

Best Evidence and the Winnable Issue

Why the home-schooling petition failed, why the association case succeeded, and the case for self-regulation

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CASES IN VIEW

Were v Cabinet Secretary, Ministry of Education · *NGOs Co-ordination Board v Gitari*

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Abstract

In *Were & another v Cabinet Secretary, Ministry of Education* the High Court first declined to empanel a three-judge bench (2022) and then dismissed (2023) a petition that asked the court to recognise home schooling as a lawful way of delivering basic education. A few years earlier, the litigation that began with *Eric Gitari v Non-Governmental Organisations Co-ordination Board* (High Court, 2015) and ended in *NGOs Co-ordination Board v Gitari* (Supreme Court, 2023) secured constitutional protection for an association of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) persons — a group whose claims attract intense social and religious opposition in Kenya.

This paper argues that the divergent outcomes are explained less by the merits than by execution of the case. The home-schooling petitioners did not enlist the strongest evidence available. They did not file affidavits from adults who have been home-schooled and went on to university; they called no expert on home education as a pedagogy or on its long international history; and they did not locate home education within Kenya's own heritage of learning in the household and the community. They also dissipated their fire by challenging the Director of Public Prosecutions and the police. The LGBTIQ litigators did the opposite. The penal-code question was in issue at first instance; on appeal the litigants and the courts set it aside, and the case was won on the express words of Article 36 alone — the decriminalisation fight being run in a separate suit, which lost. Home schoolers have an equivalent solid ground they never stood on: the parental liberty in Article 13(3) and (4) of the International Covenant on Economic, Social and Cultural Rights, which is part of Kenyan law under Article 2(6) of the Constitution, read with the family as "the natural and fundamental unit of society" (Article 45(1)), with home-based learning as a mechanism of indigenous knowledge and culture (Article 11), and with the equality and legitimate-expectation arguments that follow from the State's own accommodation of nomadic and APBET learners. Nor did they prove the one fact that mattered — that the children before the court were being educated to the national standard — which an independent assessment would have shown.

The paper then sets out, as a consolidated policy brief, a self-regulation framework for home schooling in Kenya: a community-based organisation (CBO) as the accountable body; a Teachers Service Commission-registered teacher retained for quality assurance; a national register; annual returns to the County Director of Education; and a "for-cause" threshold before the State may investigate a home. It maps each element to existing Kenyan law and to comparative practice, and it proposes three implementation routes — regulations under section 94 of the Basic Education Act, a public petition to Parliament under Article 119 of the Constitution, and administrative recognition by the Ministry of Education.

Keywords: home schooling; home-based education; right to education; freedom of association; constitutional litigation; burden of proof; self-regulation; earned autonomy; Kenya

Part I — The Litigation

1. Introduction

Thomas Edison held 1,093 United States patents, and roughly 1,500 worldwide. The company he founded, Edison General Electric, merged in 1892 with the Thomson-Houston Electric Company to form the General Electric Company, which survives as a multinational to this day (Acemoglu & Robinson, 2012). Edison had almost no formal schooling. He attended for a few months, was labelled difficult, and was thereafter taught at home by his mother, Nancy Edison. He is the standard example in the home-schooling movement's account of itself (Kunzman & Gaither, 2020), and, rhetoric aside, the biographical fact is not disputed.

One might therefore expect the case for home schooling in Kenya to have intrigued the courts. It did not. In *Were & another v Cabinet Secretary, Ministry of Education & 2 others; Abuto (Interested Party)* the High Court declined even to certify the petition as raising a substantial question of law worth a bench of three judges, holding that "the mere fact that home schooling has not been dealt with before does not make it a novel question" and that "the petitioners and interested party have not demonstrated why a bench of an uneven number of Judges should be empanelled" (*Were v Cabinet Secretary* [2022] KEHC 13233, para. 29). A single judge then heard the petition and dismissed it with costs (*Were v Cabinet Secretary* [2023] KEHC 21854).

Contrast the treatment of a far less popular claim, LGBTQ rights. In *Eric Gitari v Attorney General & another* the High Court certified a petition challenging the constitutionality of sections 162 and 165 of the Penal Code as raising "substantial questions of law" that "deserve ... the constitution of a bench of Judges", precisely because "the matters raised in the Petition are weighty and have important consequences" and because the court is "a curator of the Constitution" bound "to interpret the Constitution in a manner that is enlightened and progressive" (*Eric Gitari v Attorney General* [2016] KEHC 7739, paras. 34–37). And in the separate registration litigation, the High Court, the Court of Appeal (by a majority) and the Supreme Court (by a majority) all held that the State had unconstitutionally refused to allow LGBTIQ persons to register an association of their choice (*Eric Gitari v NGO Co-ordination Board* [2015] eKLR; *NGO Co-ordination Board v EG* [2019] KECA 902; *NGOs Co-ordination Board v Gitari*, SC Petition No. 16 of 2019 (2023)).

Home schooling is, by any ordinary measure, a virtuous enterprise. Its Kenyan practitioners are drawn disproportionately from parents who want a direct and sustained hand in their children's formation, and a philosophical case for the practice — written around this very prosecution — is already on the record (Oduor, 2019). On the international research, home-schooled children do at least as well as their peers, academically and socially (Kunzman & Gaither, 2020; Ray, 2017; Murphy, 2014). LGBTIQ identity, by contrast, attracts profound moral apprehension in most Kenyan communities; the point was made repeatedly by the appellant Board and its supporters and acknowledged by the courts, including in dissent (*NGO Co-ordination Board v EG* [2019] KECA 902, per Musinga JA). Why, then, did the court treat one claim as weighty and the other as unremarkable? Why was one community recognised as deserving the protection of the law and the other refused a hearing before three judges?

The argument of this paper is that the difference lies in legal strategy and evidence, not in the intrinsic strength of the causes. The Constitution of Kenya, 2010 offers a genuine opportunity to challenge settled practice. But to take that opportunity a litigant needs a well-grounded philosophy backed by choice facts. Outcomes in cases such as *Obergefell v. Hodges* (2015) or the *Gitari* Case are not accidents; they are the product of meticulous preparation. The petition in *Were* was dismissed for want of that preparation, not because home schooling was found to be unlawful.

2. What the courts actually decided

2.1 The two *Were* rulings

The *Were* litigation was triggered by a prosecution. On 18 February 2019 the first petitioner, Silas Shikwekwe Were, and his three children were arrested at Butali in Kakamega County and held in police cells overnight. The children were arraigned; the first petitioner was charged, under section 7 as read with section 20 of the Children Act and under section 31(2) of the Basic Education Act, with depriving his children of education by failing to enrol them in school. The children were released on condition that he enrol them, which he did. He then filed Constitutional Petition No. 236 of 2019, seeking, among other things, a declaration that home schooling does not contravene the right to education under Articles 43(1)(f) and 53(1)(b) of the Constitution; declarations that the definitions of "school" and "basic education" in section 2 of the Basic Education Act should include "home"; a declaration that section 43(2) is unconstitutional for not recognising "home" as a basic educational institution; a declaration that sections 30(2) and 31(2) are unconstitutional to the extent that they criminalise non-enrolment; and an order of *mandamus* compelling the Cabinet Secretary and the Attorney-General to make rules harmonising the Act with home schooling.

The 2022 empanelment ruling. The first petitioner applied under Article 165(4) of the Constitution to have the petition certified as raising a substantial question of law and referred to the Chief Justice for a three-judge bench. Ong'udi J refused. Applying the criteria in *Okiya Omtatah Okoit v Anne Waiguru* [2017] eKLR — that the issue must transcend the particular case and bear on the public interest, that there must be a state of uncertainty in the law, that the matter must fall within Article 165(3)(b) or (d), and that the applicant must identify the specific substantial question — the court held that the questions raised were "capable of being determined by a single Judge" and that novelty alone does not create a substantial question of law (*Were v Cabinet Secretary* [2022] KEHC 13233, paras. 26–29, citing *Kevin Turunga Ithagi v Hedwig Ongudi* [2016] eKLR).

The 2023 decision on the merits. Ong'udi J dismissed the petition. The reasoning has four strands.

Jurisdiction. The High Court at Nairobi had jurisdiction. Article 165 does not carve the High Court up geographically, and although the prosecution arose at Butali, the petitioners' grievance was directed broadly at provisions of the Basic Education Act said to violate the Constitution (*Were v Cabinet Secretary* [2023] KEHC 21854, paras. 37–39, applying *Samuel Kamau Macharia v Kenya Commercial Bank* [2012] KESC 8).

The prosecution. The challenge to the Director of Public Prosecutions failed. The DPP derives independence from Article 157 and section 6 of the Office of the Director of Public Prosecutions Act, and the courts "will not be quick to interfere" with a prosecutorial decision taken within the law (*Justus Mwenda Kathenge v DPP* [2014] KEHC 7714). The burden of proof "rests with the person alleging unconstitutional exercise of prosecutorial power", and only "if sufficient evidence is adduced to establish a breach" does the evidential burden shift to the DPP to justify the decision (*Diamond Hasham Lalji v Attorney General* [2018] KECA 856). Section 31(2) of the Basic Education Act had "not been declared unconstitutional", so it was "lawful and the 2nd respondent was bound to act as directed by the law, upon receiving sufficient evidence of disobedience". The first petitioner, "other than stating that they were arrested under section 31(2)", "did not demonstrate other factors" indicating neglect of duty or violation of rights, and so "did not discharge the burden to prove that the ... exercise of power ... was unlawful and unconstitutional" (*Were v Cabinet Secretary* [2023] KEHC 21854, paras. 40–49).

Home schooling is not unlawful — but it is not unregulated. This is the part of the ruling most often misread. The court held expressly that "under international law alternative forms of education other than what is prescribed in the [Basic Education Act] are provided for such as the homeschooling system", and that "by and of itself, homeschooling is a plausible education system". The court reached this conclusion through Article 2(5) and (6) of the Constitution, Article 21(1), Article 13(3) of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13 (para. 29), Article 18(2) of the Convention on the Rights of the Child and Article 11(4) of the African Charter on the Rights and Welfare of the Child (*Were v Cabinet Secretary* [2023] KEHC 21854, paras. 62–68). What defeated the petition was the qualification attached to that liberty in every one of those instruments: any system that offers education to a child "must conform to the minimum educational standards as may be laid down or approved by the State". That requirement is mirrored domestically by paragraph 15 of the Fourth Schedule to the Constitution, which assigns "education policy, standards, curricula, examinations and the granting of university charters" to the national government. Standard-setting "is not a preserve of parents". By the separation of powers and the political-question doctrine, the court "could not make a determination on the appropriate education policies as that was within the Government's arm" (*Kiroti wa Nguni v Attorney General* [2020] KEHC 8819). And a parent's right to select a child's education "is not absolute", being "capable of limitation as provided under Article 24" (*Were v Cabinet Secretary* [2023] KEHC 21854, paras. 59–70).

The petitioners proved nothing. The court's summary of the evidentiary record is worth setting out in full, because it is the heart of the failure:

"First there is no evidence of what system and standard they subscribe to teach their children, the academic curriculum and grading system for each stage is not made known, documentation of the various stages of the children's grades and progress are not shared. Further the petitioners did not disclose how such parents and guardians are qualified to teach their children in these systems and whether they hold such necessary qualifications to do so. The guidelines and regulation procedures they comply with are also not stated" (para. 71).

"The petitioners despite having used the system for a while do not show their attempt to engage the various government agencies such as the Ministry of Education to get approval and guidance of a standard they can apply or proposal to the national government to amend the laws in favour of the homeschooling system ... There is a taskforce which has been collecting views on our education system. I hope the petitioners, interested party and others did present their views there for consideration. They could also seek for the amendment of the Act through parliament" (para. 72).

"The petitioners did not bother to present or lay any factual basis of how they educate their children ... It is a fundamental principle of law that a

litigant bears the burden (or onus) of proof in respect of the propositions he asserts ... Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the [Constitution] and inevitably result in the improper use of judicial authority and discretion" (paras. 73–74, quoting *Edward Akong'o Oyugi v Attorney General* [2019] KEHC 10211).

The petition was dismissed with costs, the impugned provisions being "constitutional and consistent with [the Constitution], unless amended through a legal process" (para. 74).

2.2 The Gitari and NGO Board line

The registration litigation began with an application, not a prosecution. Between April 2012 and March 2013 Eric Gitari applied three times to the Non-Governmental Organizations Co-ordination Board to reserve one of several names — variations on *Gay and Lesbian Human Rights Commission / Council / Collective / Observancy / Organization* — for an NGO that would document and litigate human-rights abuses suffered by LGBTQ persons. The Board's Executive Director refused, relying on regulation 8(3)(b)(ii) of the Non-Governmental Organizations Co-ordination Regulations, 1992 and asserting that sections 162, 163 and 165 of the Penal Code "criminalise gay and lesbian liaisons". Gitari filed High Court Petition No. 440 of 2013.

High Court, 2015. A three-judge bench (Lenaola, Mumbi Ngugi and Odunga JJ) allowed the petition. The penal-code question was very much in issue at this stage — the Board had pleaded sections 162, 163 and 165 as the justification for its refusal — and the court engaged it, holding that the Penal Code criminalises certain sexual acts, not the status of being homosexual, and contains no provision limiting the freedom of association of persons by reference to their sexual orientation. The court also held that "every person" in Article 36 includes every individual regardless of sexual orientation; that the Board's reliance on religious texts and public opinion could not satisfy Article 24; and that an interpretation of the non-discrimination guarantee that excluded people by reason of sexual orientation would conflict with the national values in Article 10. It issued *mandamus* directing the Board to comply with Articles 27 and 36. *Eric Gitari v NGO Co-ordination Board* [2015] eKLR).

Court of Appeal, 2019. A five-judge bench dismissed the Board's appeal by 3:2 (Waki, Koome and Makhandia JJA in the majority; Nambuye and Musinga JJA dissenting). The majority held that the reservation of a name was not a "decision of the Board" attracting the internal appeal to the Minister under section 19 of the Act, so the petition was properly before the High Court; that the Board had violated Article 36; and that "the only limitation to this right ... is that the activities of the association must be in accordance with the law" — and there was nothing unlawful about research, documentation, reporting and advocacy. It was "arbitrary to speculate and categorize LGBTQ as persons who have the propensity to destroy society" (*NGO Co-ordination Board v EG* [2019] KECA 902).

Supreme Court, 2023. The Board's further appeal was dismissed 3:2 (Mwilu DCJ, Wanjala and Njoki Ndungu SCJJ; Ibrahim and Ouko SCJJ dissenting). The majority held that there was no internal dispute-resolution mechanism for the refusal of a name, so the doctrine of exhaustion did not bar the petition; that sections 162, 163 and 165 do not "express the intention to limit LGBTQ's right to freedom of association" and use the words "any person", covering heterosexual and homosexual offenders alike, so there was "no correlation whatsoever" between those offences and an NGO formed to champion rights; that the limitation failed the proportionality test in Article 24 and pursued no legitimate aim; and that "it would be unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants". The majority went further and held that "the use of the word 'sex' under Article 27(4) ... refers to the sexual orientation of any gender" and that "including" in Article 27(4) is "not exhaustive, but only illustrative" and comprises "freedom from discrimination based on a person's sexual orientation" (*NGOs Co-ordination Board v Gitari*, SC Petition No. 16 of 2019 (2023), paras. 46–79).

The penal code was progressively quarantined. Although the penal-code point was argued at first instance, the litigants and the courts set it aside as the case ascended. In the Court of Appeal, Waki JA — who cast the deciding vote in the 3:2 split — was explicit: "the matter before us is not about ... the constitutionality of sections 162, 163 and 165 of the Penal Code. Indeed, the latter issue is pending determination before the High Court, and the less said about it the better" (*NGO Co-ordination Board v EG* [2019] KECA 902, per Waki JA, para. 7). The Supreme Court majority took the same course: "the matter before us is not about the legalization or decriminalization of LGBTQ, or the morality of same-sex marriage" (*NGOs Co-ordination Board v Gitari*, SC Petition No. 16 of 2019 (2023), para. 34). The appellate wins therefore rest entirely on the freedom of association, not on the Penal Code.

The decriminalisation fight was run separately, and lost. The constitutionality of sections 162 and 165 was litigated in its own suit *EG & 7 others v Attorney General* (Petition Nos. 150 & 234 of 2016 (Consolidated) [2019] eKLR). That petition — which had won a three-judge bench in the 2016 empanelment ruling discussed above — *failed*. On 24 May 2019 a three-judge bench held that the sections were not unconstitutional. The matter is on appeal. The lesson is exact: the movement kept the dicey, losing question in its own container and won the association case on ground it could hold.

3. The winnable issue

3.1 What Gitari did: hold ground you can hold

The engine of the *Gitari* win is a single sentence of express constitutional text. Article 36(3)(a) commands that any statute requiring registration of an association "shall provide that ... registration may not be withheld or withdrawn unreasonably." That is a textual floor the State cannot argue away. The registration litigation stood on it and stayed on it. The penal-code question, present at first instance, was set aside on appeal by the litigants and by the courts themselves; Waki JA would not touch it, the Supreme Court majority said the case was "not about ... decriminalization." The one genuinely difficult question — whether a colonial-era criminal prohibition survives the 2010 Constitution — was quarantined in its own suit and, as it happens, lost. The association claim was decided on ground the litigants could hold, against a hostile Board, hostile interveners and, on the evidence before the courts, a hostile public.

3.2 What the *Were* petition did instead

The *Were* petitioners loaded one petition with everything: a constitutional attack on the Director of Public Prosecutions and the police; a

challenge to four sections of the Basic Education Act and a section of the Children Act; a demand that the court rewrite the statutory definitions of "school" and "basic education"; and an order of *mandamus* compelling the executive to legislate.

The attack on the DPP was, on settled authority, close to hopeless without evidence of malice *outra vires* conduct (Kathenge [2014]; Diamond Hasham Lalji [2018]; Kiriro wa Ngugi [2020]), and it consumed pleading, argument and judicial attention that should have gone to the education question. The demand that the court rewrite the Act invited, and received, the separation-of-powers and public-participation answer: standard-setting "is not a preserve of parents", and to grant the orders sought "would result in an overhaul of the education system without public participation" (Were [2023], paras. 60, 72). The petitioners were fighting on the State's strongest ground — its exclusive constitutional mandate over education standards (Fourth Schedule, para. 15) — when a solid ground of their own was available and unused.

3.3 The home schooler's Article 36: ICESCR Article 13(3) and (4)

Home schoolers have a textual floor as firm as Article 36(3)(a). It is Article 13(3) and (4) of the International Covenant on Economic, Social and Cultural Rights, which is part of Kenyan law by Article 2(6) of the Constitution — a point the *Were* court accepted (Were [2023], paras. 62–68).

Article 13(3): "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State, and to ensure the religious and moral education of their children in conformity with their own convictions."

Article 13(4): "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

Six propositions follow from the text, and together they form the spine a home-schooling petition should have.

1. **The State's duty here is restraint, not provision.** Article 13(3) is an undertaking to "have respect for the liberty of parents" — a negative obligation. The State's positive duty to provide free and compulsory basic education (Article 13(2); Constitution, Article 53(1)(b)) is a different obligation and does not license the State to close off the parental liberty that Article 13(3) protects.
1. **The liberty reaches beyond the public system by its own terms.** The text protects the choice of schools "other than those established by the public authorities." Non-State educational arrangements are contemplated by *the Covenant itself*. They are not an exception the State may grudgingly allow; they are within the guaranteed liberty.
1. **The liberty has a substantive core.** It secures the "religious and moral education of [the] children in conformity with [the parents'] own convictions." The State may not demand that this formation be surrendered as the price of compliance with compulsory-education law. In the Kenyan frame this connects directly to Article 32 of the Constitution — freedom of conscience, religion, belief and opinion — which the *Were* petition invoked but did not develop.
1. **The initiative may originate with the parent.** Article 13(4) confirms that the liberty is not merely to *select among* State-approved schools but to "establish and direct educational institutions." A parent or private body may originate an educational arrangement; the household is such an arrangement.
1. **The single permissible limit is conformity to standards — not to form.** Both paragraphs permit exactly one qualification: the education must conform to "such minimum educational standards as may be laid down or approved by the State", read with the aims in Article 13(1) (the full development of the human personality and dignity; respect for human rights; effective participation in a free society; tolerance among groups). Regulation must therefore be calibrated to **outcomes and standards**, not to the **setting or form** of delivery. A statutory scheme that permits *only* institutional attendance regulates form, not standard, and so exceeds what Article 13 reserves to the State. This is the decisive move. It reframes the challenge to sections 30(2) and 31(2) of the Basic Education Act: the vice is not that the State regulates, but that, read to compel attendance at a registered institution, the sections regulate the *place* of learning rather than its *quality*, and to that extent are inconsistent with a treaty that is Kenyan law.
1. **The instrument is directly justiciable.** By Article 2(6), Articles 13(3) and (4) are available as interpretive standards for **sections 28 to 31 of the Basic Education Act** and for **Articles 32, 43(1)(f) and 53(1)(b) of the Constitution**. The court need not "make education policy"; it need only read the impugned sections down so far as necessary to conform to a norm that already binds Kenya.

This is the ground the *Were* petition should have organised itself around. The court had in fact reached the doorway itself — holding that home schooling is "a plausible education system" recognised under international law, subject to conformity with State minimum standards — and then dismissed the petition because the petitioners had produced no standard, no evidence of conformity, and no coherent remedy. The remedy that fits the analysis is narrow: a declaration that home-based education, where it conforms to the minimum educational standards laid down or approved by the State, is a lawful means of discharging the child's right under Article 53(1)(b), and that sections 30(2) and 31(2) are to be read accordingly. Nothing more. That relief does not overhaul the education system and does not compel the executive to legislate; it reads an over-broad construction of two sections down to the treaty floor.

Two constitutional supports strengthen the spine.

The family as the foundation of society. Article 45(1) provides that "the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State." Home-based education is the family performing the formative function the Constitution expressly recognises. Article 53(2) makes the child's best interests paramount — a requirement the standards-conformity condition *satisfies*; it does not defeat the parental liberty, it disciplines it.

Home-based learning as a mechanism of indigenous knowledge. Article 11(1) "recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation", and Article 11(2)(b) obliges the State to "recognise the role of ... indigenous technologies in the development of the nation." Article 44 guarantees every person the right to use their culture; Article 69(1)(c) commits the State to protect indigenous knowledge. Pre-colonial African education was, overwhelmingly, education in the household and the community (Kenyatta, 1938; Mbiti, 1969; Sifuna & Otiende, 2006; and see Nyerere, 1967, on the colonial school as an institution alienated from the life around it). Home-based education is the continuing mechanism by which that indigenous knowledge and culture is transmitted. It is therefore not a foreign practice the State tolerates; it is an exercise of a value the Constitution places at the foundation of the nation.

3.4 A legitimate expectation of accommodation: nomadic education and APBET

Kenya already accepts, in law and in settled practice, that basic education can be delivered to a standard outside a conventional school.

Nomadic education — mobile and non-formal schooling for pastoralist communities — has been policy for two decades, is coordinated by the National Council for Nomadic Education in Kenya (NACONEK), and sits within the section 2 definition of "school", which names "mobile schooling" and "out of school programmes". *APBET* — the low-cost complementary schools of the informal settlements and the arid lands — is governed by the Alternative Provision of Basic Education and Training Policy (Ministry of Education, 2015): the Ministry registers these schools on adapted criteria, enters their learners for national assessments, and is moving to fund them. The Basic Education (Amendment) Bill, 2025 (Hon. Antony Oluoch, MP for Mathare), passed by the National Assembly in 2026 and awaiting the Senate and assent, would write APBET into the Act's definition of basic education and open capitation.

A home-based learner is in the same position as a nomadic or APBET learner: a child receiving basic education otherwise than in a conventional public or private school. Three arguments follow, none of which the *Were* petition made.

Purposive interpretation. Section 2 already reaches "alternative approaches" — "out of school programmes", "distance or correspondence instruction" — and the APBET reform widens it. Read with Article 259, sections 30(2) and 31(2) should not be construed to criminalise a parent who educates a child to a standard within that field. "A registered institution or nothing" is a construction the court can decline.

Equality and rationality. To register and support the nomadic and APBET learner while prosecuting the home-based learner's parent is differential treatment of materially identical cases. It needs a rational, non-arbitrary justification; none has been offered. That is the paradigm claim under Article 27(1) and (4), read with the Article 10 demand of rationality in the exercise of public power.

Legitimate expectation. The doctrine holds a public authority to a position it has taken by "an express promise ... or ... a regular practice which the claimant can reasonably expect to continue" (*Council of Civil Service Unions v Minister for the Civil Service*[1985] AC 374, 401). The Supreme Court adopted it in *Communications Commission of Kenya v Royal Media Services Ltd*[2014] KESC 53: the expectation must rest on a clear promise or regular practice, be reasonable, lie within the authority's competence, and not run against a clear provision of law. The relief is usually procedural — consultation, a hearing, or an offered route to comply before the authority acts to the person's detriment; substantive relief is exceptional (*Keroche Industries Ltd v Kenya Revenue Authority*[2007] eKLR).

The regular practice here is the Ministry's own conduct in the nomadic and APBET fields: it accommodates non-conventional delivery, registers it, and brings its learners into assessment and funding. A parent educating a child to a standard can reasonably expect the same currency — a route to register and comply, and at least a hearing — not arrest first. Prosecuting the *Were* family with no such route, while the Ministry runs exactly that route for materially similar learners, defeats the expectation.

Two limits keep the argument honest. It attaches to the Ministry's practice and the APBET Policy, not to the statute — a Bill or an Act does not, of itself, create a legitimate expectation. And because it cannot override a clear statutory command, it works as a reason to read sections 30(2) and 31(2) down, or to require a compliance route before enforcement: a fourth strand behind the narrow declaration in §3.3. It also answers the *Were* court's "overhaul without public participation" objection — Parliament is itself widening the field of accommodated provision.

3.5 Evidence: the record wins

Gitari was also a contest of evidence, and the same pattern held. The registration petition was backed by a documented research report (*The Outlawed Amongst Us*, Kenya Human Rights Commission), and the wider litigation marshalled professional opinion and comparative jurisprudence — the position of the World Psychiatric Association (2016), noted by the Court of Appeal, and authority from Botswana, India, South Africa and the European Court of Human Rights, cited at length by the Supreme Court. The Board offered "Bible and Quran verses as well as ... studies on homosexuality", and the Court of Appeal held flatly that "religious texts [are] neither a source of law in Kenya nor [do they] form the basis for denying fundamental rights" (*NGO Co-ordination Board v EG* [2019] KECA 902, per Asike-Makhandia JA). The party that came with a record won; the party that came with conviction lost.

The *Were* petitioners came with conviction. The judge's list of what was missing — curriculum, grading system, progress records, teacher qualifications, the guidelines followed — is a list of ordinary documents that any organised home-schooling family keeps or could produce.

4. The best available evidence the petition did not lead

The petition asserted that home schooling works. It proved nothing. Four kinds of evidence — all available, none led — would have changed that.

4.1 Independent assessment of the petitioner's own children

Whether the objectives of basic education are being met for a particular child is a question of fact, and a measurable one. The most direct proof available to Mr *Were* was his own three children. He could have had them assessed by an independent examiner — a KNEC-accredited assessor, a university school of education, or an educational psychologist — against the grade-level competencies of the national curriculum, and against published benchmarks for their peers (the Uwezo/Twaweza household literacy and numeracy surveys; the National Assessment System for

Monitoring Learner Achievement; the Kenya Institute of Curriculum Development's grade-level expectations). An assessment report showing the children at or above the level expected of schooled children of the same age would have been close to unanswerable.

It would also have met the court head-on. Ong'udi J faulted the petition because "documentation of the various stages of the children's grades and progress are not shared" and because the petitioners "did not bother to present or lay any factual basis of how they educate their children" (*Were* [2023], paras. 71, 73). A contemporaneous, independent assessment of those three children answers both complaints directly. Nothing prevented it: a party may seek leave to adduce such evidence, and the court may order the assessment itself. The burden of proving the factual proposition — that these children are being educated to the national standard — lay on the petitioners, and it was a burden they could have discharged (*Edward Akong'o Oyugi*, quoted in *Were* [2023], para. 73).

4.2 Affidavits from home-schooled university graduates

The most powerful and least answerable evidence for the proposition that home schooling delivers the objects of basic education is a home-schooled adult who has completed university. Kenya has such people. A bundle of ten, twenty or fifty sworn affidavits — each deposing to the curriculum followed, the assessments sat (KCPE, IGCSE, GED, SAT), the university admitted to, the degree earned, and the deponent's present occupation — would have placed before the court exactly the "factual basis" whose absence the judge fastened on (*Were* [2023], para. 73). It would also have converted an abstract argument about a "plausible education system" into a demonstrated one. Competence in basic education is a question of fact, established by testing and by outcomes; it is capable of proof; and the burden of proving it lay on the petitioners (*Edward Akong'o Oyugi*, quoted in *Were* [2023], para. 73). They did not attempt it.

4.3 Expert evidence on home schooling as a pedagogy and its history

The petition needed a distinguished academic — an education scholar, ideally with an international reputation — to give expert evidence on three matters:

1. **Home education as a recognised pedagogy.** There is a substantial peer-reviewed literature. The most authoritative surveys of the research conclude that home-schooled children perform at least as well as their schooled peers on academic measures and on measures of social and civic development, with the usual caveats about self-selected samples (Kunzman & Gaither, 2020; Ray, 2017; Murphy, 2014). An expert could have put that literature, and its limits, before the court.
1. **The history of formal schooling.** Universal, state-run mass schooling is a recent institution. Cathedral schools and universities are medieval, but the state school system — compulsory, age-graded, standardised — emerged at scale only in the late eighteenth and nineteenth centuries, driven by the Industrial Revolution's demand for a disciplined literate workforce and by the administrative needs of the modern nation-state (Green, 2013; Soysal & Strang, 1989). The model most Kenyans experience is less than 300 years old. Home education, by contrast, is the older and more nearly universal human practice. Presented properly, this reframes the debate: the question is not whether home schooling is a departure from the norm, but whether a recent and particular institutional form should be permitted to monopolise the constitutional concept of "education".
1. **Home schooling internationally.** A comparative expert could have shown the court that home education is lawful and regulated across the common-law world and in Africa — the United States (all fifty states), England and Wales, Australia, New Zealand, Canada, and, closer to home, South Africa, where it is expressly provided for by section 51 of the South African Schools Act 84 of 1996 and the Department of Basic Education's *Policy on Home Education* (2018). South Africa was in fact cited to the court in *Were*, but only in passing, and without the regulatory detail that would have shown the court a workable model rather than a bare assertion that "other countries allow it".

4.4 Home education and African heritage

The constitutional framing for this argument — Articles 11, 44 and 45(1), and home-based learning as the transmission mechanism for indigenous knowledge — is set out in §3.3. The point here is evidentiary: the petition asserted the heritage argument in a single sentence, invoking the Gusii cranial surgeons (*ababari b'emetwe*), who performed craniotomies for generations with proven results and without medical school (Furnas et al., 1985; Dobrin, 2024). It needed expert support and a developed record.

An expert historian or anthropologist of African education could establish, on affidavit, that pre-colonial education in the Kenyan communities was overwhelmingly education in the household and the community, oriented to the formation of a whole person integrated into that community, and transmitting substantial technical competence — in agriculture, metallurgy, medicine, navigation, law and craft — outside anything resembling an institutional school (Kenyatta, 1938; Mbiti, 1969; Sifuna & Otiende, 2006; Nyerere, 1967). That evidence does two things. It refutes the culture-shaming assumption that institutional schools are educational monopolies and that African traditional knowledge is incapable of producing modern technical know-how. And it grounds the Article 11 and Article 44 argument in fact rather than assertion, so that the court is not asked to take the heritage point on faith. (The original draft's reference to Article 10 should also be corrected: Article 10 lists the national values and principles of governance; the culture and indigenous-knowledge provisions are Articles 11, 44 and 69(1)(c).)

5. The engagement point is now spent

One of the judge's principal reasons for dismissal was that the petitioners had not shown any "attempt to engage the various government agencies such as the Ministry of Education to get approval and guidance", nor any proposal to the national government to amend the law, nor participation in the education-reform taskforce then sitting (*Were* [2023], para. 72). That was a fair criticism of the record as it stood in 2019–2023.

It is a criticism that a future petition — or a future defence to a prosecution — can meet. In the period since, home-schooling representatives have engaged the policy process: through submissions to the Presidential Working Party on Education Reform (Republic of Kenya, 2023), through correspondence and meetings with the State Department for Basic Education, and through the kind of organised advocacy this paper recommends. **The movement should now do three things deliberately.**

- 1. **Document the engagement.** Keep a dated, exhibitable record of every submission, meeting, letter and response. This converts "we have engaged" from an assertion into evidence.
- 2. **Make a formal proposal.** Put a written regulatory proposal (Part II of this paper is a starting point) before the Cabinet Secretary and the relevant departmental committee of Parliament, and record the response or the silence.
- 3. **Not overclaim.** A handful of letters is not sustained engagement. The record must show a genuine, patient effort to work within the policy process — which is also, independently, the right thing to do.

If that record exists, the *Were* court's engagement objection falls away, and the separation-of-powers objection is softened: a court asked for a narrow declaration, against the background of a documented and ignored regulatory proposal, is in a very different position from a court asked to rewrite the Act from a standing start.

6. Conclusion to Part I

The *Were* petition was not dismissed because home schooling is illegal in Kenya. It is not. The court held the opposite: home schooling is "a plausible education system" recognised under international law that Kenya has domesticated through Article 2(5) and (6). The petition was dismissed because the petitioners asked for too much, attacked the wrong targets, and proved nothing. The LGBTIQ litigation succeeded, against far heavier social headwinds, because it did the opposite: it stood on firm textual ground (Article 36(3)(a)), it built a record, and it left the unwinnable fight in its own container for another day and another court.

Home schoolers have equally firm textual ground and never stood on it: the parental liberty in Article 13(3) and (4) of the ICESCR, part of Kenyan law under Article 2(6), which permits the State to regulate education to a standard but not to a form. It is reinforced by four domestic strands — the family as the foundation of society (Article 45(1)); home-based learning as a mechanism of indigenous knowledge (Article 11); a purposive reading of "school" that already embraces "alternative approaches" (section 2; Article 259); and the equality and legitimate-expectation arguments that flow from the State's own accommodation of nomadic and APBET learners (Articles 27 and 10). The remedy that fits all of this is narrow — a declaration reading sections 30(2) and 31(2) of the Basic Education Act down to the treaty and constitutional floor — and it does not ask the court to make policy.

The movement is therefore better placed for litigation than the *Were* result suggests, provided it pleads a narrow claim on the Article 13 spine and leads the evidence it did not lead before — above all a contemporaneous, independent assessment of home-schooled children against national benchmarks. But litigation is not the only route, and it is not the best first route. Two others are open: a public petition to Parliament under Article 119 of the Constitution, and the drafting of home-schooling regulations, built on self-regulation, to be used as the basis for engagement with the Ministry of Education. Part II consolidates a policy brief for that purpose.

Part II — Policy Brief: A Self-Regulation Framework for Home Schooling in Kenya

7. Executive summary

Home schooling in Kenya sits in a legal limbo. It is not prohibited — the High Court has accepted that it is a "plausible education system" — but it is not provided for, so home-schooling parents remain exposed to prosecution under sections 30(2) and 31(2) of the Basic Education Act and section 20 of the Children Act, and there is no standard against which a home-schooling family can demonstrate compliance.

This brief proposes a **self-regulation (earned-autonomy) framework** with six elements:

- 1. Home-schooling families organise into a **Home Education Community-Based Organisation (CBO)** — a national body with county chapters — registered under the Community Groups Registration Act, 2022.
- 2. The CBO retains one or more **Teachers Service Commission-registered teachers** to provide quality assurance: moderation of assessment, curriculum review and mentoring.
- 3. Every home-schooling family enters its learners on an **anational home-education register** — by notification, not permission.
- 4. Every family files an **annual return** with the County Director of Education: a learner roster, the curriculum followed, and evidence of assessment and progress.
- 5. The State may **investigate a home only for cause** — on reasonable grounds arising from a complaint, a failed assessment, a safeguarding concern or a failure to file returns.
- 6. The CBO **holds primary responsibility** for the accountability of its members, through a code of practice, peer review, sanctions and de-listing. The State is the backstop, not the front line.

Each element has a hook in existing Kenyan law. The framework can be implemented by regulations under section 94 of the Basic Education Act, by a public petition to Parliament, or by administrative recognition pending regulations.

8. The problem

FEATURE	CURRENT POSITION
Is home schooling prohibited?	No. It is recognised under international law as a permissible alternative form of education (ICESCR art. 13(3); CRC art. 18(2); ACRWC art. 11(4); <i>Were</i> [2023]).

FEATURE	CURRENT POSITION
Is it provided for in Kenyan law?	No. The Basic Education Act does not mention home-based education.
Are home-schooling parents exposed to prosecution?	Yes. Section 31(2) of the Basic Education Act makes it an offence not to present a child for admission to a basic education institution; the first petitioner in <i>Were</i> was in fact prosecuted, and the prosecution was held to be lawful.
Is there a standard a family can comply with?	No. There is no register, no notification route, no curriculum benchmark, no assessment requirement — and therefore no way to be demonstrably compliant.
Who sets educational standards?	The national government (Constitution, Fourth Schedule, para. 15). Standard-setting "is not a preserve of parents" (<i>Were</i> [2023]).
Is the right to choose a child's education absolute?	No. It is subject to limitation under Article 24, and to conformity with State minimum standards.

The gap is not the absence of *aright*; it is the absence of *arégime*. A right without a régime leaves every home-schooling family one hostile Sub-County Director or one aggrieved neighbour away from a police cell.

9. Principles

Regulate the standard, not the form. This is the core of ICESCR Article 13(3) and (4) (see §3.3). The one qualification the Covenant permits on the parental liberty is conformity with "minimum educational standards ... laid down or approved by the State", read with the Article 13(1) aims. Regulation must therefore fasten on outcomes — what the child learns and can demonstrate — not on the setting in which learning happens. Every element of the framework below is a standards or outcomes control; none dictates the form of delivery.

Earned autonomy / co-regulation. The State sets a floor and holds a backstop; an accountable intermediary body (the CBO) does the day-to-day assurance; families that demonstrate compliance earn a light-touch relationship with the State. This is the "responsive regulation" model: enforcement escalates only when self-regulation fails (Ayres & Braithwaite, 1992; Gunningham & Rees, 1997).

Subsidiarity and parental primacy within a State floor. The Constitution makes education a national-government function for standards, but makes the parent the child's carer and protector (Art. 53(1)(e)) and gives parents "a prior right to choose the kind of education" (UDHR art. 26(3); ICESCR art. 13(3)). The floor is the State's; everything above the floor is the family's.

The family as the foundation of society. Article 45(1) recognises the family as "the natural and fundamental unit of society and the necessary basis of social order", entitled to the recognition and protection of the State. A home-education régime should be drafted as recognition of the family performing its formative function, disciplined by the child's paramount best interests (Art. 53(2)), not as an indulgence.

Proportionality (Article 24). Any State intrusion into the home — inspection, investigation, prosecution — must be the least restrictive means of achieving a legitimate aim (the child's right to education and to protection). Routine, suspicionless inspection of every home-schooling household would not pass that test, and would also engage Article 31 (privacy).

For-cause investigation. Once a compliance régime exists, the burden should sit where the constitutional logic already puts it in the prosecutorial context: on the State to show cause before it acts against a family (cf. *Diamond Hasham Lalji* [2018] KECA 856 — the burden lies on the person alleging that a public power has been exercised unconstitutionally; the evidential burden shifts only once a breach is shown). Filing returns and being a member in good standing of the CBO should raise a presumption of compliance that the State must displace on evidence.

African heritage and indigenous knowledge. Home-based learning is the historical and continuing mechanism for the transmission of indigenous knowledge and culture. The framework should be presented, and drafted, as giving effect to Article 11 (culture as the foundation of the nation), Article 44 (right to culture) and Article 69(1)(c) (protection of indigenous knowledge) — not merely as an accommodation of a foreign practice.

10. The model, mapped to law and to comparative practice

ELEMENT	KENYAN LEGAL HOOK	COMPARATIVE ANCHOR
1. Home Education CBO (national body + county chapters); code of practice; register of members	Community Groups Registration Act, 2022; Constitution, Art. 36 (freedom of association — "registration may not be withheld or withdrawn unreasonably"); Art. 10 (accountability)	Industry and professional self-regulation (Gunningham & Rees, 1997); the responsive-regulation pyramid (Ayres & Braithwaite, 1992)
2. TSC-registered teacher for quality assurance — assessment moderation, curriculum review, mentoring, an annual learning report per family	Teachers Service Commission Act, 2012; Basic Education Act, s. 2 (recognises education delivered by "competent" persons and "alternative approaches")	South Africa: annual assessment by a competent assessor under the <i>Policy on Home Education</i> (2018); Australia: registration conditional on an educational programme and periodic review
3. National home-education register — notification, effective on filing; a unique learner number issued (linking to NEMIS)	Basic Education Act, s. 2 ("alternative approaches"), s. 34 (registers); Fourth Schedule, para. 15; APBET Policy (2015); Basic Education (Amendment) Bill, 2025	England and Wales: parents notify the local authority; South Africa: registration with the Head of Department

ELEMENT	KENYAN LEGAL HOOK	COMPARATIVE ANCHOR
4. Annual return to the County Director of Education — learner roster; curriculum followed; evidence of assessment and progress; the CBO teacher's learning report	Basic Education Act, ss. 18 (County Education Boards), 34; the County Director of Education is the Ministry's county head	South Africa: s. 51(3) monitoring by the HoD; Australia: annual reporting to the registration authority
5. For-cause investigation standard — the State may inspect, investigate or prosecute only on written reasonable grounds (a complaint substantiated on its face, a failed or missed assessment, a safeguarding referral, or a failure to file returns after notice), with a right to be heard before any de-registration or charge	Constitution, Art. 24 (proportionality; least restrictive means), Art. 31 (privacy), Art. 47 (fair administrative action); Fair Administrative Action Act, 2015; <i>Diamond Hasham Lalji</i> [2018] KECA 856	South Africa: de-registration only for cause and after due process; the general "reasonable grounds" threshold for administrative intrusion
6. CBO primary accountability — code of practice; induction; annual self-assessment; peer review; a graduated sanctions ladder (advice → support plan → supervised remediation → suspension → de-listing); referral to the State only at the top of the ladder	Constitution, Art. 10 (integrity, transparency, accountability); Art. 53(2) (child's best interests); self-regulation theory	Professional regulatory bodies; the "enforced self-regulation" variant in Ayres & Braithwaite (1992)

11. How the model fits existing Kenyan law

The framework does not require the Constitution to be reinterpreted or the Basic Education Act to be struck down. It requires the existing architecture to be extended.

- **"School" and "alternative approaches"**. Section 2 of the Basic Education Act already contemplates non-institutional delivery — "mobile schooling", "out of school programmes", "distance or correspondence instruction". Nomadic education and the APBET framework operate within it, and the Basic Education (Amendment) Bill, 2025 would widen it further to name APBET institutions expressly. Home-based education is another alternative modality on the same logic. The cleanest legislative fix is to add "home-based education" to the section 2 list and to define it — ideally as a rider to the APBET amendment, which is already in the House.
- **Standard-setting stays with the national government**. Paragraph 15 of the Fourth Schedule is untouched. The CBO and the TSC teacher assure compliance with standards the State sets; they do not set them. This directly answers the *Were* court's separation-of-powers concern.
- **The offence provisions are re-calibrated, not repealed**. Sections 30(2) and 31(2) can be amended to provide that a parent does not commit an offence where the child is registered for home-based education and the parent is filing returns and is a member in good standing of a recognised Home Education CBO. That is a "reasonable excuse" / compliance defence, familiar in regulatory drafting, and far more likely to attract political support than repeal.
- **International law is satisfied on its own terms**. The régime supplies precisely the "minimum educational standards ... laid down or approved by the State" contemplated by ICESCR Article 13(3) and (4) and General Comment No. 13 — the one qualification the Covenant permits — while leaving the protected parental liberty intact. It regulates the standard, not the form (§3.3). This is what the *Were* court said was missing.
- **The family is recognised, not merely tolerated**. The instrument gives effect to Article 45(1) (the family as the foundation of society) and Articles 11 and 44 (culture and indigenous knowledge), framing home education as an exercise of constitutional value rather than an exception the State concedes.
- **The child's rights are protected**. Registration, annual assessment, a professional's learning report and a safeguarding referral route mean the régime is defensible as being in the child's paramount best interests (Art. 53(2)), not merely as a parental liberty.

12. Implementation routes

The three routes are complementary and can be pursued in parallel.

Route A — Regulations under section 94 of the Basic Education Act

Section 94 empowers the Cabinet Secretary to make regulations for the better carrying into effect of the Act. A legal notice — *The Basic Education (Home-Based Education) Regulations* — could establish the register, the notification route, the annual return, the role of a recognised CBO and its quality-assurance teacher, and the for-cause investigation standard, without primary legislation. This is the fastest route and keeps the initiative with the Ministry, which is politically easier than a Bill. A draft outline is at Appendix A.

Risk: a Cabinet Secretary who is unwilling to act cannot be compelled to make discretionary regulations (that is close to what the *Were* *mandamus* prayer sought, and it failed). Route A therefore depends on persuading the Ministry, which is where Route C comes in.

Route B — Public petition to Parliament (Article 119)

Article 119 of the Constitution and the Petition to Parliament (Procedure) Act, 2012 allow any person to petition Parliament to consider any matter within its authority, including to enact, amend or repeal legislation. A petition to the National Assembly, referred to the Departmental Committee on Education, could seek:

1. amendment of section 2 of the Basic Education Act to define and include "home-based education";
2. insertion of a new Part on home-based education (register; notification; annual return; recognised CBO; quality assurance; for-cause investigation; appeals);
3. amendment of sections 30(2) and 31(2) to insert a compliance defence.

A petition backed by the evidence Part I describes — affidavits from home-schooled graduates, an expert opinion, a documented record of prior engagement — is a strong committee submission and creates a public record that also supports Routes A and C, and any future litigation.

Route C — Administrative recognition by the Ministry of Education

Pending regulations or legislation, the movement can seek:

- a **Memorandum of Understanding** between the Home Education CBO and the State Department for Basic Education, recognising the CBO's members as compliant while a régime is developed;
- inclusion of home-based education as an APBET modality in the **National Education Sector Strategic Plan** and in Ministry circulars;
- a **Ministry circular to County and Sub-County Directors** confirming that registered home-schooling families filing returns are not to be referred for prosecution absent cause.

Route C produces the documented engagement that neutralises the *Were* objections and lays the groundwork for Routes A and B.

13. Risks and mitigations

RISK	MITIGATION
The State turns registration into a permission régime (over-inspection; discretionary refusals)	Draft the register as <i>notification effective on filing</i> ; put the for-cause standard and the right to be heard in the instrument itself; provide an appeal to the County Education Board and then the High Court
Fragmentation — multiple competing CBOs, no common standard	Provide for recognition of a single umbrella CBO with county chapters; make recognition conditional on an approved code of practice; allow the Ministry to recognise additional bodies only against the same code
Free-riding — home-schooling families that will not join or file	The compliance defence to sections 30(2)/31(2) is available <i>only</i> to registered families filing returns; non-members remain exposed. This is an incentive to join, not a penalty for the movement
Safeguarding failure damages the movement's credibility	Build a mandatory safeguarding referral route into the code of practice; the CBO's graduated sanctions ladder ends in de-listing and referral; a visible, self-imposed safeguarding standard is the movement's best protection
Cost of a TSC-registered teacher	Share the cost across the CBO and its county chapters; one teacher can moderate assessment for many families; treat it as a membership service
Data protection of the register	Comply with the Data Protection Act, 2019: register the CBO as a data controller; minimise the data collected; restrict access; publish a retention schedule
Political opposition on "African values" grounds	Present the framework as giving effect to Article 11 (culture as the foundation of the nation) and to Kenya's own heritage of household and community education (Kenyatta, 1938; Nyerere, 1967; Sifuna & Otiende, 2006), not as importing a foreign model

14. Recommendations

1. **Form the Home Education CBO now**, with a written constitution, a code of practice and a members' register, and register it under the Community Groups Registration Act, 2022.
2. **Retain a TSC-registered teacher** as the CBO's quality-assurance lead, and design an annual assessment-moderation and learning-report process.
3. **Build the evidentiary file** described in Part I: a contemporaneous independent assessment of home-schooled children against national grade-level benchmarks; affidavits from home-schooled university graduates; an expert opinion from an education scholar on home education as a pedagogy, its history and its comparative regulation; an affidavit from a historian or anthropologist of African education on household and community learning as the transmission mechanism for indigenous knowledge; and a legal memorandum on the Article 13(3)–(4) spine, Articles 32, 45(1), 11 and 44, and the equality and legitimate-expectation arguments from nomadic and APBET provision.
4. **Put a formal regulatory proposal** (Appendix A) before the Cabinet Secretary for Education and the Departmental Committee on Education, and keep a dated record of the submission and any response.
5. **File a public petition to Parliament** under Article 119 if the Ministry does not engage within a reasonable period.
6. **Hold litigation in reserve, and plead it on the Article 13 spine.** If the State prosecutes a compliant, registered, return-filing family, defend that prosecution on the record now available. If a fresh constitutional petition is filed, build it on ICESCR Article 13(3) and (4) via Article 2(6) (§3.3), reinforced by Articles 32, 45(1), 11 and 53(1)(b), by a purposive reading of section 2, and by the equality and legitimate-expectation arguments from the State's accommodation of nomadic and APBET learners (§3.4); seek one declaration only — that home-based education conforming to State minimum standards is a lawful discharge of the Article 53(1)(b) right and that sections 30(2) and 31(2) are to be read accordingly; lead the evidence in §4, above all an independent assessment of the children; and do not attack the DPP or ask the court to rewrite the Act.

Appendix A — Draft outline: *The Basic Education (Home-Based Education) Regulations, 20—*

(Heads of a legal notice under section 94 of the Basic Education Act, No. 14 of 2013. Drafting outline only.)

Part I — Preliminary

1. Citation.
2. Interpretation — "home-based education"; "recognised organisation" (the Home Education CBO); "quality assurance teacher"; "County Director"; "the register"; "annual return"; "learner".

3. Objects and guiding principles — the right to education (Arts. 43(1)(f), 53(1)(b)); the best interests of the child (Art. 53(2)); the family as the natural and fundamental unit of society (Art. 45(1)); the parental liberty in Article 13(3) and (4) of the ICESCR, applied through Article 2(6); freedom of conscience and religion (Art. 32); culture and indigenous knowledge as the foundation of the nation (Arts. 11, 44, 69(1)(c)); regulation calibrated to standards and outcomes, not to the form or setting of delivery; proportionality (Art. 24); privacy (Art. 31); fair administrative action (Art. 47).

Part II — Recognition of a home education organisation

1. Application by a community-based organisation for recognition.
2. Conditions of recognition — an approved code of practice; a members' register; a quality assurance teacher registered by the Teachers Service Commission; county chapters; a safeguarding policy; a graduated sanctions procedure.
3. Duration, renewal and withdrawal of recognition; right to be heard before withdrawal; appeal.

Part III — The national home-education register

1. The Cabinet Secretary to maintain a national home-education register.
2. Notification by a parent — content (learner details; curriculum to be followed; the recognised organisation of which the parent is a member); registration effective on filing.
3. Issue of a unique learner number; linkage to the national education management information system.
4. Amendment and closure of a registration (change of curriculum; enrolment in school; completion).

Part IV — Standards, curriculum and assessment

1. Minimum educational standards — a home-based education programme to be capable of delivering the learning outcomes of the Basic Education Curriculum Framework or of a recognised alternative curriculum.
2. Choice of curriculum — the competency-based curriculum, or a recognised national or international curriculum (e.g. IGCSE, GED), or an approved blended programme.
3. Annual assessment — moderated by the quality assurance teacher of the recognised organisation; a learning report per learner.

Part V — Annual returns and monitoring

1. Annual return to the County Director — learner roster; curriculum followed; assessment evidence; the quality assurance teacher's learning report.
2. Function of the County Education Board — to receive and record returns; to maintain the county chapter of the register; to report annually to the Cabinet Secretary.

Part VI — Investigation for cause

1. Grounds for investigation — a complaint substantiated on its face; a failed or missed annual assessment; a safeguarding referral; failure to file an annual return after written notice and a cure period.
2. Procedure — written notice of the grounds; a right to be heard; the least intrusive inquiry adequate to the concern; a home visit only where less intrusive means are inadequate and only with notice save in a genuine emergency.
3. Outcomes — no action; a support and remediation plan agreed with the recognised organisation; supervised remediation; direction to enrol the learner in a basic education institution; referral to the Director of Public Prosecutions only where the parent has refused all remediation.
4. Appeals — to the County Education Board, and thereafter to the High Court.

Part VII — Compliance defence and consequential provisions

1. A parent who has registered a learner for home-based education, is filing annual returns, and is a member in good standing of a recognised organisation does not commit an offence under section 30(2) or section 31(2) of the Act in respect of that learner.
2. Data protection — the recognised organisation and the Ministry as data controllers under the Data Protection Act, 2019; data minimisation; access controls; a retention schedule.
3. Transitional — existing home-schooling families to register within twelve months; no prosecution of a family that has notified the register and is engaging with a recognised organisation during the transitional period.

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- *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Petitions Nos. 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR).
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- *Were & another v Cabinet Secretary, Ministry of Education & 2 others; Abuto (Interested Party)* Petition No. 236 of 2019; [2023] KEHC 21854 (KLR) (Ong'udi J, 15 August 2023).

Other jurisdictions

- *Attorney General v Thuto Rammoge & 19 others*, Civil Appeal No. CACGB-128-14 (Court of Appeal of Botswana, 16 March 2016).
- *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (House of Lords).
- *Letsweletse Motshidiemang v Attorney General*, MAHGB-000591-16 (High Court of Botswana, 11 June 2019).
- *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321 (Supreme Court of India).
- *Obergefell v. Hodges*, 576 U.S. 644 (2015).
- *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
- *S v Makwanyane and another*, 1995 (3) SA 391 (CC) (Constitutional Court of South Africa).
- *Sidiropoulos and Others v Greece*, App. No. 57/1997/841/1047 (European Court of Human Rights, 10 July 1998).
- *Zhdanov and Others v Russia*, App. Nos. 12200/08, 35949/11 and 58282/12 (European Court of Human Rights, 16 July 2019).

Legislation and International Instruments

Kenya

- Constitution of Kenya, 2010 (Arts. 2, 10, 11, 20, 21, 24, 27, 31, 32, 36, 43, 44, 45, 47, 53, 55, 69, 119, 157, 159, 165, 259; Fourth Schedule, para. 15).
- Basic Education Act, No. 14 of 2013 (ss. 2, 4, 7, 18, 28, 30, 31, 34, 43, 94).
- Basic Education (Amendment) Bill, 2025 (National Assembly; sponsor Hon. A. Oluoch, MP) — passed by the National Assembly in 2026; awaiting Senate consideration and assent at the time of writing.
- Children Act, 2022 (Cap. 141).
- Community Groups Registration Act, 2022.
- Data Protection Act, No. 24 of 2019.
- Fair Administrative Action Act, No. 4 of 2015.
- Non-Governmental Organizations Co-ordination Act, No. 19 of 1990; Non-Governmental Organizations Co-ordination Regulations, 1992 (regs. 8, 9).
- Office of the Director of Public Prosecutions Act, No. 2 of 2013 (ss. 5, 6).
- Penal Code (Cap. 63) (ss. 162, 163, 165).
- Petition to Parliament (Procedure) Act, No. 22 of 2012.
- Teachers Service Commission Act, No. 20 of 2012.

South Africa

- South African Schools Act 84 of 1996 (s. 51).

International

- African Charter on Human and Peoples' Rights (1981), Art. 10.
- African Charter on the Rights and Welfare of the Child (1990), Art. 11.
- Convention on the Rights of the Child (1989), Arts. 18(2), 29.
- International Covenant on Economic, Social and Cultural Rights (1966), Arts. 13, 14.
- UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13) (1999), UN Doc. E/C.12/1999/10.
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