

OUR REF: CAJ/T.U/013/552/13

2nd October, 2013

Technical University of Kenya
Haile Selassie Avenue
P.O. Box 52428-00200
NAIROBI

Dear Sir,

RE AN ADVISORY OPINION ON THE RELATIONSHIP BETWEEN ADMISSION REQUIREMENTS IN PUBLIC UNIVERSITIES AND THE RIGHT TO MANIFEST ONES RELIGION

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with The Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration.

We acknowledge with thanks receipt of your letter dated 18th September, 2013, contents whereof we have noted and we thank you for inviting us to give an advisory which we hereby do.

We have reviewed all the questions raised in your letter and noted the following for determination;-

- i. That two students got admission to your university and have since refused to undertake medical checkup which is a prerequisite to admission in the courses they have been admitted to as stipulated in the regulations of the University. The students contend that their faith prohibits them from undertaking medical checkups.

- ii. That it is a requirement of the University that all students pay Kshs. 2,000 every academic year as medical fees, which the students want waived due to the fact that their religion, Jehovah Witness, does not allow them to subscribe to medication.
- iii. That in the foregoing, there is an apparent clash between the right to religion as provided for under A. 32 and the right to health as provided for under A. 43 (1)a of the Constitution.

Having analysed all the issues above and the delicate balance between the competing rights and interests, we note and recommend the following;

1. In terms of the Constitution of Kenya 2010:-

- a) The Constitution guarantees to every Kenyan citizen the freedom of conscience, religion, belief and opinion (A. 32). However, it should be emphasized that the right to express and manifest one's religion and religious beliefs is one of those fundamental rights and freedoms that are not absolute (A.24 &25).
- b) The limitation of such a right should however be through a law which must be reasonable and justifiable in an open and democratic state as stipulated in A. 24 of the Constitution.
- c) That any limitation to such rights and fundamental freedoms are designed to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others (A.24 (1)d)
- d) That in determining whether or not to limit a right, it is important also to consider the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose of such a limitation (A. 24 (1) e).
- e) In this situation, we are confronted with a delicate balance between two competing rights, the right to religion (A.32) and the right to health, both of the two students belonging to Jehovah Witness and of the entire student population. The right of the two students to religion is in conflict with the University's admission Regulations.
- f) We also note the provisions of A. 43 (1) & (2) which guarantee the right to the highest attainable standards of health including the right to emergency medical treatment. The right to health and the right to religion are both of equal importance. The fact that the students have exonerated

- g) That in reconciling the competing interests, the protection of public order, morals, safety or health, and the protection of the rights and freedoms of others should take preeminence over individual interests.
2. In terms of the available laws and regulations limiting that right we note the following;
- a) The Commission for University Education (CUE) is established by the Universities Act, No 42 of 2012, and has the mandate among others to develop policy for criteria and requirements for admission to Universities. Section 57 of the Act provides that a University may independently admit students to its programmes in accordance with its approved admission criteria. This Act gives universities a leeway to develop guidelines and regulation governing admission to university but under the overall supervision of the commission for university Education which develops policy.
 - b) The HIV/Aids Prevention and Control Act, No. 14 of 2006 in section 13 (2) c prohibits compulsory testing. It provides that no person shall compel another person to undergo an HIV test as a precondition to, or for the continued enjoyment of admission into any educational institution. So the university should ensure that the testing is made voluntarily and not compulsorily. Further to that, Section 14 of the Act requires that if undertaking an HIV test on a child the written consent of a parent or a legal guardian of the child must be sought.
 - c) The Children Act (2001) and section 5 contains a single broad provision prohibiting discrimination on ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. A child is any person who has not attained 18 years.

The question at hand is whether the requirement to conduct medical checkup prior to admission to the University would amount to discrimination on religious grounds. We are of the opinion that the requirements of the University for a medical checkup cannot be said to be unreasonable and unjustifiable insofar as it seeks the harmonization and co-existence of students in the university. We also note the following:-

- a) That the rights under A.32 are not absolute and can be qualified under A. 24 because they are not among the rights and freedoms that cannot be limited under A. 25.
- b) That in the circumstance we opine that the test stipulated under A.24 for the valid limitation of fundamental rights and freedoms has been met. This is in particular the provisions of **A. 24 (1) d** and **A. 24 (1) e**.
- c) That under A. 24 (4) of the Constitution, the requirements of equality have been qualified to the extent strictly necessary for the application of Muslim law before Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage divorce and inheritance. The exemption does not cover members of the Jehovah Witness.
- d) In terms of the relevant legislation, we note that the Commission of University Education is empowered by the Universities Act to develop policy on university education. The same Act gives individual universities to determine individual criteria for admission.
- e) We also note that the checkups are to be conducted by a doctor of choice and not one imposed by the University. This is in line with article 24 (1) e of the Constitution.

It is our considered opinion that the government is under an obligation to subject freedom of religion to limitations designed to uphold morality, public order and the general welfare in any democratic state. The medical checkups are designed to safeguard the general student population and also to determine the suitability of the new student in the new area of study. It thus appears that the importance of the limitation as stated above fits well within Article 24 of the Constitution.

We are of the opinion that In democratic societies in which numerous religions co-exist with each other in the same population, it may be necessary to restrict peoples' manifestations of religious beliefs in order to reconcile the interests of the various groups and ensure that every person's beliefs are respected. In learning institutions, these rights may be limited by rules and regulations made by various organs of management to ensure order and smooth running of the institutions.

In conclusion, we note that Kenya is a secular state (A. 8 Const). We also take cognizance that Technical University is a public university admitting students from all faiths and conceding to such demands would amount to elevating one religion over the others. Having looked at all the issues in this instance we advise and recommend the following:-

- (i) That the University should not make concessions as demanded as the right to religion is not absolute, the limitation of the right to religion in this instance is reasonable and justifiable as contemplated by A. 24.
- (ii) That the university should expunge all requirements demanding for a compulsory HIV test since they violate the HIV/Aids Prevention & Control Act. However, where courses to be undertaken require compulsory testing the same should be done. (Sections 13 & 14)
- (iii) That where the student has not attained the age of 18 years, a provision should be inserted requiring the consent of the parent and or the legal guardian of the child.
- (iv) We also note that the elders of the church are not in a position to give a medical opinion insofar as they are not trained.

We thank you and assure you of our highest regards

Yours Sincerely,

CMMR. OTIENDE AMOLLO, EBS
CHAIRPERSON OF THE COMMISSION