IN THE HIGH COURT OF JUSTICE
OSUN STATE OF NIGERIA
IN THE OSOGBO JUDICIAL DIVISION
HOLDEN AT OSOGBO

BEFORE HIS LORDSHIP HONOURABLE JUSTICE S. O. FALOLA - JUDGE
TODAY FRIDAY THE 3RD DAY OF JUNE, 2016

BETWEEN **SUIT NO. HOS/M.17/2013**

1. **SHEIKH SALAUDEEN ADE OLAYIWOLA**
2. **INCORPORATED TRUSTEES OF OSUN STATE MUSLIM COMMUNITY**
3. **INCORPORATED TRUSTEES OF THE MUSLIM STUDENTS SOCIETY OF NIGERIA - APPLICANTS**
4. **ALHAJI SADIQ BOLA BELLO**
   (For and on behalf of Female Muslim Students In Public Primary and Secondary Schools in Osun State

VS

1. **THE GOVERNOR OF OSUN STATE**
2. **THE ATTORNEY GENERAL AND COMMISIONER FOR JUSTICE**
3. **COMMISSIONER FOR EDUCATION, OSUN STATE**
4. **MRS. OLAGUNJU**
   (For herself and on behalf of all Principals of Public Primary and Secondary Schools in Osun State)
5. **ALHAJA SADIAT OLADAPO**
   (For herself and on behalf of all other Head teachers of Public Primary Schools in Osun State)
6. **CHRISTIAN ASSOCIATION OF NIGERIA - RESPONDENTS**
7. **SUPERIOR EVANGELIST ALADESEYE**
   (Chairman, Christian Association of Nigeria, Osun State Chapter)
8. **REV. KUNLE ADEYEMO**
   1ST VICE CHAIRMAN
   (Christian Association of Nigeria, Osun State Chapter)
9. **REV. FATHER AJAYI**
   Secretary, Christian Association of Nigeria, Osun State Chapter
   (For themselves and on behalf of all members, Christian Association of Nigeria, Osun State Chapter)

JUDGMENT

The Applicants, by their Amended Originating Summons brought pursuant to Order 1 Rule 2 of the Fundamental Rights (Enforcement Procedures) Rules 2009, as preserved by S.315 Constitution of Federal Republic of Nigeria 1999 (as amended) applied to this court for the enforcement of their rights as guaranteed under S.38 and S.42 of the Constitution.

The Originating Summons was supported with a 44 paragraph Affidavit, Statement, Written Address of Counsel and a number of exhibits, including a copy of the document titled **"Guidelines on Administration And Discipline in Osun State Public Schools**" published by Ministry of Education, Osogbo Osun State in 2004; which is the subject of dispute in this case.

The Applicants captured the essence of their grievances under **Grounds Upon Which The Reliefs Are Brought** thus:

"1. The use of *Hijab* or head cover is compulsory in Islam on every Muslim Female Students.

2. By virtue of Section 38 of 1999 Constitution of Federal Republic of Nigeria, everybody is entitled to the right to freedom of religion, conscience and thought.

3. The 1st – 3rd Respondents issued what it calls "Guidelines on Administration and Discipline in Public Schools in Osun State. Article 8.2(v) of which forbids the use of *Hijab* in some Public Schools.

4. Pursuant to the said "Guidelines on Administration and Discipline in Public Schools in Osun State," the 4th and 5th Respondents deny the Muslim female students the use of *Hijab* in the Public Schools in

Osun State and the Muslim female students who use *Hijab* in some Public Schools are beaten, embarrassed and tortured by the agents of the Respondents".

Consequently, the Applicants are seeking the following reliefs from this Honourable Court;

"1. An Order for the Applicants to enforce and secure the enforcement of the Fundamental rights of the Muslim Female Students in Public Secondary Schools in Osun State under Sections 38 and Section 42 of the Constitution of Federal Republic of Nigeria 1999.

2. Declaration that the use of Islamically prescribed head-cover called *Hijab* by the Muslim Female Students in all Primary and Secondary Schools in Osun State forms part of their fundamental rights to freedom of religion, conscience and thought as contained in Section 38 of 1999 Constitution of Federal Republic of Nigeria (as amended)

3. Declaration that Article 8.2(v) of the "Guidelines on Administration and Discipline in Osun State Public Schools " issued by the Ministry of Education under the 3rd Respondent, acting on the instruction of the 1st Respondent is not only discriminatory against Muslim female students but also uncalled for, inconsistent with Section 38 of 1999 Constitution of the Federal Republic of Nigeria and a

clear violation of the fundamental rights of Muslim female students in Public Schools in Osun State to freedom of religion and therefore null, void and of no effect whatsoever.

4. Declaration that molestation, harassment, torture, embarrassment and humiliation which Muslim female students in Osun State Public Schools are subjected to in the hands of the agents of the 1st – 3rd Respondents especially the 4th and 5th Respondents constitute a clear infringement on the fundamental right of the said Muslim female students to religion, conscience and thought as well as their fundamental right to dignity of human person and right against torture, inhuman and degrading treatments.

5. An Order of this Honourable court restraining the Respondents, their servants, agents, privies or whatsoever called from disallowing the Muslim female students in Public Primary and Secondary Schools in Osun State the use of Islamically prescribed *Hijab* in their various Schools, during and after the School hours".

Review of Facts And Arguments of Counsel

In their Counsel's Written Address, K.B. Odedeji Esq. of Counsel donated two issues for determination, that is;

1. Whether the use of Islamically prescribed head cover called *Hijab*

is not part of the fundamental right of the Muslim Female students in Public Schools in Osun State to the freedom of religion in view of S.38 of the Constitution of the Federal Republic of Nigeria.

2. Whether in view of S.38 of 1999 Constitution of the Federal Republic of Nigeria which guarantees fundamental right to freedom of religion Article 8 2(V) of the "Guideline On Administration and

Discipline in Public Schools in Osun State" is not null, void and of no effect whatsoever".

Arguing the application beginning with issue 1, Learned Counsel drew my attention to S.38 (1) Constitution of Federal Republic of Nigeria 1999 and Chapter 24 verses 30 – 31 of the Glorious Qur'an. Learned Counsel also drew my attention to the decision of the Court of Appeal Ilorin Division in **THE PROVOST, KWARA STATE COLLEGE OF EDUCATION, ILORIN & 2 ORS VS BASHIRAT SALIU & ORS IN THE UNREPORTED SUIT NO. CA/IL/49/2006**, delivered on Thursday 18th June, 2009 which according to him has decided the issue of usage of *Hijab* by Muslim female students, as part of the fundamental right of Muslim students to the freedom of religion. Counsel quoted pages 15 – 16 of the lead judgement and page 2 of the consenting judgment of Hon. Justice Massoud AbdulRahaman Oredola, JCA in extenso. It was argued that the use of *Hijab* and veil is a fundamental right of the female students in Public Primary and Secondary Schools in Osun State, but that regrettably these rights are being

curtailed illegally by the Respondents. It was argued that, the law empowers this court to determine the Applicants' reliefs under Order 2 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules. The case of **FAJEMIROKUN V COMMERCIAL BANK NIG. LTD. (2009) 2 MJC (PART II) PAGE 114, 136 – 137 and AMALE V SOKOTO LOCAL GOVERNMENT & 2 ORS (2012) VOL, 1 – 2 MJSC page 1 at 1-6 PARAG E – F** were sited in support of the assertion. It was further argued that female applicants are entitled to those rights in Public Schools in Osun State which is being jointly financed by the 1st – 3rd Respondents. Counsel therefore urged me to uphold the first issue in favour of the Applicants.

On issue 2, Learned Counsel analysed Article 8.2(V) of the Guideline in dispute to mean:

a) *Hijab* is allowed for Muslim students in "Muslim Public Schools"

b) *Hijab* is disallowed for Muslim students in other Schools apart from "Muslim Public Schools"

It was argued that irrespective of names, public Schools in Osun State are owned, financed and controlled by government of Osun State under the 1st – 3rd Respondents. Counsel emphasized that this discrimination cannot stand in view of S.38 of the Constitution. And that for the fact that the Guideline is contradictory to S.38 of the Constitution, it (the Guideline) should give way. Counsel finally urged me to hold the two issues in favour of the Applicants.

The 1st – 5th Respondents later filed a 21 paragraph Counter Affidavit and Counsel's Written Address. The 1st – 5th Respondents further raised Preliminary Objection to the Suit. In the Counter Affidavit deposed to by Mr. Jacob

Ayanyemi a Principal State Counsel in the Ministry of Justice, Osogbo, the 1st – 5th Respondents stated that some paragraphs in the Affidavit in Support of the application are true, while others are not. It was deposed that, the head teachers and Principals of Public Schools have statutory power to enforce discipline in Schools and government policy, including discouragement of the use of *Hijab* in Public Schools in Osun State. That only School beret and face cap are known to be part of School Uniform, and that school uniforms are distributed free of charge in Osun State without *Hijab*. That the Muslim Female students and their

parents are fully aware that the use of *Hijab* by Muslim students is restricted in Public Schools in Osun State.

In the Counsel's Written Address signed by Jide Obisakin, a Director in the Ministry of Justice, one issue was nominated for determination, to wit;

> *"Whether the suit of the Applicants can be competently maintained as Fundamental Rights to warrant the adjudicatory power of the court in entertaining same".*

It was argued that the action discloses no reasonable cause because the Applicants are challenging the policy of the State Government which portrays the secular nature of the State. The case of **EGBE V ADEFARASIN (1987) NWLR (pt 47) 1 at 20** was sited, to canvass that the case should be struck out. It was further

argued that S.38 (1) of the Constitution which the Applicants rely upon is not helpful to their cause, and sited the case of **MEDICAL and DENTAL PRACTITIONERS DISCIPLINARY TRIBUNAL V OKONKWO (2001) 19 WRN at page 1,** to the effect that, the Guideline of 2004 was made in the overriding public interest. It was argued that the Constitution does not confer absolute right on citizens of Nigeria, and that the claims of the Applicants are not within the confines of Fundamental Human Rights as envisaged by Section 38 of the 1999 Constitution. It was argued further that Section 42 of the Constitution permits derogation from citizen's rights.

Arguing further, Learned Counsel contended that the Guidelines provides for two categories of Public Schools to wit;

1. Muslim Public Schools and
2. The General Public Schools which can be attended by any person whether

a) Muslim

b) Christian

c) Animists

That it is an act of benevolence on the part of government to have accommodated Muslim female students wearing *Hijab* in any of the Schools. That the State government has by the provision of the Guideline over indulged the Applicants' faith, a step which might back fire and provoke litigation by other faiths. That by combination of S.4 (7) and Item 30 of the concurrent Legislative list, of the Constitution, government has jurisdictional competence to establish Schools and design policies that would guarantee peace therein. That this policy cannot be questioned by court.

It was further canvassed that the Applicants are not the victims, that is, neither the female students whose rights have allegedly been violated nor the biological parents of those children. Counsel referred to certain paragraphs of the Affidavit in Support of the Application and contended that while the Applicants have no Legal rights to come to court, they have no cause to place before the court as envisaged by Sections 38(1) and 45(1) of 1999 Constitution.

On the Court of Appeal decision in No. CA/IL/49/2006 it was argued that, while female pupils and students in Osun State Public Schools have prescribed uniform, those of Kwara State College of Education over which the case was decided are more mature, and have no prescribed uniform except code of dressing, hence this court should depart from the Court of Appeal decision. The 1st – 5th Respondents therefore urged me to refuse the application.

The 1st – 5th Respondents also raised Preliminary Objection to the Suit. The grounds of the Preliminary Objection are that:

1. The action of the Applicants/Respondents does not disclose any cause of action at all.
2. That the Applicants/Respondents lack the requisite locus standi to institute the action.

The 1st – 5th Respondents thereafter submitted one issue for determination, to wit;

"Whether in the circumstances of this case and particularly in the light of the grounds in the Respondents/Applicants Preliminary Objection, the Applicants/Respondents have a maintainable action".

The issues and argument canvassed in support of this Preliminary Objection are substantially a repetition of the submission of Counsel to the 1st 5th Respondents in aid of their Counter Affidavit, hence I do not think it is necessary to review them all over again.

The Applicants filed a 21 paragraphs Further and Better Affidavit on 5th November 2013 to oppose the Counter Affidavit of the 1st – 5th Respondents. There, it was averred that Osun State is a multi religious one and that government should accommodate all interests. That it is compulsory for Muslim female students to use ***Hijab***, and this does not offend religious interest of other faiths. That there are no Muslim or Christian Public Schools in Osun State because all such Schools are owned, financed and controlled by Osun State Government. That when the letter of complaint – 'Exhibit B' – was served on the 1st – 5th Respondents, there was no reply or call for dialogue, consequent upon which the Muslim female students started to wear ***Hijab*** to School. And that in reaction,

head teachers and overzealous School Principals started to embarrass such female pupils and students. That distribution of free School uniform does not debar Muslim female students from wearing ***Hijab***. That the 1st – 5th Respondents are solely responsible for placing students in Schools even against the choice of such pupils and students. That the situation is made worse by merger of many public Schools in Osun State in which pupils and students no longer have choice as to which school to attend.

The Learned Counsel to the Applicants filed Written argument in support of the Further and Better Affidavit. It was submitted that the fact that the state government is solely responsible for finance and administration of Public Schools

and overzealous School administrators discriminate and punish Muslim female students have not been denied by the Respondent. That even the Constitution recognizes Sharia Law and establishment of Sharia Court for Muslims both at Federal and State levels. That Muslim female women who wear *Hijab* mingle with non Muslim women in market and other work places without any security threat. That by a recent publication of the 1st – 5th Respondents titled, "Frequently Asked Questions on the new School System in the State of Osun" the 3rd Respondents at page 25 disclosed that there are no Public mission Schools in Osun State because all such Schools were taken over as far back as 1975, and that the former owners have since been paid off. Learned Counsel insisted that the Applicants have sustainable cause of action, have locus standi and that the Court of Appeal decision is a *locus classicus* which this court cannot derogate from, especially the holding of Hussein Mukartar, JCA at page 16, to the effect that it is fundamental right of Muslim female students to observe and practice their religious injunction

in any part of Nigeria. Counsel to the Applicants urged the court to sustain the application.

And in their reaction to the Preliminary Objection raised by the 1st – 5th Respondents, the Applicants, through their Counsel raised two issues for determination, to wit;

1. Whether the Applicants have not disclosed cause of action in their application before the court.
2. Whether the Applicants do not have locus standi to institute this action in view of the relevant provisions of the Fundamental rights (enforcement Procedure) Rules 2009.

On issue 1 Counsel submitted that it is the reliefs of the Applicants that determine the cause of action as he drew the attention of the court to the case of **SEHINDEMI V GOVERNOR OF LAGOS STATE (2006) ALL FWLR (part 311) page 1858, 1884 – 1885 parag. A – E.** That the complaint of the Applicants bother on discrimination on account of religious beliefs, assault and by necessary implication, infringement of fundamental rights of Muslim female students who are their members in Public Primary and Secondary Schools to use the *Hijab*. It was canvassed that, so long as the Fundamental Rights (Enforcement Procedure) Rules 2009 is made pursuant to Section 46(3) of the Constitution (as amended), it has the same force of law as the Constitution itself. Counsel drew my attention to the case of **NWAOGUGU V PFRN (2007) 12 WRN 24 at 54** lines 15 – 48. It was further contended that the combine effect of Section 3 (e) of the preamble as well as Order 1 Rule 2 Fundamental Right (Enforcement Procedure) Rules 2009,

the intention of the law makers is not to allow cases of enforcement of Fundamental rights to be frustrated by argument on lack of locus standi.

In their process titled REACTION TO REPLY OF THE APPLICANTS ON THE PRELIMINARY OBJECTION RAISED BY THE 1ST – 5TH RESPONDENTS, the 1st to 5th Respondents submitted that, by disallowing the wearing of *Hijab* by female students in Public Schools as provided in the Guidelines is to enforce discipline. That Muslim female students are being pampered by government. That the rights of the students as enshrined in the Constitution is not absolute but should be subsumed to the general interest of the State. Counsel referred to the case of **DR. SOFOLAHAN & ANOR V CHIEF (MRS) FOWLER (2002) 34 NWLR pt 788 664 – 665** and submitted finally that failure to include the names of the female students among parties to the case is fatal to the case of the Applicants.

After service of the Originating Processes on the 1st – 5th Respondents, the 6th – 9th Respondents brought application to join the suit. The application was granted without objection. And before even the 1st – 5th Respondents filed their reply processes, the 6th – 9th Respondents quickly filed their objection and other processes. Apparently, it was the intervention of the 6th – 9th Respondents and the processes they filed which introduced heavy religious dose into a case that was a straight confrontation between the Applicants and the 1st – 5th Respondents. Incidentally, when the 1st – 5th Respondents filed their reply through their Learned Counsel, Jide Obisakin, they virtually chorused all that the 6th – 9th Respondents put in their Affidavit and Counsel's argument. In response to this fresh challenge, the court in its wisdom formally invited Christian

Lawyers Association of Nigeria (CLASFON) Osun State Chapter and their counterpart, Muslim Lawyers Association of Nigeria (MULAN) as Amici curiea, to appear in court and advise the court on the issues in contention. Both groups obtained the service of Lawyers who prepared briefs for them and also participated actively in the proceedings. This court is grateful to them for offering wise counsel.

As I held above, the 6th to 9th Respondents filed a 17 paragraph Counter Affidavit deposed to by one Reverend Kunle Adeyemo who described himself as the 1st vice Chairman, Christian Association of Nigeria, Osun State Chapter and the 8th Respondent. In the said Counter Affidavit, the 6th – 9th Respondents stated that paragraphs 5,6,7,8,9,10,16 and 17 of the Affidavit in support of the Application "are correct" but that other paragraphs "are not correct". That there are some public Primary and Secondary Schools in Osun State that are founded as Christian heritage, traditions and practices but have been taken over by the government although they still retain Christian heritage, values and ethos. That the religious practice in such Schools cannot accommodate wearing of ***Hijab*** by any female student. That some of these Schools still have Church buildings within their compound. That the 6th – 9th Respondents do not want their children to attend Schools in an environment full of practices alien to the Christian faith, such as wearing ***Hijab*** in Schools founded upon Christian heritage and ethos. That the presence of Muslim students wearing ***Hijab*** in such Schools like Baptist High School Iwo, Methodist School, Isale Aro, Osogbo, St Benedicts

Catholic School, Isale Aro Osogbo among others would offend Christian faith. That the nature of

uniform prescribed by government for female students in Public Schools is shorter than those permitted by Christian faith, but Christians are not complaining.

A three page Counsel's Written Address signed by Femi Ayandokun Esq. was attached to the Counter Affidavit of the 6th – 9th Respondents. In it, the 6th – 9th Respondents raised three issues for determination viz

1. Whether the judgement of the Court of Appeal sitting at Ilorin in Suit No. CA/IL/49/2006 is applicable in this present suit
2. Whether S.38 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) can avail the Applicants in view of S.38 (2) and S.42 (1) (b) of the Constitution of Federal Republic of Nigeria (as Amended).
3. Whether the Fundamental rights of the Applicants are absolute in the face of S.32 (2) S.42(1)(b) and S.45 (1) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)

On issue 1, it was submitted that the court of Appeal decision (supra) is inapplicable in that whereas the State government prescribes School Uniform in Public Schools in Osun State (but) in the Kwara State College of Education, students are free to wear any dress of their choice.

On issue 2, it was argued that the Wards of the 6th – 9th Respondents are incapable of suing, and of impressionable age should not be compelled to attend educational institution where religious practices alien to their own are allowed.

Counsel referred to certain paragraphs of the Counter Affidavit and submitted that allowing the application would mean that Muslim female students

would enjoy comparative favour over their counterparts who do not have that privilege.

On issue 3, Counsel drew my attention to the relevant Constitutional provisions and certain paragraphs of the Counter Affidavit of the 6th – 9th Respondents and submitted that the reliefs being claimed by the Applicants are injurious to the rights and freedom of the 6th – 9th Respondents who should equally enjoy the protection embedded in sections 38 (2), S.42(1) (b) and sections 45 (1) (a) and (b) of the Constitution. The case of **MEDICAL AND DENTAL PRACTITIONERS DISCIPLINARY TRIBUNAL V OKONKWO (2001) FWLR (pt 44) 542** was sited and relied upon. Counsel therefore urged the court to dismiss the application.

Again, the 6th – 9th Respondents filed a Preliminary Objection to the effect that,

"That the action of the Applicants/Respondents is incompetent".

The Objection was on point of law, (devoid of Affidavit in support relating to facts relied upon). Learned Counsel highlighted the prerequisite for a court to

assume jurisdiction over a matter as reflected in the case of **MADUKOLU V NKEMDILIMI (1962) 2 SCNLR 341 and AJAGUNGBADE III VS ADEYELU II (2001) 16**

NWLR (pt 738) 126 at 179. It was submitted that the Muslim female students who are the victims and direct beneficiary of the reliefs are not made parties to the case. Learned Counsel drew my attention to Order II (1) and Order VII (1) of Fundamental Rights (Enforcement Procedure) Rules 2009 to reinforce his submission. It was submitted that the Rules specifically provided that parties should approach the court individually, and not as a group. Counsel further drew

my attention to the case of **THE REGISTERED TRUSTEES FTTCCN V IKWECHEGH (2000) 13 NWLR pt 683, 1 at 8** on that point. Finally Counsel urged me to strike out the suit.

The Applicants reacted to both the Counter Affidavit and the Preliminary Objection together with Counsel's Addresses of the 6th – 9th Respondents. With respect to the Counter Affidavit of the Respondents, the Applicants filed a 23 paragraph Further Affidavit along with Counsel's Address on 17/4/2013. While agreeing with paragraphs 4, 5 and 7 of the Counter Affidavit of the 6th – 9th Respondents, the Applicants described other averment therein as untrue. In the deposition made by one Alhaji Sadiq Bola Bello, the 4th Applicant, it was averred that, in schools where wearing of *Hijab* is permitted it has not affected the prescribed uniform of the School. That all public Schools belong to the State government who finance, administer and formulate policies for the Schools. That Christian students do attend Public Schools with Muslim names but are not

compelled to wear *Hijab* or learn Islamic Religious Knowledge. That wearing *Hijab* does not affect Christian students at all and that on most streets across the State such as Igbonna, Osogbo, Churches and Mosques where Muslim women put on *Hijab* exist side by side without any hindrance. That *Hijab* wearing Muslim women mingle with Christian women in market places without any problem. That Catholic faith among the 6th – 9th Respondents especially the Nuns or Reverend Sisters use *Hijab* – like head covers and are highly respected in the Christendom. That the Applicants have no objection against any other faith who may wish to seek for enforcement of their own fundamental rights if they can establish same with evidence. That as an Islamic scholar, the deponent contends that wearing of

Hijab is compulsory for female Muslims as provided by the Qur'an, sunnah, and all other sources of Islamic law. That indeed Mary the Holy Mother of Jesus Christ always appear in pictures wearing *Hijab*-like head cover on her head.

In their reply to the issues raised by the 6th – 9th Respondents in the address of Counsel attached to the Counter Affidavit, the Applicants submitted through their Counsel that, with respect to the judgement of court of Appeal No CA/IL/49/2006 the misinterpretation given to it by the 6th – 9th Respondents is a misconception. It was argued, relying on paragraphs 19 – 27 at page 15 of the Court of Appeal judgement (supra) that the issue upheld is the right of Muslim women to wear *Hijab* as enshrined in the Qur'an and not whether the School uniform is compulsory or not. That for the fact that *Hijab* is worn together with

School uniform in Schools where it is permitted implies that such conflict do not exist at all.

On issue 2 raised in the Counter Affidavit of the 6th – 9th Respondent, it was argued that S.38 (2) of the Constitution is in favour of the Applicants as there is no evidence that the Christian students who attend (even) Muslim named schools are ever compelled to wear ***Hijab***. That with reference to S.42 (1) of the Constitution, the use of ***Hijab*** by female Muslims is an obligation, a right not a privilege.

In reaction to the 3rd issue raised by the 6th – 9th Respondents, Learned Counsel for the Applicants adopted his earlier submission and further added that the 6th – 9th Respondents have not shown anything that can make them enjoy the benefits embedded in Section 45 (1) of the Constitution. Counsel therefore urged the court to discountenance the processes filed by the 6th – 9th Respondents.

As held earlier, the Applicants filed a 4 page Counsel's Written Address in opposition to the Preliminary Objection raised by the 6th – 9th Respondents. On the issue of locus standi of the Applicants, Counsel for the Applicants apparently very hard working, tenacious and creative, insisted that the Fundamental Rights (Enforcement Proceedure) Rules 2009 derived its strength from the provisions of S.46 (3) of the Constitution, and that on the authority of **NWAOGUGWU VS PFRN (Supra)** it is *sui generis* and has the same force of law and effect with the provisions of the Constitution itself. Counsel also referred to and relied on Section 3(e) of the Preamble to the Fundamental Rights (Enforcement

Procedure) Rules 2009 and submitted that, the Applicants have locus standi to initiate this action. That by paragraph 13 of the Affidavit in support of the application, the named 2nd and 3rd Applicants brought the application on behalf of their female members in line with Section 3 (e) and Order 1 Rule 2 of the Fundamental Right Rules (supra). It was further submitted that Order II Rule 1 and Order VII Rule 1 of the Rules (supra) contrary, to the submissions of the 6th – 9th Respondents, do not preclude groups as well as individuals from bringing action to enforce their fundamental right when read together with Order 1 Rule 2 and Section 3(e) Preamble (supra). Counsel referred to the case of **ELELU – HABEEB VS A.G. of FEDERATION & 2 ORS (2012) 2 MJSC (pt III) page 1 at 109 para. A – B**. Finally Counsel urged the court to hold that the Suit is competent and that the court has requisite jurisdiction to entertain the suit.

So far, that is the case put up by the parties to this case. I now turn to the briefs filed by the two Amici Curiae (friends of the court) that were invited by this Court, in exercise of its discretionary power and judicial wisdom,

and especially as provided by Order XIII Rule 2 Fundamental Rights (Enforcement Procedure) Rules to the effect that;

> *"Amici Curiae may be encouraged in human rights application and may be heard at any time if the Court's business allows it."*

Akin Akintoye II, leading other Lawyers, filed the brief of Christian Lawyers Association of Nigeria (CLASFON) containing eleven pages.

In the preamble to the brief, it was suggested that, in view of the delicate religious tension in the country, the Court should consider referring the case to a mediation panel. In the alternative Counsel then formulated two issues for determination;

I. Whether Article 8.2 (V)of the "Guidelines on Administration and Discipline in Public Schools in Osun State" violates the Fundamental human rights to freedom of religion in view of Section 38 of the Constitution;

II. Whether the judgement of the Court of Appeal in CA/IL/49/2006 is apposite and applicable in this case.

On the first issue, it was argued that Osun State government did not ban the wearing of ***Hijab*** by Muslim female students, but rather merely restricted its use in the overriding interest of the public and acceptable practice in our nation. That Article 8. 2(V) was put up to ensure uniformity and avoid division among diverse groups and interests. It was also argued that Police women and National Youth Corps female members who have prescribed uniforms do not wear ***Hijab***. That government has acted within its powers to publish the Guideline. That by virtue of S.10 Constitution of Federal Republic of Nigeria 1999 it was postulated

by Christian Lawyers Association of Nigeria through their Counsel that granting the reliefs may encourage adherents of other religion to put on their peculiar garments too. That Section 13 of the Constitution empowers government to make policies for good government. Counsel referred to a foreign authority

decided in United Kingdom, reported in **Belgium CASE (2006) VICHL 15** and submitted that the rights of the Applicants is not absolute. Other cases sited by Learned Counsel include **GOVERNOR EKITI STATE VS OJO(2006) 17 NWLR pg 26, COP V BUHARI (2000) FWLR Part 1 page 164 and DENCA SERVICES LTD V CROSS MARINE SERVICES LTD (2002) FWLR pt 86 495**. It was further argued that while the case of CA/IL/46/2006 applies to tertiary institutions, this case applies to children of impressionable ages. That this action is a class action which is not maintainable, hence it is distinguishable from the Court of Appeal Ilorin decision (supra). That government has done well by directing Muslim female students who intend to wear *Hijab* to proceed to Muslim named Schools. Finally it was urged on the court to hold that the Applicants have failed to establish that their right to religious worship has been unjustly curtailed. Counsel therefore urged me to dismiss the case of the Applicants.

The second Amici Curiae, Muslim Lawyers Association of Nigeria(MULAN) filed two briefs through their Lawyer, Alhaji G. A. Lawal.

It was noted in the first brief that in Yoruba land, including Osun State, many Christians have Muslim parents and vice versa, while many Muslims have Christian as wives and vice versa. That the takeover of Schools in the 70s affected both Muslim and Christian proprietors and communities alike. That the

Applicants are simply challenging a government policy which they do not like, but that the joinder of the 6th – 9th Respondents to this case apparently turned the dispute to a religious dispute, which ought not to be.

The Amicus Curiae therefore submitted three issues for determination and these are:

I. Whether the use of ***Hijab*** by Muslim Female students qualifies as a fundamental right under Section 38 of the Constitution of Federal Republic of Nigeria 1999 (as amended).

II. Whether Article 8. 2(V) of the "Guidelines on Administration and Discipline in Public Schools in Osun State" is not inconsistent with Section 38 of the Constitution of Federal Republic of Nigeria 1999 (as amended), and therefore null and void.

III. Whether the Applicants have the requisite locus standi to institute this action.

On issue 1, it was argued that, Section 38 (1) of the Constitution is wide enough to cover dressing, part of which is ***Hijab*** whose use is an injunction enjoined by Chapter 24 verse 31 of the Holy Quran. That the decision of Court of Appeal in CA/IL/46/2006 (supra) is applicable to this case as it was decided between students and a public educational institution as in this case. That the case also pronounced on S.42 of the Constitution. That this court should discountenance all foreign authorities sited by some parties on the issue, and that so far there is no Nigeria case law that is superior to that decision yet.

On issue 2, it was argued that Article 8 2(V) of the Guidelines (supra) is a derogation from S.38 of the Constitution, discriminatory and therefore

inconsistent with the Constitution. That by S.1 of the Constitution, it shall prevail over all other legislations, as decided in **OKULATE V ADESANYA (2002) 2 NWLR**

(pt 646) 530 and OSUAGWU VS ONYIEIKOGBO (2005) 16 NWLR (pt 950) at 80. That the court should strike down Article 8 2(V) of the Guidelines on that account.

On issue 3, Learned Counsel drew my attention to Section 3 (e) Fundamental Rights (Enforcement Procedure) Rules 2009, and submitted that, by the Affidavit in support of the application, the Applicants deposed that they are representing associations which female Muslims in Public Schools in Osun State belong. That the law prohibits striking out of a case of this nature on the grounds of lack of locus standi. That the right to practice one's religion is protected by the Constitution. That the court should grant the reliefs claimed by the Applicants.

The 1st – 5th Respondents, in their reply to the Written Address of Muslim Lawyers Association of Nigeria (MULAN) revealed that Schools are being merged irrespective of whether they are basically Christian or Muslim Schools and pupils are being relocated to Schools irrespective of any religious belief and opinion of anybody or organization, in the new education policy of the State government. That the Guideline is not contradictory to S.38 of the Constitution. That on the authority of **Dr. SOFOLAHAN & ANOR VS CHIEF (MRS) FOWLER (2002) 4 NWLR** (pt 788) 664 – 685, a wrong procedure has been adopted in initiating this case. That the court should refuse the application.

The last process in this suit was filed by Muslim Lawyers Association of Nigeria (MULAN) an Amicus curiae on 31/3/2016. It was in response to the

Counter Affidavit of the 1st – 5th Respondents filed on 28 October 2013. There, it was pointed out that the 1st – 5th Respondents admitted paragraph 13 of the

Affidavit in support of the Application. That the said paragraph 13 shows the relationship between the Applicants and the students whom they represent. That the 1st – 5th Respondents also admitted paragraph 36, 37, 38, and 40 which detailed how the Applicants' rights were violated. On that ground, it was submitted that the arguments of Counsel to the 1st – 5th Respondents are contradictory to the deposition in their Counter Affidavit, relying on the case of **CHIEF ELIJAH OMONIYI AJAYI VS TOTAL NIGERIA PLC (2013) 6 – 7 MJSC (part 1) 143, 163 parags B-D.** That application under Fundamental Rights Enforcement Procedure is in a class of its own, such that the scope of locus standi as contained in the procedure is wider in scope than the orthodox one.

It was finally submitted that, in the interest of peace, harmonious relationship between various religious groups, and justice, the application should be granted.

In the course of earlier proceedings the court decided that, all the Preliminary Objections and the substantive suit shall be heard together and determined. The court also encourage parties to meet and resolve the dispute. But despite several adjournment granted to the effect, parties stood their ground.

The parties and Amici Curiae adopted their briefs on 8th April, 2016. K.B. Odedeji of Counsel to the Applicants drew my attention to all the processes filed

by the Applicants and urged me to grant the application and the prayers encapsulated in the reliefs.

Jide Obisakin, Director of Civil Litigation and Advisory Services, Ministry of Justice, Osun State who was later led by Adedapo Adeniji, Director of Public

Prosecution of the same Ministry highlighted the content of the Preliminary Objection, the Counter Affidavit and Address of Counsel filed on behalf of the 1st -

5th Respondents. He further identified with the processes filed by the 6th – 9th Respondents, and urged me to dismiss the application.

Femi Ayandokun of Counsel to the 6th – 9th Respondents urged the court to dismiss the application on the grounds that it is capable of jeopardizing the interest of the 6th – 9th Respondents.

Akin Akintayo II on behalf of Christian Lawyers Association of Nigeria urged me to take cognizance of the rumoured intention of the Federal government of Nigeria to ban wearing of H*ijab* and face veil because it has reportedly been discovered that most of Boko Haram suicide bombers who carry and detonate Improvised Explosive Devices (EID) or bombs wear *Hijab* and face veil. He therefore urged me not to encourage worsening security situation in the land.

Alhaji G. A. Lawal of Counsel to the Muslim Lawyers Association of Nigeria urged the court to note the Constitutional implication of the case coupled with

the fact that the issues in contention have been generating debate and public disturbance and violence over the years. That the court should be courageous to take a decision and resolve the dispute once and for all. He urged me to grant the reliefs claimed by the Applicants.

Resolution of Dispute

In Order to deal with the issues thrown up by the parties in this case, it is necessary to take a brief look at the history and policy of education in Nigeria. Islamic education and Culture came to Nigeria through the old and defunct empires of Kanem Bornu and Sokoto Caliphate about one thousand years ahead

of Christianity. The Yoruba internecine wars which was activated by the Fulanis especially in the Savanah region of Yoruba land, especially the old Oyo Empire and

Ilorin Emirate cannot be divorced from the desire to expand the influence of Islamic religion and education. Makarranta Schools were growing up in the neighbourhood of Muslims. Then came Christianity and Western education around 1842. Christian educational institutions were better structured and well organized, especially with the support of foreign aid. The private school proprietors and their Schools were growing side by side. These are Schools founded by Muslims, Christians and non-conformists, communities and even by government itself all over Nigeria. During the civil war, many schools in the South Eastern and Southern geopolitical parts of Nigeria and even in the South West were closed down, destroyed or used as Military Camp. Therefore, in 1970, the Federal government took over all the Schools in the South East and

South South for the purpose of rebuilding them. And by 1975, the then Western State government took over all private Primary Schools and Secondary Schools. The owners of such Schools either Muslim, Christian, non-conformists and communities were paid compensation. Incidentally, Chief T. A. Odutola was the first to voluntarily release his Schools to the government in November, 1975. He was followed by Methodist Church of Nigeria which also voluntarily handed over its Schools to the government in December same year (1975). Catholic Church did not collect compensation on any of its own Schools after they were taken over by the government. The present Osun State was part of the then Western State. Thus from 1975, the various State governments have been responsible for recruitment of teachers, payment of salary of teachers, payment of grants to

maintain such Schools, and issuing policy guidelines for the smooth administration of Primary and Secondary Schools which are now known as Public Schools. It is remarkable that in spite of this change or ownership, each School still retained and carried over the peculiar name and culture established by the previous proprietors to the new dispensation of ownership structure. At the national level, Federal government developed what is known as National Policy on Education (NPE) in 1977 which recommended free and compulsory education up to Junior Secondary School.

In September 1976 the Federal government introduced Universal Primary Education (UPE), with a Decree which also made it compulsory for all children of School age (from 6 years) to undergo Primary education. The law provided sanction for parents who refused to send their children to School. When the

country returned to civilian rule in 1979 the newly elected government of Oyo State which was created from Western State) led by Chief Bola Ige as Governor expanded the scope of free and compulsory education from where the Federal government stopped to Secondary Schools. The new government built many new Schools in order to cope with the over whelming increase in population of Public Primary and Secondary Schools. Unlike before, students no longer have a choice of which School to attend, they were posted to any School close to their residence, no matter the subsisting culture or name of such Schools. Muslim female students who were used to wearing *Hijab* in their former Muslim named Schools before government started to place them in other Schools were set to continue with their dressing in those other Schools which bear Christian or community or government names. Muslim parents who were resistant to

Western education and refused to send their children to School were forced to give up, because of provisions for sanctions contained in the UPE Decree and the law enacted by the government of Chief Bola Ige. Either way, the population of Muslim female students wearing *Hijab* to School swelled. However, the former proprietors of Schools founded by Christians before their take over in 1975 resisted the use of *Hijab* by female students in such Schools. Even in the new Schools built by the government, the School administrators depending on their religious bent, put up different attitude on whether to allow the use of *Hijab* by female students or not in their School. Crises were bound to occur, and they did. This was the situation on ground when the Federal Government went ahead to enact Universal Basic Education Act in 2004. This law again makes it

compulsory for children to attend Primary and Junior Secondary School nationwide. The Federal Government took over the provision of infrastructure and human resources of Basic 1 – 9 Schools nationwide. By that, parents have no choice as to whether their children should attend School or not, or that students will have choice as to which School to attend. They have no choice under the Law and the Act which make the conduct mandatory.

Apparently it was an attempt by the 1st – 5th Respondents to solve this unavoidable and other challenges that made them (the 1st – 5th Respondents) to publish the document known as; "**Guidelines On Administration And Discipline In Osun State Public Schools" through the Ministry of Education Osogbo in year 2004**. The Applicants attached the document as Exhibit A to their Application. The document spelt out various issues associated with School administration,

including the role of parents, teachers, students and government. However, of particular interest to the Applicants in this case is Article 8. 2 (V). It provides;

8 . 2(V): *"The use of the Hijab by female Muslim students shall be allowed in Muslim Public Schools with the proviso that it shall not be made compulsory especially for non-Muslim students in such Schools. Its use in Schools other than the above shall not be allowed".*

The Applicants were not happy about this regulation. They said so in the letter they wrote under the aegis of **Osun State Muslim Community** with

headquarters located at No. 24 Egbatedo Street, Fagbewesa Street Osogbo. The letter was dated 14th July 2011 and addressed to both the Permanent Secretaries, Osun State Ministries of Education, and of Health, Secretariat, Osogbo. The letter which was titled "*The use of Hijab In All public Institution of Learning In Osun State: The position of Osun State Muslim Community* was signed by (1) Sheikh Salaudeen A. Olayiwola, President, (2) Alhaji Hashim Olopade, Assistant Secretary and (3) Sheikh Mustafa Olayiwola Ajisafe, President General, League of Imams & Alfas, South West, Edo & Delta States. It was copied to 16 other persons and bodies including the State Governor. The letter was attached to the application as Exhibit B. The Applicants claimed that, after waiting on end without any reply to the letter and without receiving any invitation from the authorities, to at least discuss the content of the letter of protest, they have resorted to this action.

Issues for Determination

Based on the Affidavit evidence, address of Counsel, Objections and oral submissions in court, the court hereby formulates the following issues, being the

summation of issues donated by the respective parties and the two Amici curiae; as well as from facts derived from the processes in the case file.

1) Whether the Applicants have locus standi to bring this action
2) Whether the Applicants have cognizable cause of action to maintain before this court as to warrant the intervention of the court

3) Whether the Applicants are right to have capitalized on the provision of Glorious Qur'an to insist that Muslim female students are entitled to wear *Hijab* in all Public Primary and Secondary Schools in Osun State.

4) Whether wearing of *Hijab* by Muslim female students in all public Primary and Secondary Schools in Osun State qualifies as a right to be protected as envisaged under the Constitution.

5) Whether Article 8.2(V) of the Guidelines On Administration And Discipline in Osun State Public Schools issued by Ministry of Education Osogbo Osun State in 2004 is in conflict with the provisions of the Constitution, and therefore should give way.

6) Whether the 6th – 9th Respondents have any interest to protect or any dispute to resolve against the applicants.

7) Whether the decision of Court of Appeal Ilorin in Appeal No CA/IL/49/2006 **THE PROVOST KWARA STATE COLLEGE OF EDUCATION ILORIN & 2 Ors VS BASHIRAT SALIU & ORS (supra)** is applicable to and should be applied in this case.

-30-

The seven issues shall be treated as listed;

1) The 1st to 5th, 6th – 9th Respondents and Christian Lawyers Association of Nigeria (CLASSFON) raised the issue of *locus standi*.

In order to determine this issue, recourse must be had to the names and capacities under which the Applicants instituted this action. The Applicants are:

1) Sheikh Salaudeen Ade Olayiwola

2) Incorporated Trustees of the Osun State Muslim Community

3) Incorporated Trustees of Muslim Students Society of Nigeria

4. Alhaji Sadiq Bola Bello (for themselves and on behalf of Muslim Female Students in Public Primary and Secondary Schools in Osun State).

In the attached Affidavit in support, the Applicants through the 4th Applicant deposed in paragraphs 2, 3 and 13 thus:

2. "That I have the consent and authority of the other applicants as well the Female Muslim Students in Public Primary and Secondary Schools in Osun State to depose to this Affidavit.

3. "That the 2nd and 3rd Applicants are incorporated under Part C of the Companies and Allied Matters Act (CAMA) Laws of the Federation of Nigeria 2004. While the 2nd Applicant is the umbrella body for all Muslims in Osun State, the 3rd Applicant is for the interest of all Muslim Students in Nigeria.

13 "That I also know as a fact that there are Muslim Female Students in all the Public Primary and Secondary Schools owned by Government

of the 1st – 3rd Respondents. These Muslim Female Students are members of the (2nd and) 3rd and 4th Organization.

In reaction, the 1st – 5th Respondents, by paragraphs 6 and 7 of their Counter Affidavit admitted paragraph 13 but stated that paragraphs 2 and 3 of the Affidavit in support are within the knowledge of the Applicants. On the other hand, the 6th – 9th Respondents stated in paragraph 3 of their Counter Affidavit that paragraphs 13 and 23 (among others) are not correct and put the Applicants to the strictest prove of same. I am aware the position of the law is that where a party is denying a fact in an Affidavit, apart from saying the facts are not true or

correct, the Respondent should take a step further by stating what is correct or factual position. See the case of **HON MIKE BALONWU & ORS V MR. PETER OBI & ORS (2007) LPELR 4255 CA** where the court held;

"The law is settled that where a person makes specific, material and detailed allegations of facts, in an Affidavit, the opposing party is

obligated to make specific denial and not general traverse, if he intends to join issues on the allegation of facts".

See also **BISIMILAHI V YAGBA EAST LOCAL GOVERNMENT FWLR 1939 at 1964 and OKONKWO V CCR NIG. PLC. (2003) 8 NWLR (PART 822) – Page 347 at 419.**

The 1st to 5th and 6th to 9th Respondents failed to meet the standard of law in this circumstance. Therefore, I hold the deposition contained in the Applicants' Affidavit especially in those three paragraphs as correct.

Further, the two objectors and the Christian Lawyers Association of Nigeria referred to the case of **Dr. SOFOLAHAN & ANOR VS CHIEF (MRS) FOWLER (2002) NWLR pt 788, 664 at 684 – 685.** In that case the Supreme Court per Kastina –

Alu (JSC) held that names of the children whom their parents are suing for ought to come first and not the other way round. The case of **ABRAHAM ADESANYA VS THE PRESIDENT (1981) 5 SC at 113** was also sited and relied upon.

The point has been made elsewhere that, in the recent forensic history, the Supreme Court took off from very restrictive approach to locus standi, as expressed in the case of **ABRAHAM ADESANYA V THE PRESIDENT (Supra)** where the court held that the Appellant failed to demonstrate that his interest in the subject matter towered above those of other persons in the parliament. The extreme position was quickly abandoned by the court, as decided in **ARIORI V ELEMO (1983) 1 SCNLR 1 at 18.** The scope was well expanded in 1987 in the case of **CHIEF GANI FAWEHINMI V HALILU AKILU (1987) 4 NWLR (pt 67) 797 at 847.** In that case **ESO JSC** held;

> *"It is the view of my learned brother Obaseki, which I fully share with respect, that, it is the universal concept that all human beings are brothers and assets to one another.*

He applies this to ground locus standi. That we are all brothers is more so in this country where the Socio-Cultural concept of 'family' and 'extended family' transcend all barriers. Is it not right then for the court to take note of the concept of the loose use of the word 'brother' in this country? Brother in the Nigerian context is completely different from the blood brother of the English language".

In this instant case, the 2nd and 3rd Applicants are corporate institutions to which the Applicants and the female Muslim Students belong. Nobody has denied that the Female Students affected do not belong to either or both the 2nd

and 3rd Applicants. Under the provision of Section 596 Companies And Allied Matters Act, only the Incorporated Trustees and not individual members of such organization are capable of suing and being sued on behalf of their members. The law provides;

"596 (1) From the date of their registration, the trustees or trustee shall become a body corporate by the name described in the certificate and shall have perpetual succession and a common seal, and power to sue and be sued in its corporate name---"

On that ground, it is obvious that the case of **Dr. SOFOLAHAN & ANOR VS CHIEF (MRS) FOWLER (Supra)** is not applicable to this case. And to put the matter

finally beyond reproach, the subsisting law, Fundamental Rights (Enforcement Procedure) Rules which was enacted in 2009, several years after **SOFOLAHAN V FOWLER** case (supra) was decided provides, by Section 3, (a) and (e)

3. "The overriding objectives of these rules are as follows:

3(a) *"The Constitution, especially Chapter IV, as well as the African Charter,*

shall be expansively and purposely interpreted and applied, with a view to advancing and realizing the rights and freedoms contained in them and affording the protections intended by them".

3 (e) *"The court shall encourage and welcome public interest litigation in the human right field and no human rights case may be dismissed or struck out or want of locus standi. In particular human rights*

activists, advocates, or groups as well as any non-government organization may institute human rights application on behalf of any potential applicant".

In human rights litigation, the applicant may include any of the following:

1. *Anyone acting in his own interest*
2. *Anyone acting on behalf of another person*
3. *Anyone acting as a member of or in the interest of a group or class of persons*
4. *Anyone acting in the public interest, and*
5. *Association action in the interest of its members or other individual or groups".*

While it is obvious that the 1st and 4th Applicants are qualified to bring the application under items 1, 2 and 3 above, the 2nd and 3rd applicants are qualified to bring this application under item 5 above.

Therefore, based on the above premise, I hold that the Applicants have locus standi to institute this action on behalf of themselves and Muslim female Students in Public Primary and Secondary Schools in Osun State. The First issue is resolved in favour of the Applicants.

2. It is obvious that the Applicants are challenging the policy of government which they feel it is against their interest. Under the 1963 Constitution, the government at all levels enjoyed the "**Kabyesi syndrome"** that is, "**the action of government cannot be questioned"** . However Chapter 2 of the Constitution of

Federal Republic of Nigeria 1999 (as Amended) has demystified that concept and put the actions and inactions of government at the door step of courts for scrutiny. In particular the Applicants are aggrieved that the rights guaranteed them under S. 38 (1) of the Constitution have

been taken away by the provisions of Article 8 2(v) of the Guidelines (supra) promulgated by the 1st – 3rd Respondent and implemented by the 4th and 5th Respondents. The law provides;

"38 (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion, or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance".

The Applicants are also complaining that their Wards are only permitted to propagate their religion by wearing ***Hijab*** in some Schools but are denied of that right in the others amount to discrimination under S.42 of the Constitution. The main Respondents, that is 1st – 5th Respondents did not only admit this fact, they did not deny the fact that indeed Muslim female students that insist on their right are sanctioned by exposure to assault, reprimand, humiliation, suspension and other forms of embarrassment. There is a clash between the Applicants who insist on claiming their right expressed in Chapter 24 verses 30 – 31 of the Glorious Qur'an on the wearing of ***Hijab*** to School, and are therefore seeking refuge under the Constitution on one hand, and the 1st – 5th

Respondents who have by their Guideline created different category of Schools and the concomitant rights a Student can enjoy there on the other hand. The situation has become porous now that the Muslim Female Students no longer have the right to choose the School they wish to attend because the 1st – 5th Respondents claim to have responsibility of placing students to any School, and that in recent times the new education policy of the State government has brought about merging of many

Schools together and so, many students from different background now study within the same School environment.

In the case of **EFIOK V GOVT of CROSS RIVER STATE (2011) ALL FWLR (Pt 593) 1993** it was held that an enactment that amount to a total or partial usurpation of judicial powers vested in the courts by the Constitution (S.6 (6) (b) or one that purports to divest the courts of the exercise of judicial powers shall be struck down. Also in **OKEREKE V YAR'ADUA (2008) ALL FWLR (pt 430) 626** it was held that, the jurisdiction of all Superior Courts of record is Constitutional, some having been donated by the Constitution and cannot therefore be circumscribed or limited by any other statute. The conclusion I have reached therefore is to hold that the Applicants have genuine grievances, cognizable and recognized by law, which the court can inquire into. It is laden with constitutional flavour, therefore it is the responsibility of the court to intervene in such dispute. Every Nigerian that is aggrieved over policy of government should be encouraged to approach the court to seek redress rather than slamming the doors of civil redress against him. Otherwise he may, out of

frustration, recoil to the trenches and from there levy war against innocent members of the public.

This issue is also resolved in the positive, in favour of the Applicants.

3. The next issue is on the provisions of the Glorious Qur'an and the entitlement of Muslim Female Students to wear *Hijab* in Public Primary and Secondary Schools in Osun State.

It is the case of the Applicants that Chapter 24 verses 30 – 31 of the Glorious Qur'an makes it compulsory for their female Muslim Students to wear *Hijab*. That portion of the holy book provides;

"Enjoin believing men to turn their eyes away from temptation and to restrain their carnal desires. This will make their lives purer. Allah has knowledge of their actions. Enjoin believing women to cover their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's father, their sons, their husband's Sons, their brothers or their brother's Sons or their sisters' sons or other women, or the slaves whom their right hands possess, or male servants free of physical needs or small children who have no sense of the shame of sex; and that they should not strike their feet in order to draw attention to their hidden ornaments.

And O ye believers! Turn ye all together towards Allah, that ye may attain bliss".

This Qur'anic injunction has been given judicial interpretation by the Court

of Appeal Ilorin Division in the Unreported case of **THE PROVOST, KWARA STATE COLLEGE OF EDUCATION, ILORIN & 2 ORS VS BASHIRAT SALIU & 2 ORS** Appeal No CA/IL/49/2006 where it was held, per Hussein Mukhtar, JCA, at page 15 – 16 of lead judgement:

"--- *The foregoing verses of the Glorious Qur'an and Hadiths have left no room for doubt on the Islamic Injunction on women's mode of dress, which is clearly in conformity with not only the Respondent's veiled dress but also the controversial article J of the 3rd Applicants'*

-38-

dress code --- The use of veil by the respondents, therefore qualifies as a fundamental right under Section 38 (1) of the Constitution".

The Court of Appeal further held per Massoud AbdulRahman Oredola, JCA at page 2 of the concurrent judgement;

"The right of the Respondents to wear their Hijab, veil within the School campus and indeed anywhere else is adequately protected under our laws. Human rights recognizes and protects religious rights. Section 38 of the 1999 Constitution of the Federal Republic of Nigeria guaranteed freedom of religion to all and sundry. Thus things that lawfully constitute open manifestation, propagation, worship, teaching, practice and observance of the said religion are equally and by extension similarly guaranteed and

protected by the Constitution. Indeed the Hijab, Niqab or Burqa, being part and parcel of Islamic code of dressing and by whatever standard a dignified or vividly decent one cannot be taken away by any other law other than the Constitution"

Both the Applicants and Muslim Lawyers Association of Nigeria (MULAN) as an Amicus Curiae subscribed to these religious and judicial pronouncements. The two sets of Respondents and Christian Lawyers Association of Nigeria (CLASSFON) the other Amicus Curiae though apposed this position failed to site a direct superior case law or statute to cancel out or derogate from the specific pronouncements of the Court of Appeal on this point.

I have no choice other than to submit to the Superior authority and wisdom of the Court of Appeal and apply the statutory provision. That issue is also resolved in the positive.

4) With respect to issue 4 it is obvious that from my holding above, especially the pronouncements of their Lordships of the Court of Appeal that wearing of *Hijab* by Muslim Female Students in Public Primary and Secondary Schools in

Osun State qualify as a right to be protected as envisaged under S.38 (1) and 42 of the Constitution. The Court of Appeal per Massoud AbdulRahman Oredola JCA at pages 3 – 4 of the concurrent judgement held further;

"I am of the firm but respectful view point that sticking to the fundamentals of one's religion does not and cannot make or transform someone into either an extremist or a fanatic. Let it

be reiterated, that either a right or duty conferred or imposed by the constitution cannot be taken away or removed by any other legislation or regulation, statutory or otherwise which seeks to abrogate such a right or grant relief from such a duty as conferred or exacted by the constitution will be void to the extent of its inconsistency".

Learned Counsel for Christian Lawyers Association of Nigeria submitted that this case should be distinguished from **THE PROVOST COLLEGE OF EDUCATION & ORS V BASHIRAT SALIU & ORS** case (supra) on the ground that the students affected in the Court of Appeal decision are mature students who do not wear School Uniform unlike the Muslim Female Students in this case who are of impressionable age and wear prescribed school uniform. Some decided foreign authorities were also sited to back up his submission. In reaction, Counsel to the Muslim Lawyers Association of Nigeria whose brief is decorated with clarity of thought and cases that are dead on point, drew my attention to the very wide and

comprehensive holdings of the Court of Appeal and submitted that the decision of Court of Appeal is binding on the court. That there is not yet an authority to the contrary from any higher court. It was further submitted that, the foreign and other authorities sited are merely persuasive and not on all fours with this case, hence they should be discountenanced.

With due respect to the Counsel to the Christian Lawyers Association of Nigeria whose brief is no doubt a product of hard work, diligence and

intelligence, and those of 1st – 5th and 6th – 9th Respondents, the line of demarcation they are trying to draw is rather too faint. The similarities between the issues and principles in this case and the decision of the Court of Appeal Ilorin (supra) are:

a. The two cases involve Muslim female Students in Public Schools
b. The students feel they have Constitutional right to propagate their religion by wearing *Hijab* within and outside the School premises.
c. The authorities in contrary, published regulations that seek to proscribe or at least restrict the use of *Hijab* by the students affected.
d. The two sets of students approached the courts under Fundamental Rights (Enforcement Procedure) Rules.
e. The two set of students in this case and those involved in the Court Appeal decision called for interpretation of Sections 32 (1) and 42 of the Constitution, Federal Republic of Nigeria 1999 (As Amended).

The two cases are on all fours. Therefore even if I have a different opinion from that of their Lordships of Court of Appeal, such opinion cannot matter or be countenanced. Administration of justice thrives on Order and precedence.

5) Issue 5 is whether Article 8 2 (V) the Guideline (supra) is in conflict with the Constitution.

There is no doubt that the 1st – 3rd Respondents have Constitutional right to formulate policies and administer Public Primary and Secondary Schools in Osun State. This is especially so as education falls on the Concurrent Legislative list. Pursuant to that, it is also their responsibility to ensure due diligence and best practices in such schools. However regulations which run against the Constitution to the detriment of a Nigerian citizen cannot stand.

As at the time the Guidelines now being challenged was made in year 2004, the 1st – 3rd Respondents are owners and sponsors of all Public Primary and Secondary Schools in Osun State. However, the Schools were allowed to retain their names and cultural identity of their founders before they were taken over by the government. The 1st – 3rd Respondents admit and place the Students into any of the Schools irrespective of the name or cultural foundations of such Schools. However the Muslim Female Students who have Constitutional right to propagate their religion by wearing hijab in the School premises were denied except the Muslim Female Students that are lucky to be admitted to Muslim named Schools. Any Muslim Female students who are admitted to other Public Primary and Secondary Schools will have their rights curtailed with attendant sanctions.

The situation on ground now as submitted by the Learned Counsel for the 1st – 5th Respondents, is that Schools are being merged, irrespective of whether

they are basically Christian or Muslim named Schools and pupils are being placed to Schools irrespective of any religious belief and opinion of anybody or organization.

Evidently, by this step the 1st – 3rd Respondents have sabotaged Article 8 2(v) of the Guideline which they themselves made. This is because government now place students to Schools without considering their religious beliefs. In view of this, it has become obvious that the regulation is no longer applicable operational. This is aside from the fact that it is unconstitutional. Section 1(3) Constitution of Federal Republic of Nigeria 1999 provides;

"If any other law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void".

In the case of **PDP V CPC (2011) 17 NWLR (pt 1277) 485 at 511** it was held;

"The Constitution of Nigeria is the grundnorm, otherwise known as the basic norm from which all the other laws of the society derive their validity. Each legal norm of the Society derives its validity from basic norm. Any other law that is in conflict with the provision of the Constitution must give way or abate".

See also **TROUSSEAU INVES LTD V EYO (2011)6 NWLR pt 1242 at 195.**

Article 8 2(V)of Guideline on Administration And Discipline In Osun State Public Schools issued by Ministry of Education, Osogbo in 2004 is in direct conflict with Section 38(1) and 42 Constitution of Federal Republic of Nigeria 1999. To that extent, it is void and is accordingly struck out. Female Muslim Students have constitutional right to put on *Hijab* in all Public Primary and Secondary Schools in

Osun State as enjoined by Chapter 24 verses 30 -31 of the Glorious Qur'an and in exercise of their Constitutional right under S.38 (1) and 42 of the Constitution.

6) I now move to the interest that the 6th to 9th Respondents are seeking to protect in this case or whether they have any dispute they want to resolve with the Applicants.

I had earlier in this judgement recalled the history and policy of Education in Nigeria and especially in this geo-political Zone. When Osun State was created therefore, it inherited the Schools already taken over and compensation paid by the Old Western State to those proprietors. Therefore no mission or private proprietors own any Public Primary or Secondary School in Osun State as at year 2004 when the Guideline (supra) was made. And for purpose of clarity, I want to state the following facts which evolve from the processes filed in this case:

i. Government, that is the 1st – 3rd Respondents has permitted the use of ***Hijab*** in Public Schools before this case was initiated, and even now; the only issue is that the usage has been restricted to certain School premises.

ii. In effect, the Applicants are not seeking for introduction of wearing of ***Hijab*** by Muslim Female Students of Public Primary and Secondary Schools, they (Applicants) are merely seeking for opportunity to wear ***Hijab*** in all Schools especially the ones where they were not permitted to wear it before.

iii. Even in Muslim named Schools where the use of ***Hijab*** is permitted female Christian Students were never forced to wear ***Hijab***.

iv. Indeed, having been divested of their ownership of any Public Primary or Secondary Schools way back in 1975, the Applicants have no vires to compel any student to wear *Hijab* in Schools, which do not belong to them any longer.

v. Even if the 1st – 3rd Respondents who are owners of the Schools attempt to impose the wearing of *Hijab* on Christian Female Students in Public Primary and Secondary Schools, Section 38(2) Constitution of Federal Republic of Nigeria shall protect the Students. The law provides:

"S.38 (2): No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parents or guardian"

vi. It has not been alleged by the 6th, 7th, 8th and 9th Respondents that any Christian Female Student has ever been compelled to wear *Hijab* or denied admission or placement in Public Muslim named School or any Public Primary or Secondary Schools at any time.

vii. This court concedes to the 6th – 9th Respondents that their intervention in this case is to prevent their right which they fear may likely be infringed, as provided by Order 2 rule 1 Fundamental Rights (Enforcement Procedure) Rules, to the effect that:

" Or 2 R1: Any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples Right

*(Ratification and enforcement) Act and to which he is entitled, has been, is being, or **is likely to be infringed**, may apply to the court in the state where the infringement occurs or is likely to occur, for redress".*

To that extent, the intervention of the 6th, 7th , 8th and 9th Respondents by their successful application for joinder is well founded, for the fact that they are nursing the anxiety that their fundamental right ***is likely to be infringed***.

But that appears to be the elastic end of the merit of the case of the 6th , 7th 8th and 9th Respondents. Other than that, the intervention of the 6th – 9th Respondents, as demonstrated in paragraphs 10, 11, 12 and 13 of the Counter Affidavit which they filed on 5/4/2013 is unnecessary, if not baseless. They are not necessary parties such that this dispute can be resolved without their presence. Let me quote paragraphs 10, 11, 12 and 13 of that their said Counter Affidavit.

"10. That I know for a fact that many among Public Primary and Secondary

Schools in Osun State founded on Christian heritage, tradition and practices

by members of the 6th Respondent but whose administration and educational management were forcibly taken over by government have Christian Churches located thereon where Christian worship takes place".

"11. That the members of the 6th Respondent desire to have their wards whose minds are impressionable at that level of education attend School in an environment devoid of practices alien to their Christian faith such as the wearing of Hijab in Schools founded by them upon Christian heritage and ethos but whose administration and educational management were forcibly taken over by government.

"12. That some of the many Schools founded by members of the 6th Respondent and where their wards are educated are St. Benedict Catholic Primary School 'A' Isale Aro, Osogbo, Methodist Schools A & B, Isale Aro, Osogbo, Baptist Girls High School, Gbodofon, Osogbo, St James Secondary School, Ayetoro, Osogbo, St Charles Grammar School, Osogbo, Baptist High School, Iwo, St Marks Secondary School, Osogbo, Anglican Grammar School, Osogbo.

"13. That the presence of female students wearing Hijab on the premises of such Public Primary Schools and Secondary Schools in Osun State founded by Christian and where Christian Churches have been located from their inception is offensive to Christian worshipers such practice being alien to the Christian faith".

In order to establish the fallacy in these assertions, I shall call in aid, recent publication of Osun State Government – the 1st – 3rd Respondents titled "**Frequently Asked Questions on the New School System in the State of Osun** – A special Publication of the Ministry of Education, page 25, last paragraph, which states;

"There are no mission Schools presently in the State of Osun as all Schools were taken over by the government in 1975. It is on record that majority of the previous owners were compensated at the time although some proprietors declined the compensation. The position in Osun today and indeed all over Nigeria is that all Schools are 100% owned, staffed, and funded by the State government. The takeover of Schools in 1975 stopped

short of changing their names apparently as a mark of respect for the original owners".

If any doubt still exist that the 6th – 9th Respondents have no lucus standi to lay claim to any public Primary or Secondary Schools in Osun State where "**Christian heritage, tradition and practices**" are practised the submission of Mr. Jide Obisakin, Learned Counsel to the government (1st – 5th Respondents) at paragraph 4.5 of the process he filed on 6/11/2013 titled, REPLY TO WRITTEN ADDRESS SUBMITTED BY MUSLIM LAWYERS ASSOCIATION OF NIGERIA MULAN AS AMICUS CURIE) BY 1ST – 5TH DEFENDANTS clearly puts the issue beyond further conjecture. He submitted;

"It is to be noted presently that Schools generally are being merged irrespective of whether they are basically Christian or Muslim Schools and pupils are been relocated to Schools irrespective of any religious belief and opinion of anybody or organization".

With this, I hold that the 6th – 9th Defendants have no scores to settle and no dispute to be resolved with the Applicants and/or the Muslim Female students in Public Primary and Secondary Schools in Osun State. By implication

no Public School operates exclusively where the "**Christian heritage and ethos**" is still preserved.

Finally, I now come to the issue of implication of the decision Court of Appeal Ilorin, Appeal No. CA/IL/49/2006 (supra) on this case. It is to the credit of Counsel to all the Respondents; Messrs Jide Obisakin and Femi Ayandokun respectively, and Counsel to Christian Association of Nigeria (CLASFON) Mr. Akin Akintoye II, that they made spirited and admirable efforts to convince the court to

depart from that decision. I have reviewed their submissions earlier in this judgement, so it is not necessary for me to go over them again. However, the position of the law on the issue is located in the case of **LABOUR PARTY V INEC & ORS (2012) LPELR 7901 CA** where it was held per Okoro JCA at pages 11 – 12 paragraphs E – D thus:

"Stare decisis simply put means to abide by or adhere to decided cases as a policy of courts to stand by precedent, which is based on a certain set of facts which are substantially the same. The Apex court in ***ADETOUN OLADEJI NIG. LTD. V NB PLC (2007) 5 NWLR (pt 1027) 45 at 436, paragraphs C – H*** *per Tobi JSC stated clearly the workability of the principle thus:*

"At times when Counsel distinguish cases to the minutest and infinitesimal way they do, I chuckled. While I can hardly blame them, considering their professional sentiments for the case of their clients, some of the distinctions are without distraction or difference. Factual distinctions or differences in cases can only avail a party when they are germane or material to the stare

decisis of the case, I say this because, stare decisis which means to abide by or adhere to decided cases, as a policy of courts to stand by precedent, is based on a certain state of facts which are substantially the same, and here the word is substantially. This means that the facts that give rise to the principle of stare decisis are the material facts, devoid of or without the unimportant details. This also means that the facts need not be on all fours in the sense of exactness or exactitude".

I go further to the issue of hierarchy of courts. I am fascinated by the decision of Court of Appeal in the case of **NATIONAL PENSIONS COMMISSION V FIRST GUARANTEE PENSION & ANOR (2013) LPELR 20824** where Nweze JCA quoted in extenso the principle as laid down by the Supreme Court, and the attendant sanction that awaits a lower Court that flouts the principle. I quote;

"It is, we believe, an elementary proposition that the Supreme Court is at the apex of the judicial hierarchy in Nigeria. Thus, no lower Court is permitted the indulgence of contradicting the position the apex court has taken on a principle of law - - -Indeed no lower court has the authority to nimble at the said reasoning of the final court in the land.

- - -It is only a lower court that wants to incur the wrath of the highest court in the land that could embark on such a course of action."

One more authority on the issue is **ATOLAGBE V AWUNI (1997) 9 NWLR (pt 522) 536** where the Supreme Court, speaking though Uwais, JSC held at page 24 parag C – D;

"It is now well settled that under the common law doctrine of precedent or stare decisis, the decision of a higher court may be criticized by the judge of a lower court but not withstanding the criticism the judge of the lower court is bound to follow and apply such decision in the case before him. He has no right to disregard the decision or side track it".

It is obvious from the foregoing that, apart from the fact that my line of reasoning tallies with that of their Lordships, I am bound as a matter of duty to follow their decision and principle as laid in the very closely related case.

Having resolved the seven issues in the positive, all that remains now is to decide on the five reliefs placed before this court. And in doing so I hereby make the following decisions:

1. An Order is made for the Applicants to enforce and secure the enforcements of the fundamental right of the Muslim Female Students in Public Primary and Secondary Schools in Osun State under Sections 38 and 42 of the Constitution of Federal Republic of Nigeria 1999 (As Amended).
2. It is hereby declared that the use of Islamically prescribed head-cover called *Hijab* by the Muslim Female Students in all Public Primary and Secondary Schools in Osun State forms part of their fundamental rights to freedom of religion, conscience and thought as contained

in Sections 38 of Constitution of Federal Republic of Nigeria (as amended).

3. It is hereby declared that Article 8.2(V) of the Guidelines on Administration and Discipline in Osun State Public Schools issued by the Ministry of Education under the 3rd Respondent, acting on the instruction of the 1st Respondent is not only discriminatory against Muslim Female Students but also uncalled for, inconsistent with Section 38 of 1999 Constitution of Federal Republic of Nigeria 1999 (as amended) and a clear violation of the fundamental right of Muslim Female Students in Public Schools in Osun State to freedom of religion and therefore null, void and of no effect whatsoever. It is accordingly struck out.

4. It is also declared that acts of molestation, harassment, torture, embarrassment and humiliation which Muslim Female Students in Public Primary and Secondary Schools in Osun State are subjected to in the hands of the agents of the 1st – 3rd Respondents especially the 4th and 5th Respondents constitute a clear infringement on the fundamental right of the said Muslim female Students to religion, conscience and thought as well as their fundamental right to dignity of human person and right against torture, inhuman and degrading treatment.

5. Consequently, an order is hereby made restraining the Respondents, their servants, agents, privies or whosoever called from disallowing the Muslim Female Students in Public Primary and Secondary Schools in Osun State the use of Islamically prescribed *Hijab* in the premises of all Public Primary and Secondary Schools during and after School hours.

By way of anxiliary Order, the Muslim Female Students *Hijab* shall be in the colour and design already approved by the 1st – 3rd Respondents and currently in use by Muslim Female Students in Public Schools or any other design recommended by the 1st – 3rd Respondents.

The parties are to bear their respective costs of the litigation.

Sgd
HON. JUSTICE S. O. FALOLA - JUDGE
TODAY 3RD JUNE, 2016

Attendance of Parties

The 2nd and 3rd Applicants are present.

Alhaji Olayanju Abdulateef, Public Relation Officer, represents the 2nd Applicant.

The 3rd Applicant is represented by Arikeuyo Abduljelili, the Amir/President.

The 1st and 4th Applicants are absent.

The 6th Respondent is present and represented by Reverend A. O. Fagbemi Protocol Officer and Adesola Olubadejo, Chairman Osogbo branch

of the 6th Respondent

Other Respondents are absent.

REPRESENTATION OF COUNSEL:

K.B. Odedeji appears with A. A. Mustafa, Ibrahim Abolusodun, Abdulsalam Abdulfatai, E. O. Oladimeji and N. B. Saliu for the Applicants.

K. Tijani Adekilekun, Assistant Chief State Counsel, Ministry of Justice, Osun State, appears for the 1st – 5th Respondents

Femi Ayandokun with Edward Z. Biriomoni appears for the 6th – 9th Respondents

Alhaji G. A. Lawal appears with S. A. Asafa – Olaore (Mrs) for Muslim Lawyers Association of Nigeria (MULAN) an Amicus Curiae.