IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 17TH DAY OF JUNE, 2022
BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
JOHN INYANG OKORO	JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI	JUSTICE, SUPREME COURT
MOHAMMED LAWAL GARBA	JUSTICE, SUPREME COURT
TIJJANI ABUBAKAR	JUSTICE, SUPREME COURT
EMMANUEL AKOMAYE AGIM	JUSTICE, SUPREME COURT

SC. 910/2016

BETWEEN

1. LAGOS STATE GOVERNMENT
2. HON. ATTORNEY & COMMISSIONER FOR JUSTICE, LAGOS STATE
3. HON. COMMISSIONER FOR EDUCATION LAGOS STATE
4. HON. COMMISSIONER FOR HOME AFFAIRS, LAGOS STATE

APPELLANTS

AND

1. MISS ASIYAT ABDUL KAREEM (MINOR)
   (Suing through her next friend Alhaji Abdulkareem Owolabi)
2. MISS MARYAM OYENIYI
   (Suing through her next friend Mr. Suleman Oyeniyi)
3. THE REGISTERED TRUSTEES OF MUSLIM STUDENTS' SOCIETY OF NIGERIA(MSSN)

RESPONDENTS

CERTIFIED TRUE COPY
Date 6/7/2022
Sign
Supreme Court of Nigeria

JUDGMENT

(DELIVERED BY KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC)

This appeal is against the judgment of the Court of Appeal, Lagos Division delivered on 21st July 2016 setting aside the judgment of the High Court of Lagos State delivered on 17th October 2014.

By an Originating Summons filed on 8th March 2013 and brought pursuant to Sections 38, 42 (1) (a) and (b) and 46 (1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999, as amended; Articles 2, 5, 8, 10, 17 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. A9, Laws of the Federation of Nigeria (LFN) 2004; Order 11 Rules (1), (2) and (3) of the Fundamental Rights (Enforcement Procedure) Rules 2009 and under the inherent jurisdiction of the court, the 1st and 2nd respondents suing through their respective Next Friends along with the 3rd Respondent as

applicants sought the following reliefs against the present appellants, as respondents:

(A) A Declaration that the continuous denial of the 1st and 2nd Applicants, female members of the 3rd Applicant and other female Muslim students who resolve or are obliged to use or are using Hijab (female Muslim head covering) as shown in Exhibits A and B within or outside the premises of any educational institution in Lagos State at any time is wrongful and unconstitutional as same constitutes a violation of their rights to freedom of thought, conscience and religion, freedom from discrimination and right to the dignity of the human persons and right to education as guaranteed by Section 38 1 (a) & (b) and 42 (1) (a) & (b) of the Constitution of the Federal Republic of Nigeria, 1999 (As amended) and Articles 2, 5, 8, 10, 17 and 19 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act Cap A9, Laws of the Federation, 2004).

(B) A Declaration that the punishment or humiliation of the 1st and 2nd Applicants, female members of the 3rd Applicant and any other female Muslim Students in any institution in Lagos State as a result of the use of Hijab by the students or pupils is a violation of the Applicants' Fundamental Human Rights to freedom of thought, conscience and religion, freedom from discrimination and right to the dignity of the human person, right to education, and right to free association as guaranteed under Section 38 and 42 of the Constitution of the Federal Republic

of Nigeria 1999 (As Amended) and Articles 2, 5, 8, 10, 17 and 19 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act CAP A9, Laws of the Federation 2004).

(C) An Order of perpetual injunction restraining the respondents either by themselves, their officers, agents, privies or servants from further interfering or infringing in any manner on the fundamental rights of the 1st and 2nd Applicants, female members of the 3rd Applicant and any other female Muslim Students who have resolved or are obliged to use or are using Hijab (female Muslim head covering) on their school uniforms, if any, of any educational institution in Lagos State as shown in Exhibits A and B within or outside the premises of any educational institution in Lagos state at any time in the exercise of their rights to freedom of thought, conscience and religion, freedom from discrimination and right to the dignity of human person, right to education, and right to free association as guaranteed under Section 38 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended) and Articles 2, 5, 8, 10, 17 and 19 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act Cap. A9, Laws of the Federation, 2004).

(D) A Declaration that any directive, instruction or order by the 1st – 5th Respondents whether by themselves, their officers, agents privies or servants premised on the purported minutes of meeting held on Thursday the 16th day of February, 2012 and issued by or at the instruction of 1st, 2nd,

3rd and/or 4th Respondents preventing or restricting the 1st and 2nd Applicants, the female Muslim members of the 3rd applicant and/or any other female Muslim students who is using or have resolved or are obliged to use Hijab (female Muslim head covering) on their school uniforms as shown on Exhibits "A" and "B" within or outside the premises of any educational institution in Lagos State at any time from doing so is a violation of their rights to freedom of thought, conscience and religion, freedom from discrimination and right to freedom of thought, conscience and religion, freedom from discrimination and right to the dignity of the human persons and right to education as guaranteed by Section 38 1 (a) & (b) and 42 1(a) & (b) of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) and Articles 2, 5, 8, 10 17 and 19 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act CAP A9, Laws of the Federation, 2004.

AND for such order or further order as the Honourable Court may deem fit to make in the circumstances.

It was accompanied by an affidavit of 28 paragraphs deposed to by Alhaji Abdul Kareem Owolabi Raji, the Next Friend of the 1st Respondent, setting out the facts in support of the application with several exhibits annexed thereto. Also filed in support of the summons was a statement of facts pursuant to Order 1 Rule 2(3) of the Fundamental

Rights (Enforcement Procedure) Rules 2009 and a written address. A further affidavit was deposed to on 27/5/2013 by the same deponent to which several other Exhibits were attached.

In opposition, the respondents filed a counter affidavit deposed to on 16th June 2014 by one Ebenezer Ade Olowoyeye, Assistant Director, Directorate of Basic Education Services, Office of the Commissioner for Education along with a written address. The applicants filed a reply affidavit sworn to on 30th June 2014.

All the processes filed were duly adopted and relied upon in support of the parties' respective positions. The learned trial Judge, in a considered judgment delivered on 17th October 2014, dismissed the applicants' suit and held, *inter alia,* as follows:

> *"As already stated above, the prescribed uniform engenders uniformity and allows students focus on the pursue their education together in an atmosphere that is mutually supportive, devoid of all and any distractions by signs of religious belief and affiliation. In other words, a refusal to allow the hijab to be worn*

over the prescribed school uniform is not tantamount to a breach of the freedom of religion guaranteed by the Constitution of 1999. I so hold.

The logical conclusion therefore also is that such refusal is not discriminatory against the applicants. Indeed, to the contrary, were they to be allowed to wear the hijab (headscarf) over the school's uniform, the uniformity sought to be achieved by State will be destroyed, and the non hijab wearing students will rightly feel inferior and discriminated against because they will no longer be equals – see S. 45(1) of the 1999 Constitution.

There is an obligation for every student enrolled in the school system to obey the regulations laid down by constituted authority- I therefore cannot agree with learned Senior Advocate Chief Kazeem's submission that the applicants have a right to ignore such school regulations because of their belief stated above, the values of pluralism, respect for rights of other (who have subscribed to a non faith based educational system) and equality before the law dictate that no deviation from the regulation should be allowed.

In conclusion, I find that the refusal of the respondents to allow the applicants wear the hijab (Islamic Scarf) on their prescribed uniforms is not a breach of their constitutional rights as guaranteed by Section 38 and 42 of the 1999 Constitution. I so hold."

The respondents were dissatisfied with the decision and appealed to the court below. A full panel of the court unanimously allowed the appeal and set aside the judgment of the trial court. The appellants, not surprisingly, are dissatisfied with the judgment and have appealed to this court vide their Notice of Appeal filed on 16/9/2016 containing 4 grounds of appeal.

At the hearing of the appeal on 21/3/2022, O. Osunsanya Esq., Assistant Chief State Counsel, Ministry of Justice, Lagos State adopted and relied on the Appellants' brief filed on 7th July 2017 and deemed filed on 21/3/2022 in urging the court to allow the appeal. Hassan T. Fajemite Esq., adopted and relied on the Respondents' brief filed on 21/11/2017 also deemed filed on 21/3/22 in urging the court to dismiss the appeal.

Learned counsel for the appellants distilled 3 issues for determination from the 4 grounds of appeal as follows:

Issue 1

Whether the court below was right when it held that there was no legislation or regulation etc. before the lower court to enable it place restriction or disability on female Muslim students to wear Hijab on their uniforms having found that the Respondents did not join issue on the existence of the Appellants' policy prescribing the mode of uniform in public primary and secondary schools in Lagos State? (Ground 1).

Issue 2

Whether the court below was right in relying heavily on the decision in the case of The Provost Kwara State College of Education, Illorin & Ors. Vs. Bashirat Saliu & 2 Ors., Appeal No. CA/IL/49/2006 to effect that non-use of "Hijab" violates the provisions of Section 38 and 42 (1) and (2) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) when, the facts in the unreported cases are distinct with the facts in the instant case? (Grounds 2 and 3).

Issue 3

Whether the raising of the new issue of secularity of this Country vis-à-vis Section 10 of the 1999 Constitution, as

amended sou motu by the trial court was done wrongly and out of place? (Ground 4).

The respondents formulated 4 issues reproduced below:

Issue 1

Whether the lower court was right in holding that the mere deposition in the Respondents/Appellants' counter affidavit, even when such deposition was not specifically controverted, is not enough to establish the existence and content of state policy prohibiting the wearing of hijab on school uniforms by female Muslim students in Primary and secondary school, in the absence of any legislation or regulation referred to or exhibited for construction by the court to determine the constitutionality of otherwise of such policy? (Ground 1).

Issue 2

Whether the principles laid down by the Court of Appeal in The Provost Kwara State College of Education, Illorin & Ors. Vs. Bashirat Saliu & 2 Ors. (Appeal No. CA/IL/49/2006) are applicable to this case?

Issue 3

Whether the learned trial Justices of the Court of Appeal were right in distilling from and relying on the content of the Holy Quran Chapter 24 V 31 & Chapter 33 V 59 on the principles of the wearing of Hijab by Muslim women? (Grounds 2 & 3).

Issue 4

Whether the Court below was right when it held that the raising of the new issue of secularity of this Country vis-à-vis Section 10 of the 1999 Constitution (as amended) suo motu by the trial court without hearing the parties was done wrongly and out of place and amounts to a denial of the Constitutionally guaranteed right of the Respondents to fair hearing? (Ground 4).

I observe that the respondents' issue 2, though not tied to any of the grounds of appeal, is in *pari materia* with the appellants' issue 2 predicated on Grounds 2 and 3. Issue 3 is also predicated on Grounds 2 and 3. It is not permissible to formulate more than one issue from the same ground of appeal.

In any event, I shall adopt the issues as presented by the appellants for the resolution of the appeal.

Before delving into the merit of the appeal, it is necessary to state briefly the facts that gave rise to the issues in contention between the parties.

At the time the cause of action arose, sometime in January 2012, the 1st and 2nd respondents, were female Muslim students of Atunrashe Junior High School, Surulere, Lagos State, and were both 12 years old. Atunrashe Junior High School is a public school owned by the 1st appellant. On the fateful day, they wore the Islamic headscarf (hijab) over their school uniform and were on their way to school in a commercial bus when they encountered the Vice Principal of the school, who allegedly snatched their hijabs from their heads on the ground that they were not part of the school uniform. Due to the intervention of other passengers in the bus, their hijabs were returned to them. However, upon getting to school, the said Vice Principal

called the school assembly and directed the teachers to remove and seize any hijab worn by any female Muslim student whether within or outside the school premises. They were further warned not to wear the hijab on their school uniforms. It was alleged that the 1st and 2nd respondents were singled out and *"reprimanded, threatened, humiliated and embarrassed"* by the said Vice Principal.

According to the Next Friends of the 1st and 2nd respondents, all entreaties to the school to permit their daughters to wear the hijab were rebuffed. The issue was reported to the 3rd respondent, an NGO, which decided to take up the matter with the 1st appellant. Notwithstanding the intervention of the 3rd respondent and the Muslim Lawyers Association of Nigeria (MULAN), the appellants were adamant that the wearing of hijab on school uniforms in the State-owned public schools remained prohibited. These are the facts that led to the institution of the Originating Summons at the trial court.

It was the appellants' contention that while maintaining their stance on the wearing of the hijab in breach of the dress code of the school, some concessions were made as a result of the series of meetings held with relevant stakeholders. It was their contention that meetings were held before and during the pendency of the suit. It was decided that female Muslim students in public schools in the State who wished to wear the hijab over their school uniforms were permitted to do so during the following periods:

(a) during Islamic Religious knowledge classes;
(b) during afternoon (Salat) prayers; and
(c) during Jumat (Friday) prayers.

The appellants averred that notwithstanding these concessions, the respondents insisted on proceeding with the hearing of the suit. The respondents, on the other hand, contended that the minutes of the meeting held on 16th February, 2012 at which the resolutions were purportedly

reached, did not actually reflect what transpired and did not reflect the respective positions of the contending parties.

Issue 1

Whether the court below was right when it held that there was no legislation or regulation etc. before the lower court to enable it place restriction or disability on female Muslim students to wear Hijab on their uniforms having found that the Respondents did not join issue on the existence of the Appellants' policy prescribing the mode of uniform in public primary and secondary schools in Lagos State? (Ground 1).

Appellants' Submissions

Learned counsel for the appellant argued that the respondents did not join issues on the existence of the appellant's policy prescribing the mode of uniform in public primary and secondary schools in Lagos State. He submitted that it is trite that where facts in an affidavit are unchallenged the court is bound to accept those facts as established and deemed admitted. He submitted that the facts are to be taken as true unless they are obviously false

to the knowledge of the court. He referred to: **Honda Place Vs Globe Motor Holdings Nig. Ltd. (2005) 14 NWLR (Pt. 945) 273 @ 293 – 294 F – A; Buhari Vs Obasanjo (2003) 17 NWLR (Pt. 850) 587; Alade Vs Abimbola (1978) 2 SC 39; Long John Vs Blakk (1998) 6 NWLR (Pt. 555) 524 @ 547 H; Ajomale Vs Yaduat (No.2) (1991) 5 NWLR (Pt. 191) 266.**

He submitted that the finding of the lower court that the averments in paragraphs 4, 5, 6, 7, 8, 9 and 10 of the Appellants' counter affidavit were not controverted, implies that the existence of the State Policy, rules and guidelines on uniformity in the mode of dressing of students is not in dispute. He submitted that the failure of the lower court to apply the principle in **Honda Place Vs Globe Motor Holdings Nig. Ltd. (supra)** to its findings resulted in a miscarriage of justice.

He submitted that as the guidelines and/or policy in respect of school uniform was not in dispute at the lower court, the regulation of the rights of the 1st and 2nd

respondents with regard to the wearing of hijab on their school uniform was in order and in accordance with the provisions of the 1999 Constitution, as amended. He submitted that the uncontroverted paragraphs of the Appellants' counter affidavit before the trial court further confirm the fact that there has never been a dispute on the dress code for secondary school girls in Lagos State. He referred to Section 124 of the Evidence Act 2011.

Alternatively, learned counsel argued that assuming (without conceding) that the appellants did not produce any document relating to the guidelines and/or policy on the prescribed school uniform in Lagos State, it is common knowledge that the hijab is not part of the school uniform for Muslim girls in primary and secondary schools under the management of the State Government. He submitted that the trial court was right when it held that the hijab is not part of the dress code/school uniform.

He submitted further, relying on **Dr. Olubukola Abubakar Saraki Vs F.R.N. (2016) LPELR -**

40013(SC), that the courts are always enjoined to give a liberal interpretation to Constitutional provisions and to measure the purport and scope of its provisions. He referred to **Global Excellence Communication Ltd. Vs Duke (2007) 16 NWLR (Pt. 1059) 22; A.G. Bendel State Vs A.G. Federation (1982) 3 NCLR 1.** He submitted that the rationale of the authorities is that a narrow interpretation that would do violence to the provisions and fail to achieve the intention of the Legislature, must be avoided. He submitted that where alternative constructions are equally available, the construction that is consistent with the smooth working of the system as a whole, is to be preferred.

He submitted that the guiding principle is that the Legislature would only legislate for the purpose of bringing about an effective result. See: **IMB Vs Tinubu (2001) 16 NWLR (Pt. 740) 690; Tukur Vs Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 @ 579.** He cited a host of authorities on the point in paragraph 4.12

of his brief. He argued that this approach is in keeping with the "living tree" doctrine of constitutional interpretation enunciated in the case of **Edward Vs Canada (1932) AC 124,** which postulates that "the Constitution must be capable of growth to meet the future." Reference was made to some legal texts. He referred generally to: A. Scalia and G. Garner, Reading Law: The Interpretation of Legal Texts (St. Paul, MN: Thomson (West, 2012) 167 – 168; also, **Abegunde Vs The Ondo State House of Assembly (2015) Vol. 244 LRCN, 374; Per Ngwuta, JSC. (Pp. 130 – 132, D – C)**

Learned counsel argued that the court below erred when it held that the State Government cannot regulate the use of hijab by Muslim girls in secondary schools in the State because it violates Section 38 of the 1999 Constitution. He argued that it could not be said that there was any violation of the provision because the Muslim girls are allowed to manifest and propagate their religion during Salat and Jumat prayers and are allowed to take Islamic

Studies while in the school premises, in accordance with Section 38 of the Constitution. He submitted that in so far as the 1st and 2nd respondent's school is under the management and control of the State Government, it would not be correct to state that there was a violation of Section 38(3) of the Constitution, since the institution does not belong to a religious community or denomination.

Learned counsel submitted that notwithstanding the fact that the averments in paragraphs 4 – 10 of their counter affidavits were not challenged, the appellants, due to the sensitive nature of the subject matter and in order to avoid *"unnecessary anxiety, animosity, disunity and unrest among students of different faiths in public schools,"* reviewed the policy to accommodate the use of the hijab during specific periods by Muslim girls in public schools. He contended that the revised policy does not amount to a breach of their right to freedom of religion. He argued that indeed the concessions made are reasonably justifiable in a

multi-religious State such as Lagos State and in accordance with the 1999 Constitution, which prohibits state religion.

Referring to Section 42 of the Constitution, learned counsel contended that to allow the introduction of the hijab in favour of Muslim girls without according similar privilege to other female students of other faiths would amount to discrimination against them. He submitted that it would amount to a breach of Section 42(1) (b) and 17(2) of the 1999 Constitution if this were allowed. He submitted that in Nigeria, the social order of the State is founded on the ideals of freedom, equality and justice to all manner of people, irrespective of their religion. He submitted that by virtue of Section 18(2) (a) of the Constitution, the State shall ensure that every citizen shall have equality of rights, obligations and opportunity before the law.

He submitted that if, on the basis of equality, all students in public schools are allowed to wear other clothes or apparel peculiar to their individual religion on top of their school uniforms, it would constitute a breach of the

Government's policy on uniformity in dressing of students in public school and would result in *"anxiety, animosity, unrest and lack of sense of unity amongst students in the same school."*

It was further submitted that although a child has fundamental rights, just as an adult does, he could be prevented from exercising any of the fundamental rights by his parents, guardian or relation for his protection and welfare and no action for breach of his fundamental rights would lie. He referred to the Child Rights Law of Lagos State 2007 particularly Section 6(1) and (2) thereof and submitted that the Lagos State Government, through the Ministry of Education and the Universal Basic Education Board, in issuing circulars and regulations to curtail the activities of students, act as their legal guardian.

He submitted that the lower court erred when it held that there was no legislation or regulation before the trial court which empowered the State Government to place a restriction or prohibition on female students to wear the

hijab on their uniforms. He submitted that the lower court ought to have taken judicial notice of Section 6(1) and (2) of the Child Rights Law in arriving at its decision. He relied on Section 122(1) of the Evidence Act 2011 and the cases of **Ado Ibrahim Co. Ltd. Vs Bendel Cement Co. Ltd. (2007) 4 SC (Pt.1) 33 @ 54 Lines 31 – 36 (wrongly cited as Pt. 133 @ 21 F – G)**.

Respondents' Submissions

In response, learned counsel for the respondents submitted that while it is correct that the lower court found that the averments of the appellants regarding the policy on school uniforms were not specifically denied, the said court went further to hold that if the court is to take judicial notice of the existence of a policy to that effect, it should also take judicial notice of the fact that the said policy must have been embodied in some form of documentation. He noted that the lower court held *inter alia* that it was only possible to take judicial notice of the fact that there was an old policy in existence. He argued that it would be

speculative to presume that the old policy is relevant and up to date as to strictly ban the wearing of the hijab. He contended that what is in issue is not whether there is a State policy on the wearing of school uniforms in the State, but the form and content of the said policy.

He submitted that the deponent to the counter affidavit, an Assistant Director in the Department of Education, who is not the author of the State policy, which he averred had been in existence for a long time, ought to have disclosed the source of his knowledge. He submitted that Government Policy is usually contained in a record that is accessible to successive generations of public servants and that it is not sufficient to merely aver that he is aware of the policy. He submitted that the averments are in violation of Sections 38, 67 and 125 of the Evidence Act. He also referred to Sections 85 and 86 of the Evidence Act, which provides that the contents of documents may be proved by primary or secondary evidence. He cited the case

of: **Okafor Vs Okafor (2015) 4 NWLR (Pt. 1449) 335 @ 359 F – G.**

With regard to the submission that the court failed to apply the principle in **Honda Place Ltd. Vs Globe Motors Holdings Nig. Ltd. (supra)**, he submitted that in the circumstances of this case, it was not necessary to controvert the existence of a dress code for public schools in Lagos State, which is of common knowledge, but what is relevant is the fact that the appellants failed to refer to any document whose authenticity could not be doubted, which contained the policy on the subject, as required by Section 124 (1) (b) of the Evidence Act. He urged the court to disregard the appellants' submission on this issue.

Learned counsel rejected the argument of the appellants contending that the purport of the decision of the lower court is that the 1st appellant cannot regulate the school attire (including the wearing of the hijab) in schools owned, funded, and run by it. He submitted that on the contrary, the purport of the decision is that any order or

regulation that would have the effect of curtailing a citizen's constitutionally guaranteed right, must be embodied in properly enacted legislation, subsidiary regulation or guidelines issued by the appropriate government authority. He submitted that the *ipse dixit* of a government official is not sufficient.

He submitted that the submission that a female Muslim student who finds the policy prohibiting the use of the hijab unacceptable, is free to enroll in a private, faith-based or community-owned school, is discriminatory and contrary to Section 42(1) of the 1999 Constitution, as amended. He submitted that the appellants have a Constitutional responsibility to provide equal and adequate educational opportunities at all levels for all Nigerian Students resident in the State without discrimination on account of sex, religion or creed. He referred to Section 18 (1) of the Constitution.

Learned counsel argued further that the concessions made by the appellants permitting the wearing of the hijab

during particular periods does not make the policy any less discriminatory. He noted that the appellants have prescribed the wearing of a beret on school uniforms by all female students without any limitation as to time or period even though the wearing of beret derives from cultures other than Islam.

On the contention that allowing the use of the hijab, which is a mandatory part of Islamic doctrine, without according similar privileges to other girl students of other faiths to wear apparel peculiar to their own religion would amount to discrimination by virtue of Section 42 of the Constitution, he submitted that the argument is speculative in the absence of any averment or allegation by the appellants that any other religious group or individual has asserted such a right. On the attitude of the courts to issues that are speculative or academic, he referred to **Douglas Vs Peterside (1994) 3 NWLR (Pt. 330) 37.**

Learned counsel submitted that it is evident from paragraphs 4 and 6 of the appellants' counter affidavit that

the dress code for public schools has been in existence for a long time. He contended that in the colonial era it was the norm for ladies to wear berets over their gowns to churches and social events. He submitted that it was the social development at the time that influenced the mode of dressing. He submitted that there is a recent consciousness among Muslims, particularly in the Southwestern part of Nigeria, to inculcate the wearing of hijab in their female children and that there is nothing inherently wrong or unconstitutional in the Government reviewing its existing policy (if any) to accommodate this new consciousness.

He gave examples of other areas where the Government has accommodated other religious interests in the light of new consciousness, such as the establishment of pilgrim welfare boards and commissions to facilitate the observance of one of the pillars of Islam, which is the performance of the holy pilgrimage to Mecca. He noted that when the Christian community developed the consciousness to perform holy pilgrimage to Jerusalem,

decades after the Muslim pilgrim boards were set up, pilgrim welfare boards were set up to accommodate them.

Learned counsel disagreed with the argument of learned counsel for the appellants that if the wearing of the hijab were to be accommodated, it would lead to chaos and disunity. He submitted that the wearing of the hijab is not just a mere innovation by any Muslim group to make a difference, but a religious injunction firmly rooted in the Holy Quran. He referred to paragraph 5.3 of the written address in support of the Originating Summons at page 77 of the record and paragraph 8 of their Reply Affidavit at page 134 of the record. He submitted that any other group seeking similar indulgence would have to provide biblical or other authentic scriptural evidence to buttress their claim, which the government would be required to investigate and to satisfy itself of the authenticity of the claim. He argued that where such proof is not forthcoming, a refusal would not amount to discrimination nor would it be unconstitutional.

He submitted that on the other hand, the prohibition of the hijab as part of the dress code in public schools in Lagos State is discriminatory against the female Muslim students and therefore violates Section 42(1) (a) of the Constitution as it amounts to preventing them from practicing their religion. He noted that permitting female Muslim students to wear the hijab cannot amount to disturbing the equality of opportunity for other students because the wearing of the hijab is optional for any student who chooses to wear it and that a female Muslim student who does not feel comfortable wearing it cannot be compelled to do so and would not lose anything by seeing her fellow students who so desire, wearing it. He submitted that any discriminatory rule or policy should be struck down as this court did in **Lafia Local Government Vs Nassarawa State (2012) 17 NWLR (Pt. 1328)... @ 127 E,** per Rhodes Vivour, JSC.

On the submissions relating to the Lagos State Child Rights Law, learned counsel submitted that Section 6(1) (2)

and (3) thereof did not make the State education authorities the legal guardians of the child. He submitted that the primary party to provide guidance to the child in the practice of his/her religion is the parent and that a legal guardian only has a role to play where the parent is absent. He submitted that since the 1st and 2nd respondents sued through their Next of Friends, who are their biological fathers, the preference of their parents as to the direction they wish their children to follow in the practice of their religion is ascertained. He referred to Sub-section (3) of the law and submitted that the appellants cannot assume the role of legal guardians and at the same time be the party mandatorily required to respect the guidance and direction of the parents or legal guardians. He disagreed with the argument that in issuing the directions regarding the wearing of the hijab, the appellants assumed the role of legal guardians.

Reference was also made to Section 13 of the Lagos State Education Law Cap E 3 Laws of Lagos State 2015 to

the effect that in the exercise and performance of its functions, the Commissioner for Education shall, as far as practicable, have regard to and act in accordance with parental wishes in the provision of efficient instruction and training. Learned counsel submitted that upon a combined reading of Section 6(1) and (3) of the Child Rights Law, Section 13 of the Lagos State Education Law and Section 38 (2) of the 1999 Constitution, as amended, the appellants have no role in deciding how the respondents practice their religion. He urged the court to resolve the issue against the appellants.

RESOLUTION OF ISSUE 1

It is a general principle of law that facts pleaded, or averments deposed to in an affidavit, if not specifically challenged or controverted, are deemed admitted and require no further proof, except where the facts are obviously false to the knowledge of the court. There is a plethora of authorities on this, such as, **The Honda Place Ltd. Vs Globe Motor Holdings Nig. Ltd. (supra)**, cited

by learned counsel for the appellants, **Ajomale Vs Yaduat (No.2) (supra); Ogunleye Vs Oni (1990) 4 SC 130; CBN Vs Interstella Communications Ltd. (2017) LPELR – 43940 (SC) @ 62D; Nishizawa Ltd Vs Jethwani (1984) 12 SC 234.**

As with every general rule, there are some exceptions. It was held in **B.B.B. Manufacturing Co. Ltd. Vs A.C.B. Ltd (2004) 2 NWLR (Pt. 858) 527 @ 550 – 551 F – A**, per Pats-Acholomu, JSC as follows:

> *"Although it is the general rule that uncontradicted evidence from which reasonable people can draw but one conclusion may not ordinarily be rejected by the court but must be accepted as true, it is also true to say that the court is not in all the circumstances bound to accept as true testimony an evidence that is uncontradicted where it is willfully or corruptly false, incredible, improbable or sharply falls below the standard expected in a particular case."*

It was held in **R-Benkay (Nig) Ltd. Vs Cadbury (Nig) Plc. (2012) 9 NWLR (Pt. 1306) 596 @ 624 C – D**, per Peter- Odili, JSC, *inter alia,* as follows:

> *"...it is not a fait accompli that once there are averments in an affidavit which are not controverted, the result would be a favourable disposition to the position of the party who had proffered the disposition. This is so because all averments must go under the surgical knife of evaluation which is done by the court as a matter of duty to see its acceptability as happened in this case."*

See also: **Gonzee (Nig) Ltd Vs NERDC (2005) 13 NWLR (Pt. 943) 634 @ 650 D**, cited and relied upon.

The paragraphs of the counter affidavit which are alleged not to have been disputed and which ought to have been deemed admitted and proved are paragraphs 4 – 10 thereof wherein it is averred thus:

> *"4. The dressing code by use of uniforms in public [primary and secondary] schools is not a new policy of the State Government.*
>
> *5. I know as a fact that the compulsory wearing of uniforms in public [primary and secondary] schools is for identification of students from different school in Lagos State.*
>
> *6 I am also aware that a standardized set of dress (uniform, cap, beret, cardigan and tie) for students in public schools is meant to encourage a sense of unity, discipline organisation and orderliness in public schools in the state.*

7. *I am also aware that wearing the same uniform in a public school without deviation of any sort encourages objectivity on the part of students and teachers and students are not judged or related to on the basis of appearance or mode of dressing.*

8. *I know that wearing undiluted uniform in public schools have reduced social anxiety or animosity among students while enhancing each student's confidence and sense of belonging as well as encourages focus on school work.*

9. *I know as a fact that the State Policy and Rules on guide lines on uniformity in mode of dressing of students in public schools does not seek to prevent only Muslim girl students from varying the recognised uniforms in public [primary and secondary] schools, it generally prohibits any student or group of students irrespective of religion from breaching the prescribed dress code of the school.*

10. *I am aware that the clamour and demand for compulsory use of Hijabs on top of school uniform by Muslim girl students in public schools in Lagos State is a recent development from the 3rd Applicants."*

In their reply affidavit, the respondents only addressed the averments beginning from paragraph 11. It is therefore not in dispute that paragraphs 4 – 10 above, were not specifically denied or controverted. The question that arises

is whether the failure to challenge those paragraphs, in the circumstances of this case enures in favour of the appellants?

After a consideration of the various meanings ascribed to the word "policy" in various dictionaries, including Black's Law Dictionary 9th Edition at page 1276, the lower court came to the conclusion that the existence of a policy as averred by the appellants denotes some form of documentation, especially where the government or a government institution is concerned. The court held, *inter alia*, at pages 310 - 311 of the record:

> *"A court is not allowed to make findings on documents that have not been laid in evidence before it. I am of the view that it would amount to an undue speculation for the lower court to do more than hold that there is in existence an old policy of Lagos State Government on School Uniforms in its Public Schols. That is no more than what can be deemed to have been admitted by the Appellants in the circumstances, or maybe even the objectives of that old policy. Whether that old policy is relevant and up to date to ban or restrict the wearing of hijab by female Muslim students must remain a moot question subject to a proper perusal of its actual contents.*

Whether that old policy is relevant or could be said to be relevant against the provisions of the 1999 Constitution, as amended, and as now being sought to be enforced by the Appellants is also another huge question."

Having carefully perused paragraphs 4 – 10 of the counter affidavit, I am of view that the relevant paragraphs for the purpose of this discourse are paragraphs 4 and 9 to the effect that a dress code consisting of the wearing of uniforms by students in public primary and secondary schools in Lagos State is not a new policy and that the extant policy prohibits any student, irrespective of religion, from breaching the prescribed dress code in a particular school. Paragraphs 5 – 9 are the appellants' views on why it is necessary to have a dress code or uniform in schools. They do not require a counter averment. As regards paragraph 4, the respondents do not challenge or dispute the fact that uniforms are prescribed for public primary and secondary schools in the State.

In paragraph 9, the appellants allude to a State policy that specifically prohibits a breach of the prescribed dress

code. I do not think the lower court could be faulted for holding that failure to exhibit such policy requires the court to speculate on its existence and contents. This is particularly so having regard to paragraph 10 of the counter affidavit where the appellants aver that the clamour and demand for compulsory use of the hijab on their school uniforms by female Muslim students is a recent development. The prohibition of its use must also be a recent development for which there ought to be some form of documentation circulated to all schools for their guidance and compliance. The burden of proving or establishing the existence of a State policy prohibiting the wearing of the hijab was on the appellants who asserted that fact. See Section 131 of the Evidence Act, 2011.

The appellants have argued that the court should take judicial notice of the State policy prescribing school uniforms for students in its public primary and secondary schools and the fact that the hijab cannot be worn by

female Muslim students, except as permitted by the concessions recently made.

The real issue in controversy in this appeal is whether the appellants' stance amounts to a breach of the 1st and 2nd respondents' fundamental rights, particularly their rights to freedom of thought, conscience and religion, guaranteed by Section 38 of the 1999 Constitution, as amended. Apart from Section 38 of the Constitution, other relevant sections are Sections 42(1) (a) and (b) and 18 (1) thereof.

The sections provide as follows:

> *"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.*
>
> *(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 parent or guardian.*

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

42. (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

(a) be subjected either expressly by, or in the practical application of any law in force in Nigeria, or any executive or administrative action, of government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of original, circumstances of birth, sex, religious or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religious or political opinions.

18 (1) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels."

In **Miscellaneous Offences Tribunal Vs Okoroafor (2001) 8 NWLR (Pt. 745) 295 @ 350; (2001) LPELR – 3190 (SC) @ 59E,** the meaning and nature of the Constitution was explained thus by Karibi-Whyte, JSC:

> *"The Constitution of the country is its fundamental law, the fons et origo of all laws, the exercise of all powers and the source from which all laws, institutions and persons derive their authority."*

In **Hon. Michael Dapianlong & Ors. Vs Chief (Dr.) Joshua Chibi Dariye & Anor. (2007) LPELR – 928 (SC) @ 55 B – D,** His Lordship, Onnoghen, JSC (as he then was) held as follows:

> *"It is settled law that the Constitution of any country is what is usually called the organic law or grundnorm of the people. It contains all the laws from which the institutions of state derive their creation, legitimacy and very being. The Constitution is also the unifying force in the nation, opportuning rights and imposing obligations on the people who are subject to its operations. It is a very important composite document the interpretation or construction of which is subject to recognized cannons of interpretation designed or crafted to enhance and sustain the esteem in which Constitutions are held the world over."*

See also the recent decision of this court in **APC & Ors. Vs Enugu State Independent Electoral Commission & Ors. (2021) LPELR 55337 (SC) @ 65 – 67 F – A**, per Saulawa, JSC; **Rossek & Ors. Vs A.C.B. Ltd & Ors. (1993) 8 NWLR (Pt. 312) 382.**

The supremacy of the Constitution is clearly provided for in Section 1(1) thereof, to wit:

> *"(1) The Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."*

Subsection (3) provides:

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

As stated by his Lordship, Onnoghen, JSC (as he then was) in **Dapianlong Vs Dariye (supra)**, there are recognized cannons of interpretation, which guide the courts in the interpretation of the Constitution. The purpose of interpretation is to ascertain and articulate the intention

of the Legislature. It was held in the case of **Rabiu Vs Kano State (1980) 8 – 11 SC 130; (1980) LPELR – 2936 (SC) @ 31 C – E,** that the court should, as far as possible, and in the interest of justice, lean in favour of a broader interpretation of constitutional provisions unless there is something in the text or the rest of the document indicating that the narrower interpretation would best carry out the objects and purposes of the Constitution.

In **A.G. Lagos State Vs Eko Hotels Ltd & Anor. (2006) 18 NWLR (Pt. 1011) 378 @ 458 B – E,** this court, per Tobi, JSC, held, *inter alia:*

> *"Generally, words in a Constitution bear their ordinary grammatical meaning, when the intention of the maker of the Constitution is clear and can be captured at a glance of the language. However, where the meaning is not directly obvious on the face of the language, the court will investigate the intention behind the use of the language and come out with an interpretation or construction that best fits the apparently hidden intention. That is one principle of constitutional interpretation.*
>
> *Another principle is that courts are enjoined to give a liberal interpretation to the language of the Constitution in order to achieve the desired purpose*

of the maker of the Constitution. The court will not embark upon such an exercise when the language is exact, precise and concise and therefore not able to admit a liberal interpretation, the court will succumb to the clear meaning. The court takes this position of least resistance because it cannot wear gloves for battle with the makers of the Constitution as that will vex or annoy their intention.

Afterall, the law of statutory interpretation is clear that Courts invoke their interpretative jurisdiction to vindicate the intention of the law makers. They cannot plant their judicial mind or thought in place of the intention of the law makers."

Other interpretative principles copiously alluded to in **Skye Bank Vs Iwu (2017) LPELR – 42595 (SC) @ 26 – 32 B – F,** per Nweze, JSC are:

"(i) Sections of the Constitution are not to be construed in isolation, but as a whole. See: A.G. Federation Vs Abubakar (2007) ALL FWLR (Pt. 389) 1264 @ 1289 – 1291; Elelu-Habeeb Vs A.G. Federation (2012) LPELR – 15515 (SC) @ 121 – 122 D -A; INEC Vs Musa (2003) 3 NWLR (Pt. 806) 72 @ 102;

(ii) Although words used will ordinarily be given their plain and grammatically meaning, where there is inherent ambiguity in any section, a holistic interpretation must be resorted to in order to arrive at the intention of its framers. See: A.G.

Federation Vs Abubakar (supra); Elelu-Habeeb Vs A.G. Federation (supra); INEC Vs Musa supra;

(iii) The Sections must not be construed in such a manner as to render other sections redundant or superfluous. See: N.U.R.T.W. Vs R.T.E.A.N. (2012) 10 NWLR (Pt. 1307) 170;

(iv) If the words of a statute are ambiguous, the law maker's intention must be sought, first in the statute itself and then in other legislation and contemporary circumstances and by resort to the mischief rule. See A.G. Ekiti State & Ors. Vs Adewumi & Ors (2002) 1 SC. 47 @ 51; Ugwu Vs Ararume (2007) 12 NWLR (Pt. 1048) 365."

The following authorities were also relied on: **Saraki Vs F.R.N. (2016) 3 NWLR (Pt. 1500) 531 @ 631-632; Global Excellence Communication Ltd Vs Duke (2007) 16 NWLR (Pt.1059) 22; A.G. Bendel Vs A.G. Federation (1982) 3 NCLR 1.**

I shall proceed to apply the principles to the case at hand. There is no doubt that Chapter IV of the 1999 Constitution, as amended, makes provision for the establishment and protection of the fundamental rights of every Nigerian citizen. Section 38 provides for the right to freedom of thought, conscience and religion. It provides in

sub-section (1) that the freedom of thought, conscience and religion includes:

> *"Freedom...to manifest and propagate his religion or belief, in worship, teaching, practice and observance."*

Blacks' Law Dictionary, 8th Edition at page 1317 defines "***Religion***" thus:

> *"A system of a faith and worship usually involving a belief in a Supreme being and usually containing a moral or ethical code, especially such a system recognised and practiced by a particular Church, sect or denomination.*
>
> *...courts have interpreted the term religion quite broadly to include a wide variety of theistic and nontheistic beliefs."*

"***Freedom of Religion***" is also defined at page 689 thereof as follows:

> *"The right to adhere to any form of religion or none, to practise and abstain from practicing religious beliefs, and to be free from governmental interference with or promotion of religion."*

The word "***manifest***" as used in Section 38 is a verb meaning:

> *"show clearly or appear"*

See: Oxford Dictionary Thesaurus and Word Power Guide. In Dictionary. Com for iPad, it is defines as:

> *"to make clear or evident to the eye or the understanding; show plainly."*

"***Practice***" is defined as:

> *"to follow or observe habitually or customarily: to practice one's religion"*

"***Observance***" is defined as:

> *"the practice of obeying a law, celebrating a festival or behaving according to a particular custom"*

"***Propagate***" means

> *"to spread an idea, a belief or piece of information among many people."*

See: Oxford Advanced Learner's Dictionary. International Student's Edition.

Th plain or ordinary grammatical meaning of Section 38(1) of the 1999 Constitution, as amended, is that every person is entitled to freedom of thought, conscience and religion, including the freedom to manifest and spread his religion or belief in the manner in which he worships, teaches, disseminates or observes the rules or customs of

his religion. Sub-sections (2) and (3) further affirm the protection of these rights.

The wearing of the hijab by a female Muslim is a manifestation, practice and observance of her religion of Islam. A perusal of all the processes filed by the parties and submissions thereon shows that it is not in dispute that wearing of the hijab by a female Muslim is a religious injunction prescribed in the Holy Quran. It would also appear that the appellants are not challenging the right of a female Muslim to wear the hijab. The issue in contention is whether they are justified in prohibiting its use over the prescribed school uniform in their public primary and secondary schools.

It is the appellant's contention that if the female students are allowed to wear the hijab outside of the periods conceded to them, it would amount to a violation of Section 42(1) (b) and 17(2) of the Constitution, as it relates to other students in the school. It is also argued that allowing students to wear apparel peculiar to their faith

over their prescribed school uniforms would constitute a breach of the Lagos State Government's Policy on uniformity of dressing and would result in anxiety, animosity, unrest and lack of unity among the students.

Section 45 of the Constitution provides as follows:

> *"45(1) Nothing in Sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –*
>
> *(a) In the interest of defence, public safety, public order, public morality or public health; or*
> *(b) For the purpose of protecting the rights and freedom of other persons"*

Thus, the fundamental right guaranteed in the Sections referred to are not absolute, but can only be curtailed in the circumstances set out in sub-paragraphs (a) and (b) of sub-section (1). From the submissions of learned counsel for the appellants and the finding of the learned trial Judge, they are of the opinion that permitting the use of hijab by female Muslim students as asserted by the 1st and 2nd respondents

is discriminatory and would infringe on the rights and freedom of other students.

The question that arises for consideration is: what does the wearing of the Hijab entail? In paragraphs 8, 9 and 10 of the affidavit in support of the Originating Summons deposed to by the father and Next Friend of the 1st respondent, it is averred as follows:

> *"8. That since the birth of the 1st Applicant, my wife and myself had brought up the 1st applicant in accordance with the Islamic tenets and she had imbibed the culture of using hijab (female Muslim head covering) in public places and I am aware that the same fact holds for the 2nd applicant and her parents."*
>
> *9. That as a devout Muslim, I am aware that it is a cardinal principle of the Islamic faith that every female Muslim shall at all times in public places, use "Hijab" to cover her head up to her bosom as shown in Exhibits "A" and "B" attached to this affidavit.*
>
> *10. That I am also aware that the 1st and 2nd Applicants and many female Muslim students dress in Public places using the "Hijab" as a matter of choice, conviction and in obeisance to the tenets of the Islamic faith."*

In paragraphs 10 and 11 of their counter affidavit, the appellants averred thus:

"10. I am aware that the clamour and demand for compulsory use of Hijab on top of school uniform by Muslim girl students in public schools in Lagos State is a recent development.

11. The demand was considered by the Respondents [now appellants] who came to the decision not to allow the use of hijab in public schools on the ground that any deviation from the prescribed school uniform for students for any reason, religious, cultural or personal will bring about and encourage group affiliations, promote prejudice and weaken the sense of unity amongst students of the same school."

The court below, at page 324 of the record held:

"Going to the resolution of this issue, let me point out that as explained by counsel on behalf of the Appellants, Muslims all over the world accept the Quran and Sunnah as the 2 most important sources of law. It is provided in various verses of the Quran that religion of Islam has commanded female Muslims to guard their private parts which extends to parts of the female anatomy beyond the genitalia and are required to employ proper means of achieving that (See Surah Al-Nur 24:31). **The Quran signifies the Hijab as a mark of modest and elegant women who are recognised from afar as discreet and unapproachable by undesirable elements**. See Quran Surat 33 verse 59. These are some other Quranic verses and Hadith or Sunnah on Hijab. It is against these mandatory and prophetic imperatives that female Muslims

observe the various forms of covering of their heads, faces, bosoms or mid-sections etc in the form of either the regular full Hijab, Burqa, Niqab or Khimar or a combination of one and the other e.g. Hijab and Niqab or Khimar."

The court also relied on its unreported decision in the case of: **Provost, Kwara State College of Education, Ilorin & 2 Ors**. in CA/IL/491/2006 delivered on 18th June 2009 in support of its position. This authority is the subject of issue 2, which will be addressed later in this judgement.

Suffice it to say that the wearing of the hijab, described as a mark of modesty for female Muslims who have attained the age of puberty, has not been shown to be an act that infringes on or is likely to infringe on the rights and freedom of other students. It was held in **Medical and Dental Practitioners Disciplinary Board Vs Emewulu (2001) 3 SCN J 106 @ 224** per Ayoola, JSC:

"The right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religions belief.

The limits of these freedoms as in all cases are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy."

There are no facts to suggest that in enforcing their right to freedom of religion by wearing the hijab, the 1st and 2nd respondents are seeking any favourable treatment not available to other students nor has it been shown how the wearing of the hijab could lead to chaos or disunity among the students. It is speculative to say the least.

To suggest, as done by learned counsel for the appellants, that the 1st and 2nd respondents are free to attend a faith-based school or private school in order to exercise their constitutionally guaranteed right under Section 38 of the Constitution, would itself be discriminatory and in violation of Sections 17(2)(a), 18(1)(a) and 42(1)(a) of the Constitution, which provide thus:

"17(2) In furtherance of the social order-

(a) every citizen shall have equality of rights, obligations and opportunities before the law.

18(1)(a) Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels

42(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

(a) be subjected either expressly by, or in the practical application of any law in force in Nigeria, or any executive or administrative action, of government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of original, circumstances of birth, sex, religious or political opinions are not made subject; or"

The evidence before the court shows that the appellants made concessions, allowing the female students to wear the hijab during certain periods only. I am of the considered view that the concession is a recognition of the Constitutionally guaranteed right of female Muslim students to manifest their religion through the practice and observance of its tenets, one of which is that female Muslims who have reached the age of puberty, are to be modesty covered from their head to their bosom. The purpose of maintaining their modesty is defeated if they can only wear it at certain times. Unless it is shown that they

are infringing on the rights of others, there is no justification for curtailing that right.

It must be noted that the right to freedom of religion and its ramifications has been tested in various cases decided by this court. Each case was decided on its peculiar facts and the impact of the enforcement of those rights on the community. In the case of **Medical and Dental Partitioners Disciplinary Board Vs Emewuru (supra)**, a patient and her husband were members of the Jehovah's Witness sect, which was said to believe that blood transfusions are contrary to God's injunction. They relied on the Biblical Scripture as contained in Leviticus 17:10-11. The patient required a blood transfusion, which she and her husband rejected in writing on the basis of their religious belief. She was treated without it and eventually died. The doctor who treated her was charged with attending to her in a negligent manner and acting in breach of his oath as a Medical Practitioner. He was convicted by the Tribunal. The decision was set aside on appeal and the decision of the

Court of Appeal was affirmed by this court. I have reproduced an aspect of the court's decision earlier in this judgment. His Lordship, Ayoola, JSC, further held thus:

> *"Law's role is to ensure the fullness of liberty when there is no danger to public interest. Ensuring liberty to conscience and freedom of religion is an important component of that fullness.*
>
> *The courts are the institution society has agreed to invest with the responsibility of balancing conflicting interests in a way as to ensure the fullness of liberty without destroying the existence and stability of society itself...*
>
> *This is why, if a decision to override the decision of an adult competent patient not to submit to blood transfusion or medical treatment on religious grounds, is to be taken on the grounds of public interest or recognised interest of others, such as dependent minor children, it is to be taken by the courts."*

In another case, **Ojiegbe Vs Ubani (1961) ALL NLR 277**, there was a complaint that the fixing of elections on a Saturday (Sabbath Day), which was a sacred day for the Seventh Day Adventist sect, violated their fundamental right to freedom of religion. It was held that there was no substance to the complaint because the evidence showed that their numbers, even if they all voted for the losing

candidate, would not have been sufficient to alter the election result.

What I am labouring to say is that whenever a right guaranteed by the Constitution is challenged or in issue, it is the court that must have the final say. It must be stated emphatically too, that no matter how justified one might feel in a cause or course of action, he ought not to take the law into his own hands.

With regard to Section 6 of the Child Rights Law of Lagos State, 2007 relied upon by the appellants, I have given careful consideration to its provisions which are as follows:

> *"6 (1) Every child has the right to freedom of thought conscience and religion.*
>
> *(2) Parents, and where applicable, legal guardians shall provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interest of the child.*
>
> *(3) The duty of parents, and where applicable, legal guardians, to provide guidance and direction in the enjoyment of the right in Sub-section (1) of this Section by their child or ward shall be*

respected by all Persons, Bodies, Institutions and Authorities.

(4) ... "

I am unable to see where the appellants have a role to play in a situation where, as in this case, the 1st and 2nd respondents are fully under the care and control of their biological parents and Next Friends in this case. The provisions reflect and affirm the rights guaranteed under Section 38 of the Constitution. Indeed, what is required is that the appellants have a duty to respect the guidance and direction the parents of the 1st and 2nd respondents have given them in the practice of their religion, so long as it does not infringe on the rights of others.

Nigeria is a multireligious and multi-cultural society, which is evolving continuously, and citizens are becoming more aware of their rights and the avenues through which to enforce them. In **Bronik Motors Vs Wema Bank (1983) ALL NLR 272 @ 291 – 292,** this court, per Nnamani, JSC, reiterated the principles of construction of Constitutional provisions to the effect that a Constitution is

a living document providing a framework for the governance of a country, not only for the present, but for generations yet unborn. Adopting a liberal interpretation of Section 38 of the 1999 Constitution, as amended, I hold that it amounts to a breach of the 1st and 2nd respondents right to freedom of thought, conscience and religion to forbid the wearing of the hijab, by those who wish to do so, on their school uniform.

If it is the desire of the appellants to foster unity and a sense of belonging among all students, it should standardise the hijab for use in schools and incorporate it in the prescribed uniform.

Issue 2

Whether the court below was right in relying heavily on the decision in the case of The Provost Kwara State College of Education, Illorin & Ors. Vs. Bashirat Saliu & 2 Ors., Appeal No. CA/IL/49/2006 to the effect that non-use of "Hijab" violates the provisions of Section 38 and 42 (1) and (2) of the Constitution of Federal Republic of Nigeria, 1999 (as

amended) when, the facts in the unreported cases are distinct with the facts in the instant case? (Grounds 2 and 3).

Issue 3

Whether the raising of the new issue of secularity of this Country vis-à-vis Section 10 of the 1999 Constitution, as amended sou motu by the trial court was done wrongly and out of place? (Ground 4).

Appellant's Submissions

Learned counsel submitted, relying on **Nigeria Arab Bank Ltd. Vs Barri Eng. Nig, Ltd. (1995) 8 NWLR (Pt. 413) 289 G – H**, that the doctrine of *stare decisis* requires all subordinate courts to follow decisions of superior courts even when those decisions are obviously wrong, having been based on a wrong premise. He also relied on **N.B.C. Plc Vs Ubani (2014) 4 NWLR (Pt.421) @ 449 E – F,** to the effect that the doctrine applies where the facts are similar.

He submitted that the facts in the case of **The Provost, Kwara State College of Education, Ilorin &**

2 Ors. Vs Bashirat Saliu & 2 Ors are distinct from the facts of the instant appeal. He observed that even the court below opined that the facts are not fully the same but applied the principles enunciated therein nonetheless. He submitted that in the **Kwara State case,** the issue in contention had to do with the use of veil rather than the Hijab and that it related to female Muslim students in a Higher Institution and not minors, as in the instant case. He submitted that there was no restriction or regulation on the use of the hijab in that case but an absolute disapproval of the use of the veil. He submitted that the distinction lies in the status and age of the students. He referred to the Holy Quran Chapter 24 Verse 31 and argued that it is not applicable to the 1st and 2nd respondents because they are under the age of 18 years and do not qualify as women whereas the religious injunction is mandatory for female students in Higher Institutions who are above the age of 18.

With regards to issue 3, learned counsel submitted that the lower court erred in holding that the learned trial Judge raised the issue of Nigeria being a secular State by virtue of Section 10 of the Constitution *suo motu*, without affording the parties an opportunity to address the court on it. He submitted that the learned trial Judge made the remark in passing and it did not constitute the *ratio decidendi* or the main reasoning of the court. He urged the court to reverse the lower court's decision in this regard.

Respondents' Submissions

Learned counsel submitted that there is no difference between the hijab and a veil. He referred to the explanation given by His Lordship, Oredola, JCA at page 327 of the record to the effect that the Hijab is a badge of honour and emblem of modest chastity. He cited the Holy Quran Chapter 24 Verse 31 and Chapter 33 Verse 59 in support of the contention that the injunction refers to wives and daughters with no distinction made as to age or marital

status but by the scientific fact as to whether or not the female has attained the age of puberty.

As regards the argument that the 1st and 2nd respondents could not be classified as women to whom the injunction applies, he referred to paragraphs 10 – 12 of the respondents' reply affidavit deposed to by one Dr. Zafaran Adeniyi, an Islamic scholar, to the effect that Islamically, womanhood is determined not by biological age or marriage but by the time she attains the age of puberty and that the attainment of puberty differs between individuals. He submitted that having regard to the provisions of the Holy Quran Chapter 24:31, once a Muslim female is in or moving to an area where she will most likely meet someone outside the degree of prohibition, she must wear her Hijab. He argued that it is therefore not a valid distinction to say that in the Kwara State Case there was an absolute ban while in the instant case it is a partial prohibition. He submitted that the injunction is mandatory.

He submitted that what is important in the application of the doctrine of *stare decisis* is the principle of law decided in a particular case. He referred to several authorities, including **Oduye Vs Nig. Airways Ltd. (1987) 2 NWLR (Pt.55) 126 @ 155 E; Adedayo Vs P.D.P. (2013) 17 NWLR (Pt. 1382) 1 @ 40 E – G; Melwani Vs Chanhira Corporation (1995) 6 NWLR (Pt. 402) 438 @ 472 – 473.**

On the issue of secularity raised by the trial court, learned counsel for the respondents submitted that the lower court was right when it held that it was the court's reliance on Section 10 of the Constitution, which it raised *suo motu,* that led it to rely on the foreign decision in **Leyla Shahin Vs Turkey** in dismissing the case. He submitted that it was part of the *ratio decidendi* of the case and not merely an *obiter dictum*. On the admonition of courts not to raise issues *suo motu* without inviting the parties to address it before reaching a decision, he relied on:

Adedayo Vs P.D.P. (supra) @ 56 F – H; Ekunola Vs C.B.N. (2013) 15 NWLR (Pt. 1377) 224 @ 226.

RESOLUTION

The position of the law and decided authorities on the doctrine of *stare decisis* was eloquently adumbrated by a full panel of this court in the case of **Dalhatu Vs Turaki & Ors. (2003) LPELR – 917(SC) @ 41 – 43 C – F**, thus:

> *"The doctrine of judicial precedent otherwise known as stare decisis is not alien to our jurisprudence. It is a well settled principle of judicial policy which must be strictly adhered to by all lower courts. While such lower courts may depart from their own decisions reached per incuriam, they cannot refuse to be bound by decisions of higher courts even if those decisions were reached per incuriam. The implication is that a lower court is bound by the decision of a higher court even where that decision was given erroneously."*

The court referred to its earlier decision in the case of **N.A.B. Ltd. Vs Barri Eng. (Nig) Ltd (1995) 8 NWLR (Pt. 413) 257 @ 289 – 290**, to wit:

> *"The doctrine of judicial precedent (otherwise known as stare decisis) requires all subordinate courts to follow the decisions of superior courts even where*

these decisions are obviously wrong having been based on false premise; this is the foundation on which the consistency of our judicial decision is based....

***It is however the principle of law upon which a particular case is decided that is binding**. Such a principle is called the ratio decidendi. A statement made in passing by a Judge, which is not necessary to the determination of the case in hand is not the ratio decidendi of the case, but an obiter dictum and it has no binding effect for the purpose of the doctrine of judicial precedent."*

In **Atolagbe Vs Awuni (1997) 9 NWLR (Pt. 522) 536 @ 564**, his Lordship, Uwais CJN stated thus:

"It is now well settled that under the common law doctrine of precedent or stare decisis, the decision of a higher court may be criticised by the Judge of the lower court but notwithstanding 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."

In distinguishing the facts of this case from the case of Kwara State College of Education Ilorin, the learned trial Judge agreed with the appellants' counsel that the respondents in this case were minors as opposed to the respondents in the earlier case, who were adults. His

Lordship also observed that in the Kwara State case there was no prescribed uniform unlike in the present case.

The unreported decision of the lower court in the case of **Provost, Kwara State College of Education Ilorin & Ors Vs Bashirat Saliu & Ors, Appeal No. CA/IL/49/2006,** delivered on 18th June 2009 is reproduced at pages 40 – 71 of the record. The issue in contention in the case was whether the dress code prescribed by the appellants for students of the 3rd appellant, the Kwara State College of Education, as contained in article J of their regulations, which prohibited the wearing of apparel that covers the entire face of an individual, amounted to a violation of the respondents' constitutionally guaranteed right to wear the veil.

Thus, although there was no prescribed uniform for students of the 3rd appellant, there was a dress code that the students were required to abide by, which included the prohibition of the use of the veil. The distinction made by the learned trial Judge in this regard does not hold water.

The second distinction requires an examination of the relevant chapters of the Holy Quran, that is Chapter 24 Verse 31 and Chapter 33 Verse 59, wherein it is stated:

"24:31 And tell believing women to lower their gaze (from looking at forbidden things and protect their private parts from illegal sexual acts) and not to show off their adornment except only that which is apparent (like both eyes for necessity to see the way or outer palms of hands or one eye or dress like veil or gloves, head cover, apron, etc) and to draw their veils all over Juyubihinna) i.e. their bodies, faces, necks and bosoms and not to reveal their adornment except to their husbands , or their fathers, or their husbands' fathers, or their sons or their husband's son, their brothers or their brother's sons or their sister's sons, or their (Muslim) women (i.e. their sisters in Islam) or their (female) slaves, whom their right hands possess or old male servants who lack vigour or small children who have no sense of feminine sex. And let them not stamp their feet so as to reveal what they hide of their adornment. And all of you beg Allah to forgive you all, O believers that you may be successful."

33:59 – O Prophet! Tell your wives and your daughters and the women of the believers to draw their cloaks (veils) all over their bodies (i.e. screen themselves completely except the eyes or one eye to see the way). That will be better, that

they should be known (as free respectable women) so as not to be annoyed. And Allah is Ever oft-forgiving, Most Merciful."

As rightly observed by learned counsel for the respondents, the injunction covers women generally and does not distinguish between adults and minors. The essence of the injunction is to protect the modesty and chastity of women. The body and appearance of a female begins to change upon the attainment of puberty. It is this stage of development and thereafter that is relevant for the application of the injunction. It is a well-known fact that females attain puberty at different times and sometimes as young as 9 or 10 years of age.

The issue in the Kwara State case was that the appellants' regulation J infringed on the respondents' right to manifest and practice their religion as constitutionally guaranteed by Section 38 of the Constitution. It had nothing to do with the biological ages of the litigants. I am of the considered view that the court below was right when it held that there was no justification for the learned trial

Judge to side-track the decision in that case and refuse to be bound by it in favour of a decision of the European Court of Human Rights.

It is a settled position of our law that the decision of any foreign court is of persuasive authority and not binding on our courts. They can only persuade our courts in reaching a particular decision where our own laws and authorities are silent on the point of law in question. See: **Yahaya Vs The State (2002) 2 SC (Pt. I) 1; (2002) LPELR – 3508 (SC) @ 14 B – C; Adetoun Oladeji Nig. Ltd Vs Nigerian Breweries Plc (2007) 5 NWLR (Pt. 1027) 415; (2007) LPELR – 160 (SC) @ 23 – A – D; Araka Vs Egbue (2003) LPELR – 532(SC) @ 19 – 20 A – C.**

In the instant case, in light of the decision of the Court of Appeal in the Kwara State case, the learned trial Judge was bound by it and ought to have applied it. Although he was entitled to express his reservations with the decision, if any, he was still bound to follow it, the principle of law

therein decided being the same as what the court was called upon to decide.

I have carefully examined the judgment of the learned trial Judge, particularly at pages 182 – 185 of the record, where reference was made to Section 10 of the 1999 Constitution and the effect of the said section on the rights conferred by Section 38 of the said Constitution. Contrary to the contention of learned counsel for the appellants, the application of Section 10 formed the bedrock of the court's reasoning and was the basis for jettisoning the decision of the Court of Appeal in the Kwara State College of Education, Illorin case in favour of the decision of the European Court of Human Rights.

His Lordship held thus at page 185 of the record:

> *"This decision [Leyla Sahin Vs Turkey-Appeal No. 44774/98 - reported in European Constitutional Law Review Vol. 1/Issue 03 Pg. 495 – 510] is very relevant to the instant case. Section 10 of the Constitution of 1999 makes the country a secular State. The primary and secondary schools in question are State primary and secondary schools, founded and run by the State and therefore is the*

> *competent authority to make rules and regulations thereto. Which regulation it has made prescribing a uniform for all students.*
>
> *In such setting, the decision of the European Court provides guidance to the effect that the prohibition or denial of the wearing of the hijab over the school uniform cannot be said to be a breach of the fundamental right of the applicants guaranteed by Sections 38 and 42 of the 1999 Constitution by reason of the provision of Section 10 of the said Constitution."*
>
> *(Emphasis mine).*

It is significant that learned counsel for the appellants does not deny the fact that the issue of the secular nature of the Nigerian State and the effect of Section 10 on Section 38 of the Constitution, was raised *suo motu* by the learned trial Judge. His contention is that it was merely an *obiter dictum*. The reasoning of the learned trial Judge at pages 182 - 185 of the record and particularly the finding at page 185 reproduced above shows quite clearly that it forms the *ratio decidendi* of the case.

It is a well-established principle of law that a court is not permitted to raise an issue *suo motu* and base its decision on that issue without calling on the parties to

address it on the point. It has been held that in doing so, it is seen to leave its exalted position as an impartial arbiter and descend into the arena of conflict, thereby occasioning a miscarriage of justice. See: **Wagbatsoma Vs FRN (2018) 8 NWLR (Pt. 1621) 199; Kuti Vs Balogun (1978) 1 SC (Pt. II) 92; (2015) LPELR – 243999 (SC) @ 25 – 26 D – B; Araka Vs Ejeagwu (2000) 15 NWLR (Pt. 692) 684.**

The court below was therefore right when it held that the raising of the issue of the secularity of this country vis-à-vis Section 10 of the 1999 Constitution, as amended, by the learned trial Judge *suo motu,* without inviting the parties to address him before predicating his decision on it, amounted to a denial of the respondents' right to fair hearing and was therefore fatal to the appellants' case.

Issues 2 and 3 are accordingly resolved against the appellants.

In conclusion, I hold that the appeal is devoid of mer
It is hereby dismissed in its entirety. The judgment of th
lower court delivered on 21/7/2016 is affirmed.

The parties shall bear their respective costs in th
appeal.

Appeal dismissed.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN
JUSTICE, SUPREME COURT OF NIGERIA

- **O. OSUNSANYA ESQ.,** Asst. Chief State Counsel, Ministry of Justice, Lagos State for the Appellants
- **HASSAN T. FAJEMITE ESQ.** for the Respondents with Nasir Runmonkun Esq and Ahmed Adetola-Kazeem Esq.

CERTIFIED TRUE COPY 6/7/2022
Date.....
Sign.....
Supreme Court of Nigeria Official

IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 17TH JUNE, 2022
BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
JOHN INYANG OKORO	JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI	JUSTICE, SUPREME COURT
MOHAMMED LAWAL GARBA	JUSTICE, SUPREME COURT
TIJJANI ABUBAKAR	JUSTICE, SUPREME COURT
EMMANUEL AKOMAYE AGIM	JUSTICE, SUPREME COURT

SC.910/2016

BETWEEN

1. LAGOS STATE GOVERNMENT
2. HON. ATTORNEY GENERAL AND COMMISSIONER FORJUSTICE, LAGOS STATE
3. HON. COMMISSIONER FOR EDUCATION LAGOS STATE
4. HON. COMMISSIONER FOR HOME AFFAIRS LAGOS STATE

AP[PELLANTS

AND

1. MISS AYISAT ABDULKAREEM (MINOR) (Suing throughhernext friend Alhaji Abdulkareem Owolabi
2. MISS MARYAM OYENIYI (Suing through hernext friend Mr. Suleman Oyeniyi
3. THE REGISTERED TRUSTEES OF MUSLIM STUDENT'S SOCIETY OF NIGERIA (MSSN)

RESPONDENTS

CERTIFIED TRUE COPY
Date 6/7/2022
Sign
Supreme Court of Nigeria
Official

JUDGMENT
(Delivered by Olu Ariwoola, JSC)

I had the opportunity of reading in draft the lead judgment of my learned brother **Kekere-Ekun, JSC** just delivered. I agree entirely with the reasoning and conclusion of the lead judgment that the appeal is unmeritorious and deserves to be dismissed. Accordingly, it is dismissed by me.

Appeal dismissed.

Olu Ariwoola
Justice, Supreme Court

O. Osunsanya Esq, Asst. Chief State Counsel, Ministry of Justice, Lagos State for the appellants.

Hassan T. Fajemite Esq with Nasir Runmonkun Esq and Ahmed Adetola-Kazeem Esq. for the respondents.

IN THE SUPREME COURT OF NIGERIA

HOLDEN AT ABUJA

ON FRIDAY, THE 17TH DAY OF JUNE, 2022

BEFORE THEIR LORDSHIPS

OLUKAYODE ARIWOOLA	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
JOHN INYANG OKORO	JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI	JUSTICE, SUPREME COURT
MOHAMMED LAWAL GARBA	JUSTICE, SUPREME COURT
TIJJANI ABUBAKAR	JUSTICE, SUPREME COURT
EMMANUEL AKOMAYE AGIM	JUSTICE, SUPREME COURT

SC. 910/2016

BETWEEN:

1. LAGOS STATE GOVERNMENT
2. HON. ATTORNEY & COMMISSIONER FOR JUSTICE, LAGOS STATE
3. HON. COMMISSIONER FOR EDUCATION, LAGOS STATE
4. HON. COMMISSIONER FOR HOME AFFAIRS, LAGOS STATE

APPELLANTS

AND

1. **MISS ASIYAT ABDUL KARREM (MINOR)**
   (Suing through her next friend Alhaji Abdulkarrem Owolabi)
2. **MISS MARYAM OYENIYI**
   (Suing through her next friend Mr. Suleman Owolabi)
3. **THE REGISTERED TRUSTEES OF MUSLIM STUDENTS' SOCIETY OF NIGERIA (MSSN)**

RESPONDENTS

JUDGMENT
(DELIVERED BY UWANI MUSA ABBA AJI, JSC)

I was privileged to read in advance the draft judgment just delivered by my learned brother, Kekere-Ekun, JSC, and I entirely agree that the appeal be dismissed.

The 1st and 2nd Respondents were female muslim students of Atunrashe Junior High School, Surulere, Lagos State (owned by the 1st Appellant) and were both 12 years old. Sometime in January, 2012, they wore their hijab over their school uniform and were on their way to school in a commercial bus when they met their Vice Principal, who allegedly snatched their hijabs from their heads on the

ground that it was not part of the school uniform. Due to the intervention of some passengers in the bus, their hijabs were given back to them. However, when they got to school; the Vice Principal assembled and directed the teachers to remove and seize any hijab worn by any female student within and outside the school premises and further warned that they should no longer wear hijabs on their school uniforms. It was alleged that he singled out the 1st and 2nd Respondents, threatened, humiliated and embarrassed them. Subsequently, all entreaties to the school to permit them to wear hijabs were refused. The issue was reported to the 3rd Respondent and an NGO, which decided to present the matter to the 1st Appellant. Notwithstanding the intervention of the 3rd Respondent and Muslim Lawyers Association of Nigeria (MULAN), the Appellants remained unyielding and banned the wearing of hijab on school uniforms in State-owned public schools. This led to the

institution of this suit. The trial court dismissed the 1st and 2nd Respondents' suit as Applicants. On appeal to the lower court, it was set aside, hence this appeal by the Appellants. The Appellants seek these issues for determination thus:

1. *Whether the court below was right when it held that there was no legislation or regulation, etc. before the lower court to enable it place restriction or disability on female Muslim students to wear hijab on their uniforms having found that the Respondents did not join issue on the existence of the Appellants' policy prescribing the mode of uniform in public primary and secondary schools in Lagos State?*
2. *Whether the court below was right in relying heavily on the decision in the case of The Provost Kwara State College of Education, Ilorin & Ors Vs. Bashirat Saliu & 2 Ors, Appeal No. CA/IL/49/2006 to effect that non-use of "Hijab" violates the provisions of section 38 and 42 (1)*

and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) when, the facts in the unreported cases are distinct with the facts in the instant case?

3. *Whether the raising of the new issue of secularity of this country vis-à-vis section 10 of the 1999 Constitution, as amended suo motu by the trial court was done wrongly and out of place?*

The issue of compulsion in dressing or dress code or uniform has generated a lot of controversies in the world especially with respect to the freedom or liberty to be exercised by people in their society. The matter worsens when it comes to religious rights and liberties because of ethno-religious intolerance for one another. This possibly has made societies and countries to come up with body of laws to allow people to dress in the liberty of their religious and cultural beliefs. In a secular country like Nigeria, where

we have many co-existing religions, the Constitution has addressed and settled this. Sections 38 and 42 are express and categorical on this:

> *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.***
> *(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 religion not approved by his parent or guardian.*
> *(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.*
> *(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.*
>
> *42 (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-*
> *(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to*

disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

The only legal derogation, restriction and limitation to the above is what section 45 of the Constitutions provides:

45. (1) Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

(a) in the interest of defence, public safety, public order, public morality or public health; or
(b) for the purpose of protecting the rights and freedom of other persons.

Thus, where the dressing of any person does not constitute a threat or violation to *"defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons"*, there will be a violation of sections 38 and 42 to

enforce a particular dress code to a group of students, workers, corps members in NYSC, etc; save they surrender or waive these rights. In fact, to force and compel a person to dress in a manner or method contrary to the *"religion or belief in worship, teaching, practice and observance"* of a person is contrary to his fundamental rights contemplated under section 38 of the 1999 Constitution (as amended).

By the restrictions under section 45 of the Constitution, the dressing that evokes and spreads immorality, corruption and nudity in the society cannot be taken as a freedom to the right to religion or any cultural beliefs. To allow men and women to dress provocatively immoral and nude as we see in our present society is to plunge the society into a theatre of lusts, rapes and promiscuity, which all are contrary to every religious and cultural beliefs.

To liberalize the use and wearing of decent and modest dress by students or the people in general as an expression of their religious rights is the wisdom the society needs to contain rascality and immodesty. GOWRI RAMACHANDRAN of Southwestern Law School in addressing this in his Article, "Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing" has this to advise:

> *Many countries have attempted to justify bans on the wearing of headscarves as supportive of student rights, rather than infringing on student rights. France, for instance, has justified such bans as promoting the rights of Muslim girls who might otherwise be coerced into wearing headscarves by parents and fundamentalist religious leaders. By providing a space at school where girls can decide to be secular, decide that they feel headscarves are not appropriate, or decide to be religious without subscribing to the admonition that a headscarf be worn, government actors claim to actually further the rights of these girls, who may be facing coercion at home to wear a headscarf. While I think that the meaning of a headscarf is not as fixed as the French government claims, in general, discouraging the wearing of headscarves by teaching a negative history of their meaning would, in my view, be a permissible means of socializing children in the manner the government sees*

fit. However, as I've argued above, the relationship between socialization and liberty is not perfectly inverse. Granting students some liberty within school actually furthers socialization goals and can prevent exit into the private sphere, where children may be economically marginalized and unable to make the very choices the government hopes to provide them. Moreover, granting some liberty can prevent backlash by students who feel isolated and wronged by the intrusion on what they see as their identity and community.

...given that schools need to protect some student liberty in order to socialize their students, dress is an ideal one to protect. Granting this accommodation, even where the state believes that a child's choice is anything but freely made, can provide the necessary demonstration of good will to begin a dialogue that empowers children within their communities. Rather than telling children they must choose freedom in the public sphere or oppression in a private sphere, schools can reach out to students and give them the tools to be empowered within both public and private spheres.

He continued that "in the case of uniforms and dress code, the government intrudes on the market not as a neutral provider of access and promoter of diversity, but rather to remove certain kinds of content altogether and replace it with dress that is deemed more appropriate. Although this restriction on dress leads to a kind of equality,

I argue that it is worse than the state in which unequal initial entitlements lead to unequal exercises of the freedom of dress. State-enforced equality of dress attaches permanent meaning to practices that could otherwise be the site of cultural flourishing and experimentation with new identities. I do not deny the effects of inequality altogether, and that is why I demand some protection of freedom of dress in the workplace, in order to soften the effects of major sites of power on appearance choices. "Neither the individual nor the society can rely for the security of our dress freedom upon the so-called free market. When vast differences in the respective sartorial powers of corporations and persons are palpably omnipresent, the non-interventionist principle is a dress authoritarian's charter." But to sacrifice dress choices completely in favor of equality poses its own problems."

The military or the para-military may enforce this only if there is consent before the recruitment that a

person must comply with a particular dress code, otherwise, it will be a violation of their right to freedom of religion to force them to dress in a particular manner.

The NYSC has been forcing their female members to dress on trousers contrary to their religious right encapsulated under section 38 of the 1999 Constitution. It must firmly assert here that these female corps members were solely and singularly trained and financed by their parents and brought up in their respective religious beliefs that some have never worn trousers in their lives. To make them comply with the compulsory trouser-wearing of all NYSC corps members is a violation of their rights to freedom of religion.

In the same light, to compel school students or undergraduates or pupils to dress in a manner contrary to their religious beliefs is to violate their fundamental rights. This applies even where the institution is private or

government owned. Fundamental rights from the origin and history of the world are inalienable and cannot be taken away even by the most powerful government except in cases of despotism, anarchy and lawlessness.

Human rights are part of the common heritage of all mankind without discrimination on grounds of race, sex, religion, and association, etc. See Section 38 and 42 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). These rights common to mankind have a long history. Fundamental Rights are rights which stand above the ordinary laws of the land. They are in fact antecedent to the political society itself. Fundamental rights have been described as the minimum living standard for civilized humanity. The fundamental rights have been enshrined in the Constitution so that the rights could be inalienable and immutable to the extent of the non-immutability of the Constitution itself. See **RANSOME-KUTI VS. A-G**

FEDERATION (1985) 7 NWLR (PT 6) 211 AT 229 -231. So the right of the Respondent to change her religion with the attendant consequences inheres to her and is inalienable and immutable. A fundamental right is more significant than the rights under other statutes or laws as it goes to the root of the day to day existence of the citizen and corporate living of the citizens: **ESSIEN VS. INYANG (2011) LPELR (4125) 1 AT 24**. The Courts are under a duty as provided by the Constitution to see that executive and administrative actions are in conformity with the fundamental rights of persons. See **OBAYIUWANA VS. MINISTER OF FCT (2009) LPELR (8202) 1 AT 26.**

The Appellants were in gross violation of the rights to freedom of religion of the 1st and 2nd Respondents. The government in a democratic society ought to rather protect the rights of the citizens than to violate them. If the idea of uniform must be maintained, and for protection and security

reasons, the hijab should be in the same type of material and design and should not cover the whole face. Same may apply to other institutions and organizations who may want to promote the wisdom of uniform or uniformity.

This appeal therefore fails and is hereby dismissed.

UWANI MUSA ABBA AJI
JUSTICE, SUPREME COURT

APPEARANCES:

O. OSUNSANYA, ASST. CHIEF STATE COUNSEL, MOJ, LAGOS STATE, FOR THE **APPELLANTS.**

HASSAN T. FAJEMITE, WITH NASIR RUNMONKUN AND AHMED ADETOLA-KAZEEM, FOR THE **RESPONDENTS.**