concerns the Appellants' entitlement to education. Of the 127 Appellants, 102 were primary school students whom the purported circular affected.

Section 56(2) of the National Education Act reads:

56(2). ***No person may, within the United Republic, be denied opportunity to obtain any category, nature or level of education for reasons of*** *his race,* ***religion,*** *or political or ideological beliefs." (Emphasis added)*

Moreover, section 35(1) of the Act provides for compulsory enrolment in primary education of every child who has attained the age of seven years. The Law of the Child Act, No 21 of 2009 also recognizes, under sections 8(2) and 9(1) right to access to education and the Child's right to it.

In balancing and engaging the right to freedom of conscience and religion; national cohesion or interest; patriotism; the entitlement to education and the rights of the Child, we respectfully think that a host of factors merit utmost consideration.

Professor Saffari also posed a pertinent question worth reflection: Can sheer singing of the National Anthem be a recipe for nationalism or patriotism? He thought not.

For our part, as we have cautioned ourselves earlier, we need not cross the rubicon. Suffice it to reflect on the concurring opinion of Justice Black and Justice Douglas in **West Virginia Board of Education's case**: (p. 644):

"Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the express bounds of constitutional prohibitions."

In **Roel Ebralinag Et al v. The Division of Superintendant of Schools of Cebu Et al.**, (1996 SCR Vol 219 (G.R. No. 95770), para. 14), the Supreme Court of the Philipines (Kapunan, J.) also observed:

"Compelling members of a religious sect to believe otherwise on the pain of denying minor Children the right to an education is futile and unconscionable detour towards instilling virtues of loyalty and patriotism which are best instilled and communicated by painstaking and non-coercive methods. Coerced loyalties, after all, only serve to inspire the opposite. The methods utilized to impose them breed resentment and dissent".

In conclusion and for all the foregoing reasons, we proceed to hold the Circular as having no legal effect. In consequence, with respect, the Ministerial decision emanating from the Circular, inevitably cannot stand. We accordingly declare that the Circular, lacking the force

to compel the Appellants to sing the National Anthem against their sincerely and conscientiously held religious belief, guaranteed under Article 19(1), read together with 29(1) of the Constitution. It interfered with and violated their right to freedom of religion, thereunder. The resultant expulsion or suspension of the students, we respectfully also hold, was and remains unlawful.

Accordingly, we allow the appeal, quash and set aside the majority Judgment of the High Court and reverse all the consequential orders issued.

In the circumstances, each party is to bear its own costs.

DATED at **DAR ES SALAAM** this 5th day of July, 2013.

M. C. OTHMAN
CHIEF JUSTICE

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR