



**The Law and the Beautiful: A Critical Analysis of how Kenyan Law Addresses Appearance  
Discrimination.**

By

**Student:** Esther Barbara Wambui Karanja.

**Student Number:** KRNEST002

**Submitted to:** University of Cape Town

**Minor dissertation presented for the approval of the Senate in fulfilment of part of the  
requirements for the Master of Laws in approved courses and a minor dissertation.**

**Supervisor:** Prof. Amanda Barratt.

**Word Count:** 24,363

**The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only. Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.**

### **Plagiarism Declaration Form**

This thesis/dissertation has been submitted to the Turnitin module (or equivalent similarity and originality checking software) and I confirm that my supervisor has seen my report and that any concerns revealed by such have been resolved with my supervisor.

**Name:** Esther Barbara Wambui Karanja.

**Student Number:** KRNEST002.

**Signature:**

Signed by candidate

**Date:** 12<sup>th</sup> February 2023.

## Table of Contents

<b>PREFACE</b> .....	1
<b>ACKNOWLEDGMENTS</b> .....	2
<b>CHAPTER ONE</b> .....	3
1.0 Introduction .....	3
1.1 Background and Scope of the Study .....	4
1.1.1 The Halo Effect .....	4
1.1.2 Appearance Discrimination .....	5
1.1.3 Scope of the Study .....	6
1.1.4 Appearance Discrimination and Its Intersection with Other Forms of Discrimination..	7
1.1.5 Conclusion .....	7
1.2 Problem Statement .....	8
1.3 Research Questions .....	9
1.4 Hypothesis.....	9
1.5 Justification for the Study .....	9
1.6 Methodology .....	10
1.7 Conclusion.....	10
1.8 Chapter Breakdown.....	11
<b>CHAPTER TWO</b> .....	12
2.0 Introduction .....	12
2.1 The Social Dominance Theory.....	13
2.2 Appearance Discrimination as an Individual Concept.....	14
2.2.1 Appearance Discrimination in Schools .....	14
2.2.2 Appearance Discrimination in Workplaces .....	17
2.3 Appearance Discrimination and its Intersection with Other Forms of Discrimination.....	20

2.3.1 Introduction .....	20
2.3.2 The concept of Intersectionality .....	20
2.3.3 Racism .....	21
I. Schools.....	21
II. Workplace.....	23
2.3.4 Sexism .....	25
I. Schools.....	26
II. Workplace.....	28
2.3.5 Religion and Culture.....	30
I. Schools.....	30
II. Workplace.....	32
2.4 Conclusion.....	33
<b>CHAPTER THREE</b> .....	<b>35</b>
3.0 Introduction .....	35
3.1 Legal Underpinning in Kenya.....	36
3.1.1 The Constitution of Kenya .....	36
I. The Constitution of Kenya and Appearance Discrimination.....	36
3.1.2 Legislation .....	38
I. Educational Laws .....	38
a) The Children’s Act.....	38
b) The Basic Education Act .....	39
II. Employment Laws .....	40
a) Employment Act .....	40
3.1.3 Discussion on the Legal Foundation of Appearance Discrimination in Kenya .....	41
I. Appearance Discrimination as an Individual Concept .....	41

a) Freedom from Discrimination Based on Dress.....	41
b) Other Grounds.....	44
II. Appearance Discrimination and its Intersection with Other Forms of Discrimination .....	44
a) Intersection with Sex.....	45
b) Intersection with Race and Culture.....	46
c) Discrimination Based on Religion and Culture .....	46
d) Proof of Discrimination .....	47
III. Rights Generally Applicable to Both Appearance Discrimination as an Individual Concept and When Appearance Discrimination Intersects with Other Protected Forms of Discrimination.....	49
a) Right to Education and Fair Labour Practices .....	49
b) Freedom of Expression .....	50
IV. Conclusion.....	50
3.2 Legal Underpinning in the United States of America.....	52
3.2.1 The Constitution.....	52
I. First Amendment .....	52
II. Fourteenth Amendment .....	53
3.2.2 Federal Legislation .....	53
I. Educational Laws .....	53
a) Title IV of the Civil Rights Act of 1964.....	53
b) Title IX of the Education Amendments of 1972.....	54
c) The Equal Educational Opportunities Act of 1974.....	54
II. Employment Laws.....	55
a) Title VII of the Civil Rights Act of 1964.....	55
3.2.3 State Legislation .....	56

I. CROWN Act.....	56
3.2.4 Local Laws .....	57
I. Urbana (Illinois) .....	57
II. District of Colombia (Washington DC).....	58
III. Howard County, Maryland .....	60
IV. Madison, Wisconsin .....	61
3.2.5 Conclusion .....	62
3.3 The Juxtaposition of USA and Kenyan Law.....	62
3.3.1 Right to Equal Benefit of the Law .....	62
3.3.2 The Freedom of Expression.....	63
3.3.3 Justiciability of Appearance Discrimination .....	64
3.4 Conclusion.....	65
<b>CHAPTER FOUR.....</b>	<b>67</b>
4.0 Introduction .....	67
4.1 Recommendations .....	68
4.1.1 Maximizing on the constitutional freedom from discrimination based on dress .....	68
4.1.2 Explicit protection against appearance discrimination by legislation .....	70
4.1.3 Balancing conflicting legal rights.....	70
4.1.4 Prohibition of appearance discrimination in institutional laws .....	71
4.1.5 Civic Education .....	72
4.2 Proposed Legislation.....	72
The Prevention of Appearance Discrimination Act.....	73
4.3 Conclusion.....	77
<b>BIBLIOGRAPHY .....</b>	<b>79</b>
<b>International Instruments .....</b>	<b>79</b>

<b>National Laws</b> .....	79
I. Kenyan Laws.....	79
II. United States of America Laws.....	79
<b>Books</b> .....	80
<b>Journals</b> .....	80
<b>Reports</b> .....	83
<b>Online Sources</b> .....	83
<b>Other Resources</b> .....	86
<b>Government Publications</b> .....	87
<b>List of Cases</b> .....	87
I. Kenyan Case Law.....	87
II. American Case Law .....	88

## PREFACE

I first realized the need to write this dissertation in 2017, when a lecturer asked us to read the mandatory dress code formulated by the Legal Society of Kenya (LSK) in preparation for our judicial attachment. Once I read through this dress code, I quickly realized that most rules and policies intended for women criminalized the very essence of being a woman. The dress code requirements were not only sexist, but also harsher for women. Aggrieved by this realization I started reading about the hidden effects of dress codes, which introduced me to the concept of appearance discrimination.

My newly acquired interest in the legal effects of appearance discrimination was often underestimated. Comments like ‘you would seem trivial, dramatic, and uneducated’, or ‘of all the social and legal problems happening today, you chose to write about appearance?’ or ‘you are too intelligent to write about what people wear’ were disheartening.

Writing this dissertation was a daily battle against my imposter syndrome. There were tears, panic attacks, constant thoughts of changing my topic, and writer’s block. Nonetheless, writing this paper changed me, it pushed me ‘to do it scared’. Writing this paper taught me to pursue my passions and dreams relentlessly, to stand in my power, to bask in the glory of how different I am, and to fight for what I believe in.

I stand on the shoulders of giants and brilliant legal minds who have explored the concept of appearance discrimination in its various facets. Reading every scholarly writing not only unveiled the depths of appearance discrimination and its effects, but also reassured me that it was okay to question. My admiration goes out to each scholar that has contributed to this subject matter.

This dissertation changed me for the better, and as you read it, I hope it does the same for you. My hope is that this dissertation opens your eyes to the concept of appearance discrimination and how it continues to propagate inequality and prejudicial social hierarchies. I hope that every person who has endured the detrimental effects of appearance discrimination feels heard and seen. I hope to make a scholarly contribution to this topic, or at the very least stir up a conversation about this form of discrimination. Lastly, I hope this dissertation motivates you to pursue your passion fiercely.

***Your voice matters. The butterflies you feel are just evidence of the adventure that awaits you.***

## ACKNOWLEDGMENTS

First and foremost, I would like to thank the Almighty God for seeing me through this academic journey. It is by his grace I was able to persevere through the sleepless nights, frustration, tears, and overwhelming days. The tough days would have been unbearable without his help, guidance, and comfort.

I am most grateful to my parents, Loise Njeri Karanja and Sammy Karanja Njau for being my biggest cheerleaders. My mother's prayers, constant encouragement, and unwavering support were a calming shield. Additionally, my father's support both financially and emotionally, as well as his reassurance anchored me.

I would also like to thank my supervisor, Prof. Amanda Barratt, for believing in my dissertation and for her invaluable insight throughout this journey. It was an honour to be supervised by such a brilliant academic.

I am appreciative to all my friends and family. Thank you to everyone who encouraged me, who believed in me, and who held my hand throughout this process.

Last but certainly not least, I appreciate myself. Thank you for believing in yourself, for pushing through the hard times, for daring to question, and for following the butterflies.

*To more adventures.*

## CHAPTER ONE

*'A favourable appearance has been described as a greater recommendation than any letter of introduction.'*<sup>1</sup>

– Aristotle

### 1.0 Introduction

Appearance discrimination is a cogent example of how vices such as discrimination and oppression transform over time, and how difficult it is to see the manifestation of discrimination while swimming in it.<sup>2</sup> Appearance discrimination is defined as the prejudicial treatment of an individual, based on their physical appearance or characteristics.<sup>3</sup> Discrimination based on appearance is largely influenced by our subconscious, hence, making it hard to acknowledge or even recognize.

Due to its masked nature, appearance discrimination is considered a social and ethical issue that is distinct from the law, and in most instances perceived as trivial and superficial in nature.<sup>4</sup> As a result, the law has availed schools and workplaces (hereafter institutions), the extensive discretion to impose dress codes and grooming practices within their establishments, under limited supervision.<sup>5</sup> This extensive and largely unregulated power has created a loophole in which injustices such as the limitation of fundamental human rights, the propagation of discrimination, and the marginalization of vulnerable groups and communities, have infiltrated our institutions globally.<sup>6</sup> The notion that 'conversations around physical appearance are trivial', has acted as a catalyst for the invasion of appearance discrimination.

Kenya perceives appearance discrimination as inconsequential, despite an increase in vexing incidents related to appearance discrimination and its various interactions. Although the Kenyan legal regime contains an extensive Bill of Rights, the protection afforded to victims of appearance discrimination is mostly based on implied as opposed to explicit protection. Meanwhile, countries such as the United States of America (USA) are now moving away from the discussed misconceived notion and are recognizing the detrimental legal and social effects of appearance

---

<sup>1</sup> Viviers, 2014.

<sup>2</sup> Viviers, 2016: 897.

<sup>3</sup> Viviers, 2016: 897.

<sup>4</sup> Pavlakis and Roegman, 2018: 54.

<sup>5</sup> Murray, 2013: 18.

<sup>6</sup> Viviers, 2016: 897.

discrimination. The USA has adopted a progressive approach by formulating explicit legal protections against appearance discrimination. This dissertation commends this approach and advances the argument that Kenya should follow in the footsteps of the USA.

### 1.1 Background and Scope of the Study

An individual's appearance is the first thing that informs the impression they make. Social scientists have proven that a person's character, competence, and likeability is determined within 'a tenth of a second' of meeting a new person.<sup>7</sup> Meaning that, before an individual speaks or even introduces themselves, their look has already determined how they will be perceived.<sup>8</sup> Additionally, scientists determined that upon forming a conception of an individual's traits within a tenth of a second, people are more likely to use any further interactions with that individual as an opportunity to confirm their already conceived perceptions.<sup>9</sup>

Appearance is a physical trait while competence, trustworthiness, and honesty are character traits.<sup>10</sup> Logically, a person's physical appearance has no correlation to their character traits.<sup>11</sup> However, society whether consciously or subconsciously, associates attractiveness or physical appeal with positive character traits such as competence, intelligence, and trustworthiness.<sup>12</sup> Consequently, an individual's physical appearance directly informs society on what character traits to assign to that person. Additionally, any further interaction with that individual is already biased based on the first impression. This societal fixation with physical appeal is not novel as explained by the concept known as the halo effect.

#### 1.1.1 The Halo Effect

The halo effect 'is a cognitive bias that influences our perception, thoughts, and behaviour towards an individual based on one trait such as appearance, or an unfounded belief of what is good or bad.'<sup>13</sup> The halo effect in relation to appearance is also referred to as the 'what is beautiful is good' concept.<sup>14</sup> The halo effect can be traced back to ancient Greek culture, which believed that there

---

<sup>7</sup> Willis and Todorov, 2006: 592.

<sup>8</sup> Jones, n.d.

<sup>9</sup> Willis and Todorov, 2006: 592.

<sup>10</sup> Willis and Todorov, 2006: 592.

<sup>11</sup> Jones, n.d.

<sup>12</sup> Maestripieri, Henry and Nickels, 2016: 1.

<sup>13</sup> Nufer, 2020: 439.

<sup>14</sup> Viviers, 2014.

exists a direct correlation between beauty and positive character traits.<sup>15</sup> Persons considered physically appealing were also believed to automatically be good and in possession of positive character traits.<sup>16</sup>

This effect has been replicated in our current society where physically appealing persons are treated favourably as compared to average looking people.<sup>17</sup> A study by a group of psychologists, asked a group of 100 participants to match desirable character traits to photographs of persons ranging in different levels of the societal perception of attractiveness.<sup>18</sup> It was observed that the participants attributed positive traits to the attractive individuals, while the negative traits were assigned to the subjects considered least attractive.<sup>19</sup> Attractive people are considered likeable, moral, intellectual, and competent as compared to less attractive people.<sup>20</sup> This effect, therefore, glorifies physical appeal and diminishes the importance of positive character traits in the absence of physical appeal.

### 1.1.2 Appearance Discrimination

The first conception of the phrase ‘appearance discrimination’, was in the 1970s by the Washington Post.<sup>21</sup> Throughout the decades, this form of discrimination has assimilated different names such as lookism and aesthetic labour across the globe.<sup>22</sup> As earlier defined, appearance discrimination is the unfair and detrimental treatment accorded to an individual, based on their inability to meet the criteria of physical appeal or attractiveness society perceives as ideal.<sup>23</sup>

Appearance discrimination is not limited to facial appearance. Rhode describes appearance discrimination as a vice grounded on two rudiments namely, immutable and mutable characteristics.<sup>24</sup> Immutable characteristics are the characteristics of an individual which are hard to change or are completely unalterable, such as height, race, or facial appearance.<sup>25</sup>

---

<sup>15</sup> Nufer, 2020: 439.

<sup>16</sup> Nufer, 2020: 439.

<sup>17</sup> Viviers, 2014.

<sup>18</sup> Dion, Berscheid and Walster, 1972: 285.

<sup>19</sup> Dion, Berscheid and Walster, 1972: 285

<sup>20</sup> Viviers, 2016: 897.

<sup>21</sup> Warhurst and others, 2009: 131.

<sup>22</sup> Viviers, 2014.

<sup>23</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>24</sup> Rhode, 2010: 25.

<sup>25</sup> Rhode, 2010: 25.

Mutable characteristics, on the other hand, are discretionary and flexible traits, capable of being altered.<sup>26</sup> Examples of mutable characteristics include tattoos, piercings, and an individual's choice of dressing and grooming, including hairstyles.<sup>27</sup> In between the described continuum lies characteristics that can be described as both mutable and immutable, for example, weight.<sup>28</sup> Weight is described as both immutable and mutable because it can either be informed by genetic factors which are immutable, or the lifestyle of an individual which is mutable.<sup>29</sup>

If appearance discrimination is the unfair treatment of an individual because they are not perceived by society as physically attractive, whether based on mutable or immutable characteristics, the next logical question is what characteristics are considered beautiful or physically appealing?

Beauty or physical appeal has arguably been described as '*a social construct that varies in its definition across cultures, and changes over time.*'<sup>30</sup> However, due to globalization and social media, most cultures can now agree on the fundamental traits that amount to beauty and/or attractiveness.<sup>31</sup> For example, in most cultures, women are ideally considered attractive when their facial features are soft and when their waist-to-hip ratio is small, while men are considered attractive based on a large waist-to-hip ratio.<sup>32</sup>

Additionally, certain appearances are frowned upon in most cultures globally, for example, persons with tattoos or body art. A majority of society views individuals with tattoos as misfits, deviants, and criminals.<sup>33</sup> While some tattoos may be affiliated with gangs, not all persons with body art are members of a gang.<sup>34</sup> Joining a gang is a personal choice, not a direct consequence of getting a tattoo. Moreover, some tattoos have cultural and religious significance.

### 1.1.3 Scope of the Study

Appearance discrimination is a very wide concept, nevertheless, this dissertation restricts itself to appearance discrimination based on mutable characteristics, that is the choice of dressing and

---

<sup>26</sup> Rhode, 2010: 25.

<sup>27</sup> Viviers, 2016: 897.

<sup>28</sup> Viviers, 2014.

<sup>29</sup> Rhode, 2010: 25.

<sup>30</sup> Viviers, 2014.

<sup>31</sup> Streeter, 2003: 88

<sup>32</sup> Streeter, 2003: 88.

<sup>33</sup> Broussard and Harton, 2017: 1.

<sup>34</sup> Broussard and Harton, 2017: 1.

choice of grooming, which includes tattoos, piercings, and hairstyles. The choice of dressing does not relate to the mandatory nature of uniforms. Consequently, any reference to appearance discrimination, physical appearance, or attractiveness, henceforth refers to discrimination based on the mutable characteristics of an individual.

#### 1.1.4 Appearance Discrimination and Its Intersection with Other Forms of Discrimination

Appearance discrimination is a dangerous form of discrimination because it also interacts with other forms of discrimination such as sex, race, religion, and culture. Appearance discrimination and its various intersections have been the source of multiple public outcries globally, with hashtags such as #iammorethanadistracted in the USA, #croptopday in Canada, #whitewednesday in Iran, and #mydressmychoice in both Uganda and Kenya. The #iammorethanadistracted and #croptopday were public outcries in relation to the sexist nature of dress codes in schools, which not only promotes appearance discrimination but also gender discrimination.<sup>35</sup>

The #whitewednesdays was an online campaign initiated in 2017, to fight against the dress code imposed in Iran which mandates women to dress ‘modestly’ and cover their hair for religious reasons.<sup>36</sup> Similar hashtags and online campaigns such as #NoToCompulsoryHijab have also emerged in 2022, due to the mandatory dress code and gruesome human rights violations in Iran.<sup>37</sup> Women considered ‘immodestly dressed’ for failing to adequately cover their hair, have been subjected to imprisonment and police brutality which has caused several deaths.<sup>38</sup> Lastly, the #mydressmychoice was a movement inspired by the acts of some men who resulted to stripping and sexually assaulting women, simply because their choice of dressing purportedly ‘tempted the men’.<sup>39</sup>

#### 1.1.5 Conclusion

Public outcries and litigation relating to appearance discrimination have significantly increased globally, leading to countries such as the USA, to formulate laws specifically intended to curb appearance discrimination.<sup>40</sup> In workplaces, appearance discrimination has been used to determine

---

<sup>35</sup> Donovan, 2015.

<sup>36</sup> Hatam, 2017.

<sup>37</sup> Alinejad, 2022.

<sup>38</sup> Chappell and Hernandez, 2022.

<sup>39</sup> Santos and Seol, 2015.

<sup>40</sup> Viviers, 2014.

whether an employee gets the job, maintains the job, or receives a salary increase or promotion.<sup>41</sup> On the other hand, appearance discrimination in schools affects the quality of education received by students. Appearance discrimination in schools also determines whether a student gets to attend their classes and express themselves as will be discussed in chapter two.<sup>42</sup>

Institutions continue to misuse the liberty afforded by the law, by propagating inequality and restricting fundamental freedoms and rights such as, freedom from discrimination and freedom of expression. Additionally, appearance discrimination has overshadowed the competency-based system that promotes equality in institutions, by emphasising appearance. Appearance discrimination is a global menace that affects persons irrespective of their geographical location. While this dissertation recognizes the universal nature of appearance discrimination, the dissertation restricts itself to investigating appearance discrimination in Kenya as compared to the USA.

## 1.2 Problem Statement

The notion that appearance discrimination is a social and ethical issue distinct from the law, has encouraged the misuse of the discretion given to institutions to prescribe dress codes and grooming practices. Consequently, appearance discrimination has morphed from just a social and ethical issue to a legal problem, as evidenced by the numerous expressions of public discontent and increased litigation surrounding this issue.

In Kenya, appearance discrimination has barely been researched upon, despite the rise in litigation and the consequential public incidents relating to appearance discrimination and its various intersections. Additionally, the regulation of appearance discrimination in Kenya is based on implied protections as opposed to explicit protections. There is, therefore, a need to explore the implied legal protections afforded by Kenyan law, in a bid to understand whether these protections are effective in curbing appearance discrimination. Furthermore, it is important that recommendations are proposed to ensure that appearance discrimination is effectively and unambiguously regulated in Kenya.

---

<sup>41</sup> Mahajan, 2007: 165.

<sup>42</sup> Martin and Brooks, 2021: 2.

### 1.3 Research Questions

This paper addresses the following research questions:

- I. What are the effects of appearance discrimination as an individual concept, and when it intersects with other forms of discrimination?
- II. Does Kenyan law regulate against appearance discrimination and is this regulation effective?
- III. How can the law in Kenya improve its efficacy in mitigating the effects of appearance discrimination?

### 1.4 Hypothesis

This dissertation hypothesizes that appearance discrimination violates fundamental human rights and entrenches discrimination based on legally protected characteristics. Additionally, this dissertation hypothesizes that Kenyan law insufficiently protects against appearance discrimination, due to lack of explicit protections. Legislation must therefore, be enacted to put into operation and strengthen the existing legal protections against appearance discrimination in Kenya. Lastly, this dissertation makes recommendations based on the hypothesis that, Kenya can effectively curb appearance discrimination by emulating the progressive steps taken by the USA.

### 1.5 Justification for the Study

Appearance discrimination is often dismissed as a trivial issue despite its legal implications. As a result, the detrimental effects of appearance discrimination and its various interactions with other forms of discrimination, have become more prevalent. Public outcries and increased litigation around appearance discrimination have led countries such as the USA, to adopt an active and legal approach to curbing this menace. Kenya, on the other hand, continues to wear its rose-coloured glasses despite the mounting social and legal effects of appearance discrimination and its various interaction with other forms of discrimination.

Appearance discrimination violates various individual rights such as freedom of expression, freedom from discrimination, right to freedom of religion, and right to culture. Additionally, appearance discrimination continues to entrench social inequality based on race, sex, religion, and culture. Despite the discussed effects, appearance discrimination has barely been researched in Kenya. In addition, the Kenyan legal regime provides inadequate implied protections which are insufficient in curbing appearance discrimination.

This dissertation, therefore, aims to illustrate the detrimental effects of appearance discrimination both as an individual concept and through its intersection with other forms of discrimination. Moreover, this dissertation intends to explore the implied protections against appearance discrimination afforded by Kenyan law and make recommendations on how Kenyan law can improve its legal regime using adapted examples from American law.

## 1.6 Methodology

This dissertation employs analytical, evaluative, and comparative methodologies to investigate appearance discrimination as an individual concept and its intersection with other forms of discrimination. These methodologies also assist in analysing whether Kenyan law effectively protects against appearance discrimination.

This dissertation first utilizes the analytical and evaluative methodologies, by investigating appearance discrimination as an individual concept and its interaction with other forms of discrimination. Consequently, this dissertation employs the comparative methodology by juxtaposing Kenyan law to American law, for purposes of investigating the efficacy of Kenyan law in preventing appearance discrimination. Lastly, this dissertation utilizes the analytical methodology to formulate recommendations that will improve the efficiency of Kenyan law in curbing appearance discrimination.

This study applies secondary methods derived from multi-jurisdictional laws, scholarly writings, and case law.

## 1.7 Conclusion

In conclusion, appearance discrimination is far from a superficial problem but a mutation of discrimination in society. This dissertation interrogates the concept of appearance discrimination both as an individual concept, and through its intersection with other forms of discrimination, with an aim of highlighting its detrimental effects. This dissertation disputes the view that appearance discrimination is a trivial issue.

Secondly, this dissertation investigates the ineffective protection afforded by Kenyan law against appearance discrimination. The protection afforded by Kenyan law is juxtaposed to the protection afforded by American law, for purposes of assessing how Kenyan law can improve its efficiency

in curbing appearance discrimination. This dissertation chose the USA because of its progressive local laws which explicitly and effectively regulate against appearance discrimination.

Lastly, this dissertation makes recommendations on how Kenyan law can increase its efficiency in curbing appearance discrimination. The dissertation proposes the enactment of legislation aimed at explicitly prohibiting and regulating against appearance discrimination.

### 1.8 Chapter Breakdown

Chapter two explores the manifestation of appearance discrimination as an individual concept and through its intersection with other forms of discrimination. This chapter also highlights the effects of appearance discrimination, which disproves the notion that appearance discrimination is an insignificant issue undeserving of legal protection.

Chapter three explores whether the law in Kenya effectively protects against appearance discrimination. The efficacy of Kenyan law is assessed through a comparative analysis between the protections afforded by the law in Kenya and the USA.

Chapter four makes recommendations on how Kenyan law can improve its efficacy in curbing appearance discrimination and its various intersections. This chapter also formulates a draft legislation that may be adopted in Kenya as an explicit prohibition of appearance discrimination. The recommendations and proposed legislation are motivated by the progressive protections American law provides for appearance discrimination.

## CHAPTER TWO

*'Unconscious discrimination is the most pervasive form of bias today, especially because overt bigotry has diminished in response to antidiscrimination laws and evolving social norms.'*<sup>43</sup>

### 2.0 Introduction

Appearance discrimination, as discussed in chapter one, is considered a perilous form of discrimination on its own merit. However, its ability to intersect with other forms of discrimination makes it more hazardous. In essence, not only does appearance discrimination form a new niche of inequality, but it also creates a loophole for the proliferation of other forms of discrimination such as sexism and racism.<sup>44</sup> Consequently, appearance discrimination continues to oppress already marginalized social groups in society, despite the legal protections afforded by the law.

Appearance discrimination is often referred to as trivial in its entirety, however, critics have dismissed the detrimental effects of appearance discrimination based on mutable characteristics even more than those based on immutable characteristics.<sup>45</sup> The fact that mutable characteristics are informed by personal choice and are capable of being altered, grounds the criticism that they are tremendously inconsequential.<sup>46</sup> Contrary to the criticism, mutable characteristics are based on fundamental human rights such as freedom of expression and freedom from discrimination based on sex and race.<sup>47</sup> Additionally, these characteristics also inform other pertinent rights such as the right to religion and culture.<sup>48</sup>

To understand why appearance discrimination is so perilous, hence deserving of legal protection, the effects of this form of discrimination must be exposed. The chapter starts by exploring the social dominance theory, which briefly explains how discrimination is propagated and maintained in society and institutions. Thereafter, this chapter explores how appearance discrimination manifests in our institutions. This discussion not only exposes the detrimental effects of appearance discrimination, but also disputes the idea that appearance discrimination based on mutable characteristics is inconsequential. Lastly, this chapter delves into how appearance

---

<sup>43</sup> Wax, 1999: 1130.

<sup>44</sup> Mahajan, 2007: 165.

<sup>45</sup> Viviers, 2016: 897.

<sup>46</sup> Viviers, 2016: 897.

<sup>47</sup> Viviers, 2014.

<sup>48</sup> Alston, 2006: 83.

discrimination intersects with other forms of discrimination such as sexism, racism, religion, and culture, while exposing the effects of these intersections.

## 2.1 The Social Dominance Theory

The social dominance theory hypothesizes that inequality between different social groups is maintained as a result of three strategies namely, aggregated individual discrimination, institutional discrimination, and behavioural asymmetry.<sup>49</sup> Aggregated individual discrimination occurs when individuals in a dominant group, for example, men or white people, discriminate against specific persons in a subordinate group (women or black people).<sup>50</sup>

Institutional discrimination, on the other hand, occurs when members of a dominant group are linked to positive values, while members of a subordinate group are associated with negative societal values.<sup>51</sup> Lastly, behavioural asymmetry relates to the behaviour and attitudes of both dominant and subordinate members that reinforce inequality.<sup>52</sup> While the discussed strategies work together to reinforce unequal hierarchies in our society, this paper mostly focuses on institutional discrimination.

Institutions entrench inequality by generating rules, policies, and procedures that strengthen discriminatory norms, ideologies, and social hierarchies.<sup>53</sup> The culture of our institutions tends to mirror the needs, standards, and preferences of dominant groups such as white and male persons.<sup>54</sup> As a result, the rules and policies in our institutions often glorify the mannerisms and cultures of dominant groups, while disparaging the mannerisms and cultures of subordinate groups.<sup>55</sup>

Dress codes have been weaponized by institutions, as the tool used to reinforce discrimination based on appearance, sex, race, culture, and religion. Most dress codes are tailored to promote homogeneity in employees based on white supremacy, western beauty standards, and patriarchal notions.<sup>56</sup> For example, some institutions forbid black hairstyles, such as dreadlocks and place

---

<sup>49</sup> Sidanius, Levin and Pratto, 1996: 385.

<sup>50</sup> Klare, 1992: 1395.

<sup>51</sup> Sidanius, Levin and Pratto, 1996: 385.

<sup>52</sup> Sidanius, Levin and Pratto, 1996: 385.

<sup>53</sup> Hoose, 2018: 47.

<sup>54</sup> Mahajan, 2007: 165.

<sup>55</sup> Mahajan, 2007: 165.

<sup>56</sup> Mahajan, 2007: 165.

unequal burdens relating to dressing and grooming on women, such as mandatory makeup, as will be elucidated later in this chapter.

Dress codes and grooming practices also discourage diversity and freedom of expression for subordinate groups, who do not conform to the appearance expected by dominant groups.<sup>57</sup> Institutions use dress codes to restrict freedom of expression, which is a fundamental right protected in most jurisdictions and international law.<sup>58</sup> The freedom of expression intends to protect the individuality of a person and in some instances the expression of their culture, religion, and beliefs.<sup>59</sup> An individual can choose to express their culture or religion in various ways including their choice of dressing or personal grooming.<sup>60</sup> An appropriate example of the expression of religion through dressing and grooming, includes Muslim women expressing their religion by wearing hijabs. Institutional dress codes that forbid the wearing of hijabs, therefore, restrict the freedom of expression and the right to religion. Appearance discrimination is therefore used as a tool to propagate institutional discrimination, which maintains unequal social hierarchies and inequality.

## 2.2 Appearance Discrimination as an Individual Concept

### 2.2.1 Appearance Discrimination in Schools

Children are considered vulnerable under the law and impressionable by society. Based on this vulnerability, school administrators support dress codes for reasons such as security, maintenance of an educational environment, and the curbing of gang initiations.<sup>61</sup> While these objectives may seem reasonable, the provision and enforcement of dress codes in schools have been equally accompanied by questionable motives.<sup>62</sup>

Challenges like the suppression of basic human rights such as the freedom of expression, the freedom from discrimination, and in extreme circumstances, the infringement of the right to life,

---

<sup>57</sup> Rhode, 2009: 1033.

<sup>58</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR), International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4<sup>th</sup> January 1969) 660 UNTS 195.

<sup>59</sup> Alston, 2006: 83.

<sup>60</sup> Alston, 2006: 83.

<sup>61</sup> Alston, 2006: 83.

<sup>62</sup> Gilbert, 1999: 3.

call into question the legitimacy of dress codes. The vulnerability of children requires a delicate balance between their protection and the protection of their rights. The court in *Bethel School District No. 403 v Fraser*<sup>63</sup> acknowledged that, ‘the rights of students in educational institutions are not automatically coextensive with the rights of adults in other settings.’<sup>64</sup> However, the court in *Tinker v Des Moines Independent Community School District*<sup>65</sup> also stipulated that ‘students do not shed their constitutional rights... at the schoolhouse gate.’<sup>66</sup>

In the case of *Tinker v Des Moines Independent Community School District*,<sup>67</sup> the American courts grappled with how appearance discrimination affects the freedom of expression. A group of students organized a silent protest against the Vietnam War, by wearing black armbands with a peace symbol to school.<sup>68</sup> The school suspended the students who wore the black armbands for violation of the school’s dress code, stating that the students’ actions were likely to disrupt the learning environment of the school.<sup>69</sup>

The students sued the school for the violation of their First Amendment rights which protects the freedom of expression. The Supreme Court ruled in favour of the students while stating that, *‘for the State in the person of school officials to justify the prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint.’*<sup>70</sup> The above case raises an important question, do institutions use dress codes and grooming policies as a tool to prevent the freedom of expression, based on personal preferences and biases?

In Kenya, appearance discrimination has evoked serious consequences in schools as seen in the stories of Shamamcy Wanjiru and Ebbie Samuels. Wanjiru a 16-year-old girl unbraided her hair on the last day of school, contrary to the Langalanga Secondary School’s grooming policy.<sup>71</sup> As

---

<sup>63</sup> *Bethel School District No. 403 v. Fraser* 478 U.S. 675 (1986).

<sup>64</sup> *Ibid.*, at 677-678.

<sup>65</sup> *Tinker v Des Moines Independent Community School District* 393 U.S. 503 (1969).

<sup>66</sup> *Ibid.*, at 506.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, at 509.

<sup>71</sup> Nyambura, 2022.

punishment for violating the school's grooming policy, she was ordered to shave her hair before she returned to school for the next term.<sup>72</sup>

Once Wanjiru reported to school the next term, she was asked to go back home and shave her hair in accordance with the punishment meted out the previous term.<sup>73</sup> Wanjiru was forced to choose between her education and her hair, which was a crucial element of her individuality and her freedom of expression. Aggrieved by the ultimatum, Wanjiru committed suicide.<sup>74</sup>

The story of Wanjiru is not an isolated incident, as evidenced by the death of 15-year-old, Ebbie Noelle Samuels. Samuels a student at Gatanga Girls CCM Secondary School, was severely beaten by a senior high school teacher for styling her hair in a manner contrary to the school rules and regulations.<sup>75</sup> According to her friend, Samuels allegedly struggled to sleep due to her injuries and unfortunately, died in her sleep.<sup>76</sup> Multiple autopsies carried out indicated that Samuels died from blunt force trauma on her head, which was most likely inflicted by the teacher who assaulted Samuels for her violation of the school's grooming standards.<sup>77</sup>

Samuels was a victim of the cruel enforcement of grooming policies. In schools, indiscipline cases are frequent, hence, school administrators are tasked with enforcing discipline and giving punishments that correspond to the indiscipline of the student. For Gatanga Girls CCM Secondary School, the violation of the prescribed grooming practice was so erroneous, that the corresponding punishment was severe assault which then led to Samuels' death.

Appearance discrimination as discussed in chapter one, is an unconscious bias. In the case of Wanjiru and Samuels, this unconscious bias influenced the way the school administrators viewed and enforced the grooming violations. The punishments meted out in both cases did not correspond to the seriousness of a grooming violation or relate to any reasonable educational purpose. For Wanjiru, unbraiding her hair was 'untidy' and for Samuels, the style of her hair was 'too different'.

---

<sup>72</sup> Njoroge, 2022.

<sup>73</sup> Nyambura, 2022.

<sup>74</sup> Njoroge, 2022.

<sup>75</sup> The Nation Media Group, 2019.

<sup>76</sup> Ngugi, 2022.

<sup>77</sup> News Blaze, n.d.

The excessive punishment was, therefore, motivated by bias which was informed by the societal perception of acceptable appearance.

School administrators claim that dress codes and grooming standards are utilized as a way of protecting students and maintaining an educational environment. However, these policies have also been used to enforce punishments informed by bias. As mentioned earlier, children are vulnerable, therefore, dressing and grooming represents an important aspect of their individuality and freedom of expression. A balance between their rights (such as the freedom of expression) and their protection (through dress codes and grooming policies) must be maintained. Additionally, the institutional power to formulate and enforce dress codes, must be questioned and properly regulated to avoid such disastrous incidents.

### 2.2.2 Appearance Discrimination in Workplaces

Appearance discrimination influences how potential employees are assessed during interviews, hence informing hiring decisions.<sup>78</sup> Once an individual is an employee, the institution further controls how they look by imposing dress codes.<sup>79</sup> Lastly, if an employee fails to conform to the prescribed dress code, some employers retaliate by terminating the employee's contract of employment or withholding promotions or a salary increase.<sup>80</sup>

Employers discriminate and regulate the appearance of their employees as a way of obtaining a competitive edge and increasing financial productivity for the business.<sup>81</sup> The marketplace can be extremely competitive, hence, employees are seen as representatives and walking advertisements for the business.<sup>82</sup> Employers are, therefore, incentivized to hire aesthetically pleasing employees and limit their freedom of expression through dress codes and grooming practices.<sup>83</sup>

Employers also rely on other reasons for prescribing dress codes and grooming policies such as maintaining professionalism and uniformity, increasing employee productivity, and ensuring the safety of the employees.<sup>84</sup> Reasons such as maintaining the safety of the employees are rational,

---

<sup>78</sup> Zakas, 2005.

<sup>79</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>80</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>81</sup> Steinle, 2006: 261.

<sup>82</sup> Waring, 2011: 193.

<sup>83</sup> Waring, 2011: 193.

<sup>84</sup> James, 2008: 629.

however, other reasons such as uniformity, increased productivity, and in some instances business necessity, raise questionable motives.<sup>85</sup>

An employee's productivity is informed by their qualification as opposed to their appearance.<sup>86</sup> Additionally, the promotion of uniformity in the workplace suppresses its employees' freedom of expression.<sup>87</sup> Lastly, businesses outside the beauty industry cannot claim business necessity, because an individual's appearance is not an essential prerequisite to performing their obligations.<sup>88</sup>

An example of the effects of appearance discrimination in the workplace can be illustrated by the case of *Jespersen v Harrah's Operating Co Incorporated*.<sup>89</sup> Jespersen had been a bartender at Harrah's Casino in Reno, Nevada for more than 20 years. During the 20 years she was an employee, Jespersen had been praised by her customers as a '*highly effective employee, with excellent customer service, and a positive attitude and impression*'.<sup>90</sup> Due to Jespersen's delightful experience, customers indicated that they were encouraged to frequent Harrah Casino.

In 2000, Harrah Casino introduced a personal best program that required all female employees attending to customers to apply makeup, while the men were prohibited from applying any makeup.<sup>91</sup> The employees were taken through training on how to look their best and a photograph was taken as a measurement of how each employee should look every day. Jespersen did not comply with the mandatory personal best program.<sup>92</sup> According to Jespersen, putting on makeup made her feel '*sick, degraded, exposed, and violated by forcing her to be feminine and dolled up like a sexual object*'.<sup>93</sup> Additionally, applying makeup interfered with her productivity as a bartender, due to the constant harassment caused by drunk and disorderly customers.<sup>94</sup> The discussed acts according to Jespersen, took away her '*credibility as an individual*'.<sup>95</sup>

---

<sup>85</sup> James, 2008: 629.

<sup>86</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>87</sup> Rhode, 2009: 1033.

<sup>88</sup> Viviers, 2014.

<sup>89</sup> *Jespersen v Harrah's Operating Co Inc* 392 F.3d 1076 (9th Cir. 2004).

<sup>90</sup> *Ibid.*, at 1076.

<sup>91</sup> *Ibid.*, at 1077.

<sup>92</sup> *Ibid.*, at 1078.

<sup>93</sup> *Ibid.*, at 1077.

<sup>94</sup> *Ibid.*, at 1077.

<sup>95</sup> *Ibid.*, at 1077.

Jespersen was forced to choose between forfeiting her dignity (which was being stripped away by the mandatory personal best program) or her job. Jespersen chose her dignity which then caused her employment to be terminated. She instituted a suit against her employer claiming discrimination based on sex.

Jespersen's claim was premised on the fact that she was only mandated to wear makeup because she was a woman.<sup>96</sup> The District Court summarily dismissed the suit, based on the reasoning that Harrah's Casino had not discriminated against Jespersen based on the 'immutable characteristics' associated with her gender.<sup>97</sup> She appealed to the Court of Appeals for the Ninth Circuit, where the court held that differentiated rules for men and women do not amount to discrimination, one must show that the rules imposed an unequal burden on one gender as opposed to the other.<sup>98</sup>

Despite her impeccable employee record, Jespersen was subjected to appearance discrimination by her employer regardless of her safety, dignity, and freedom of expression. The mandatory nature of the personal best program stripped Jespersen of her dignity by sexualizing her, infringed on her freedom of expression exercised through her personal appearance, and exposed her to sexual harassment from intoxicated clients. The personal best program also placed an unequal burden on women because only women were mandated to wear makeup, which is not only expensive to buy, but also time consuming to apply.

Nevertheless, since the law does not directly prohibit against appearance discrimination, Jespersen had to rely on discrimination based on sex to institute a suit against her employer's unreasonable actions. Unfortunately, the law still relies on flawed social norms to determine what amounts to 'normal grooming practices for women', hence, Jespersen's rights were invalidated because the suit did not meet the threshold required to prove discrimination based on sex.

As elucidated in section 2.2, appearance discrimination as an individual concept has subtly created a new niche of discrimination, which contravenes individual freedoms such as the freedom of expression, and freedom from discrimination.

---

<sup>96</sup> Ibid., at 1078.

<sup>97</sup> Ibid., at 1079.

<sup>98</sup> Ibid., at 1082.

## 2.3 Appearance Discrimination and its Intersection with Other Forms of Discrimination

### 2.3.1 Introduction

Appearance discrimination is considered particularly problematic because it frequently intersects with other forms of discrimination. To understand how the intersection occurs and the resulting effects, we must first begin by understanding the concept of intersectionality.

### 2.3.2 The concept of Intersectionality

Kimberlé Crenshaw is celebrated for creating the term intersectionality which is defined as ‘the complex, cumulative manner in which the effects of multiple forms of discrimination (such as racism and sexism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups.’<sup>99</sup> According to Crenshaw, the overlap or intersection of two or more forms of discrimination creates a distinct form of discrimination, that cannot be sufficiently remedied by protections afforded by each distinct form of discrimination.<sup>100</sup>

To put it into perspective, Crenshaw illustrates the aforesaid concept through the lens of a black woman who may experience three distinct forms of discrimination.<sup>101</sup> A black woman may experience racial discrimination solely based on her race, sexism solely based on her sex, and an intersection of racism and sexism, based on her dual membership in two marginalized groups (being black and a woman).<sup>102</sup>

The law views racism and sexism as two different forms of discrimination, as a result, courts have held that an aggrieved party can only claim the benefits of one marginalized group, despite belonging to and being discriminated against based on two forms of discrimination.<sup>103</sup> Intersectionality is not limited to an overlap of two forms of discrimination, there can be multiple overlaps based on the number of marginalized groups an individual belongs to. This section

---

<sup>99</sup> 'Intersectionality' n.d.

<sup>100</sup> Crenshaw, 1989: 139.

<sup>101</sup> Crenshaw, 1989: 139.

<sup>102</sup> Crenshaw, 1991: 1241.

<sup>103</sup> *DeGraffenreid v General Motors* 413 F Supp 142 (E D Mo 1976) at 143. The Plaintiffs were discriminated upon based on both race and gender however, the court held that the Plaintiffs could not sue on behalf of Black women based on the reasoning that they could not ‘combine the statutory remedies of race and sexism to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended’.

discusses how appearance discrimination interacts with other forms of discrimination such as race, sex, religion, and culture.

### 2.3.3 Racism

Racism and appearance discrimination intersect when an institution discriminates, prohibits, or vilifies race-linked or race-specific dressing and grooming practices in a manner that would be equivalent to discriminating based on race.<sup>104</sup> Dress codes and grooming policies seem race neutral, however, their very origin is grounded on white supremacy hence disproportionately prejudicing other races, particularly black people.<sup>105</sup> This section explores how the intersection between appearance discrimination and race manifests in schools and workplaces.

#### *I. Schools*

A study conducted in the USA by Martin and Brook shows that most school dress codes promote racism, by outlawing dressing and grooming practices associated with African and African-American culture.<sup>106</sup> While racism in the USA can be easily perceived due to the country's racially diverse population, racism in Kenya is propagated in a subtler nature. Nonetheless, elements of racism can be deduced in Kenya through the preference for western dressing and grooming practices, while African dressing and grooming practices are vilified.<sup>107</sup>

Students of colour in the USA, are targeted due to the detrimental stereotypes associated with being black.<sup>108</sup> Coloured students are perceived as susceptible to gang initiations, hence, they are frequently criminalized before they commit any infractions due to the colour of their skin.<sup>109</sup> School administrators tend to overly scrutinize coloured students and enforce dress codes and grooming practices that anticipate their poor behaviour without any probable cause.<sup>110</sup>

An example of the criminalization of coloured students is evidenced by an incident in 2018, where a black male student from Arizona was arrested for wearing a blue bandana to school.<sup>111</sup> The first time the student wore the bandana to school, he was asked to remove it and he complied. In the

---

<sup>104</sup> James, 2008: 629.

<sup>105</sup> Flagg, 1993: 953.

<sup>106</sup> Martin and Brooks, 2021: 2.

<sup>107</sup> Kang, 1997: 283.

<sup>108</sup> Aghasaleh, 2018: 95.

<sup>109</sup> Martin and Brooks, 2021: 2.

<sup>110</sup> Martin and Brooks, 2021: 2.

<sup>111</sup> Skerry, 2020.

months following his first time wearing the bandana, he observed that white students were allowed to wear a bandana without being coded.<sup>112</sup> Based on this premise, the student wore the bandana to school for a second time and was once again asked to remove it. The student refused to comply with the teacher's order and intimated that he would only remove the bandana if the other students (white), were also required to comply with the same rule.<sup>113</sup>

Instead of enforcing the dress code equally among the white and black students, the teacher called the police, and the black student was handcuffed and arrested.<sup>114</sup> According to the student, he wore the bandana as a symbol of his tough childhood, however, due to his race and the colour of the bandana, the school administration and the officers assumed he was affiliated to a gang.<sup>115</sup>

Another controversial and racially biased form of dressing and grooming policy revolves around African hair. Black hair has been a source of controversy in society and institutions alike.<sup>116</sup> Patton argues that the notion that African hair is untidy, problematic, and unprofessional emanates from white supremacy.<sup>117</sup> African hair is kinky and curly in its natural state, therefore, black people prefer protective hairstyles such as braids as opposed to rebounding<sup>118</sup> which damages African hair.<sup>119</sup> In a majority of Kenyan high schools, students are required to either have their hair rebound or shaved to appear 'neat and tidy'.<sup>120</sup> A campaign dubbed 'Help Kenyan students have freedom with their hair', was commenced in a bid to eradicate this racist and colonial culture against African hair in Kenya.<sup>121</sup> African girls are conditioned to think that the texture of African hair is untidy and unprofessional, and institutions such as schools are used to impose western standards of beauty (soft, smooth, and silky hair), hence entrenching neo-colonialism and racism.<sup>122</sup>

---

<sup>112</sup> Coded means being cited for breaking a school rule.

<sup>113</sup> Skerry, 2020.

<sup>114</sup> 'Arrested Teen Teacher Called the Police for Wearing Bandana to School', 2018.

<sup>115</sup> Skerry, 2020.

<sup>116</sup> Patton, 2006: 24.

<sup>117</sup> Patton, 2006: 24.

<sup>118</sup> Rebounding is the straightening of hair through chemicals or extreme heat to create a straight and smooth texture.

<sup>119</sup> Knipp and Stevenson, 2021: 79.

<sup>120</sup> Achieng, 2019.

<sup>121</sup> Musyoka, 2020.

<sup>122</sup> Knipp and Stevenson, 2021: 79.

## II. Workplace

Since independence, the dress code in the Kenyan Parliament has been a source of controversy with parliamentarians such as Raila Odinga, Koigi Wamwere, and Gor Sunguh challenging the dress code as set out in the Speaker Rules.<sup>123</sup> Rule 8 of the Speaker Rules subjects parliamentary members, the press, and guests intending to access any facilities in the legislature, to a formal dress code.<sup>124</sup> The rules particularly specify that men should dress in an official suit, while women are required to dress decently in formal or business wear.<sup>125</sup>

Throughout the years since independence, several leaders have defied the prescribed dress code as a stand against the adoption of the colonial culture.<sup>126</sup> Hon. Koigi Wamwere, a former member of Parliament, was perhaps the most vocal leader when it came to deconstructing the notion that only business suits could be considered professional and/or formal.<sup>127</sup> Wamwere expressed his concern over the rise of neo-colonialism in Kenya, when he was kicked out of multiple parliamentary sittings because he came dressed in West-African robes each time.<sup>128</sup> The speaker of Parliament then, Francis Ole Kaparo, termed the West-African robes as ‘pajamas’, despite their very decent and formal looking nature.<sup>129</sup>

Wamwere, was however not deterred, he took a stand against neo-colonialism by consistently showing up to parliamentary sittings in African attire, despite the repercussions faced at his place of employment. When asked why this was important to him, he stated that:

*‘The argument that the only dress that can be decent is European dress is to me awfully colonial. And I am not sure that even Europeans would today dare advance such an argument... You will be surprised that the champions of our new colonial culture, new colonial ideology, and new colonial argument today are not Europeans anymore. It is the Africans!’<sup>130</sup>*

---

<sup>123</sup> Speaker Rules of Kenya, 2018.

<sup>124</sup> Rule 8, Speaker Rules of Kenya 2018.

<sup>125</sup> Rule 8, Speaker Rules of Kenya 2018.

<sup>126</sup> The National Assembly, 'Appropriate Dress in the Chamber and in Committees', (2019).

<sup>127</sup> Driscoll, 2003.

<sup>128</sup> Crawley, 2003.

<sup>129</sup> Driscoll, 2003.

<sup>130</sup> BBC News, 2003.

Several parliamentary leaders have followed suit despite being thrown out of parliamentary sittings. For example, the Minister of Roads and Public Works then, Hon. Odinga was applauded by the members of parliament when he walked into Parliament in a brightly-coloured Agbada (a flowing Nigerian robe).<sup>131</sup>

Institutions all over Kenya continue to enforce colonial measures of professionalism at the expense of our very own culture. Unfortunately, such racist incidents are so rampant in Kenya, yet they go undocumented because appearance discrimination and its intersection with racism is a foreign concept in the country. The mindset that African dressing and grooming is informal, untidy, unsightly, casual, and incapable of representing any semblance of professionalism is in itself promoting neo-colonialism and racism.<sup>132</sup>

Incidents of racism in the USA are also very prevalent as illustrated by the case of *Hollins v Atlantic Company Inc.*<sup>133</sup> Hollins, an African-American employee at Atlantic Company, sued her employers for racial discrimination based on the overregulation of the way she styled her hair.<sup>134</sup> Employees of Atlantic company were required to adhere to the grooming standards specified in the company's grooming policy. The company's grooming policy required that '*all women maintain a neat and well-groomed hairstyle, prohibited the use of hair setting aids and rollers, and mandated that women's hair be tied back for their safety*'.<sup>135</sup>

Within a series of two days, Hollins was reprimanded by the foreman and the plant supervisor for styling her hair in a design referred to as the 'finger wave'.<sup>136</sup> According to the foreman, although the finger wave hairstyle was neat, well-groomed, and safe as per the grooming standards, the reason he reprimanded Hollins was because the hairstyle was 'too different and eye catching'.<sup>137</sup> Additionally, Hollins was informed by the plant manager that she would have to seek approval for her hairstyles ( implying hairstyles used by African-Americans). Hollins and another colleague,

---

<sup>131</sup> BBC News, 2003.

<sup>132</sup> Kang, 1997: 283.

<sup>133</sup> *Hollins v. Atlantic Company, Inc.* 188 F 3d 652 6th Cir (1999).

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*, at 655.

<sup>136</sup> *Ibid.*, at 655.

<sup>137</sup> *Ibid.*, at 656.

being the only non-supervisory African-Americans, submitted photographs of the hairstyles they intended to try, and some of those hairstyles were approved.

In a different instance, Hollins styled her hair in a ponytail and was once again reprimanded for the style.<sup>138</sup> She was reminded that she had to seek approval before changing her hairstyle. It is imperative to note that Hollins worked with white female colleagues in the same department, shift, and under the same supervisors.<sup>139</sup> On the day she was reprimanded for styling her hair in a ponytail, five white colleagues had also styled their hair in the same way but none of them were reprimanded or asked to seek permission in advance before changing their hairstyle.<sup>140</sup>

The company officials continued to frustrate Hollins whenever she styled her hair, she was cited in her performance review for failing to adhere to the grooming policy, and her employers even implied that any other unacceptable hairstyles would be detrimental to her employment.<sup>141</sup> Hollins sued for racial discrimination, and upon multiple appeals, the Sixth Circuit ruled that Hollins had established a prima facie case of racial discrimination and disparate treatment.<sup>142</sup>

Appearance discrimination as elucidated by section 2.3.3, has created an avenue for racism to permeate in our institutions, hence circumventing anti-discrimination laws put in place to eradicate racism.

#### 2.3.4 Sexism

Sexism is simply defined as ‘the discriminatory and prejudicial attitudes, beliefs and practices directed against a person based on their sex and/or gender, which mostly affects women.’<sup>143</sup> According to the American Psychological Association (APA), ‘sexualization occurs when... a person is sexually objectified, that is, made into a thing for others’ sexual use, rather than seen as a person with the capacity for independent action and decision making; and/or when sexuality is inappropriately imposed upon a person.’<sup>144</sup>

---

<sup>138</sup> Ibid., at 656.

<sup>139</sup> Ibid., at 656.

<sup>140</sup> Ibid., at 656.

<sup>141</sup> Ibid., at 657.

<sup>142</sup> Ibid., at 663.

<sup>143</sup> Zehnter and others, 2021: 1.

<sup>144</sup> Task Force on the Sexualization of Girls, 2007.

The ‘ambivalent sexism’ theory opines that gender discrimination is advanced in society through two ways, namely hostile and benevolent sexism.<sup>145</sup> Hostile sexism is defined as a form of sexism that advances adverse and offensive stereotypes, beliefs, and attitudes towards women in an overt manner, for example, slut shaming.<sup>146</sup> Benevolent sexism, on the other hand, is defined as the obscure form of sexism that promotes the advancement of seemingly favourable and positive beliefs, attitudes, and stereotypes about women, which are actually patronizing and detrimental.<sup>147</sup> For example, the characterization that women are pure and prized possessions.<sup>148</sup>

Benevolent and hostile sexism work concurrently to ensure the subjugation of women, by punishing any offenders and glorifying women who conform to approved gender roles.<sup>149</sup> Hostile sexism is used as a tool of punishment for the women who disregard and violate gender roles, while benevolent sexism is used to commend and applaud the women who adapt to the societal perception of womanhood.<sup>150</sup> Institutions utilize these two forms of sexism, to propagate gender inequality through dress codes and grooming practices.

### *I. Schools*

Schools at first instance utilize benevolent sexism by overregulating the female body. The number of rules regulating what girls wear is significantly higher than what boys wear, this places a higher burden on girls and increases their probability of violating the prescribed dress code.<sup>151</sup> Additionally, dress codes specifically prescribed for girls are purportedly formulated for purposes of maintaining modesty, preserving girls’ purity, and protecting girls from sexual harassment.<sup>152</sup> This view reinforces benevolent sexism, by reinforcing the belief that a woman’s worth is premised on her decency and purity.<sup>153</sup>

A study conducted by Martin and Brook,<sup>154</sup> shows the overregulation of the female body through an example of the Maggie Walker Governor's School. The school administration broadcasted over

---

<sup>145</sup> Glick and Fiske, 2011: 530.

<sup>146</sup> Blumell and Mulupi, 2020: 1.

<sup>147</sup> Leighton, 2017.

<sup>148</sup> Glick and Fiske, 2011: 530.

<sup>149</sup> Mahajan, 2007: 165.

<sup>150</sup> Blumell and Mulupi, 2020: 1.

<sup>151</sup> Harbach, 2016: 1039.

<sup>152</sup> Alston, 2006: 83.

<sup>153</sup> Blumell and Mulupi, 2020: 1.

<sup>154</sup> Martin and Brooks, 2021: 2.

a PA system, that they would be inspecting the girls to ascertain that their shorts complied with the required dress code length.<sup>155</sup> The school only carried out a length-check on the girls as opposed to the whole student body, therefore, implying that female bodies are so problematic they must be overregulated to maintain decency.<sup>156</sup>

Schools also perpetuate sexism by promoting the notion that girls bear the responsibility of maintaining decency, to avoid being objectified and sexually harassed.<sup>157</sup> Dress codes reinforce the notion that a girl's body is hypersexual, hence, society must constantly inspect girls to ensure that their dress code is 'decent', for purposes of protecting the girls and avoiding any distraction to the men.<sup>158</sup> This mentality coincides with the APA definition of sexism as earlier discussed.

Most Kenyan high schools mandate that every female student (even in all-girls high schools), must wear long skirts or skirts that cover the knees for 'decency, and to prevent the girls from tempting the male teachers or workers'.<sup>159</sup> A public debate ensued in Kenya after 400 students from Rwathia Secondary initiated a strike, protesting the introduction of maxi skirts by the administration.<sup>160</sup> The debate was further fuelled by the assertions of the Minister of Education then, Hon. Mutula Kilonzo who intimated that *'I am in total agreement with the students. Why do you dress a schoolgirl like a nun? These girls do not want to be nuns; they want to be modern...'*<sup>161</sup> He further proposed a mid-length skirt size for the students.

While public opinion included critics and supporters of Hon. Kilonzo's proposal, the religious leaders in Kenya, were so aggrieved that they demanded for the Minister's resignation.<sup>162</sup> Critics of the Minister's sentiments cited reasons such as exposure of the students to sexual harassment and assault, the temptation of male teachers and workers, and maintaining morality in schools as the reasons to maintain the maxi skirts.<sup>163</sup> The reasons cited above, all arose from sexist social norms intended to control the woman's body and 'protect' men from their own desires.

---

<sup>155</sup> Martin and Brooks, 2021: 2.

<sup>156</sup> Martin and Brooks, 2021: 2.

<sup>157</sup> Leighton, 2017.

<sup>158</sup> Harbach, 2016: 1039.

<sup>159</sup> 'Skirting Around the Dress Code for Girls', 2012.

<sup>160</sup> Macha, 2012.

<sup>161</sup> Macha, 2012.

<sup>162</sup> 'Skirting Around the Dress Code for Girls', 2012.

<sup>163</sup> 'Skirting Around the Dress Code for Girls', 2012.

Pavlakis and Roegman<sup>164</sup> also highlight some of the measures taken by school officials, in the enforcement of dress codes on female students. These measures are enforced in line with hostile sexism, as a means of punishing any girls who do not ascribe to what is considered decent.

A public outcry ensued on social media over the extreme enforcement measures imposed upon girls, over the alleged contravention of dress codes in schools.<sup>165</sup> Girls were mandated to wear sweatshirts during a heatwave for purposes of ‘covering up’, and in another instance put tape on their nipples when they had no bra.<sup>166</sup> These enforcement measures were based on the reasoning that the girls created a distracting environment for learning, based on their choice of dressing.<sup>167</sup> Such enforcement measures send a subconscious message to the girls that their bodies are a sexual distraction that boys ought to be ‘protected from’.<sup>168</sup> The boys on the other hand, subconsciously internalize sexism by learning that there are no consequences to their actions, and that women are to blame for the derogatory sexual actions of the men.<sup>169</sup>

Additionally, the boys are seen as incapable of controlling their sexual urges, hence, placing all the responsibility and blame on the girls while the boys get away with sexually harassing and assaulting girls.<sup>170</sup> Boys are taught that women shouldn’t act in a manner men consider sexually enticing, unless they want a man’s sexual attention.<sup>171</sup> This promotes the rape culture, the over sexualization of the female body, and victim blaming. Lastly, female students are also deprived of their right to education when sent home to change or in extreme cases suspended, hence, entrenching the notion that creating a ‘distraction-free’ learning environment for the boys is far more important than the girl’s education.<sup>172</sup>

## II. Workplace

Appearance discrimination in the workplace also intersects with other forms of discrimination such as sex as elucidated by the case of *Hub Folding Box Company v Massachusetts Commission*

---

<sup>164</sup> Pavlakis and Roegman, 2018: 54.

<sup>165</sup> Pavlakis and Roegman, 2018: 54

<sup>166</sup> Pavlakis and Roegman, 2018: 54

<sup>167</sup> Harbach, 2016: 1039.

<sup>168</sup> Whitman, 2020: 72.

<sup>169</sup> Leighton, 2017.

<sup>170</sup> Whitman, 2020: 72.

<sup>171</sup> Whitman, 2020: 72.

<sup>172</sup> Martin and Brooks, 2021: 2.

*Against Discrimination.*<sup>173</sup> This case involved a dispute instituted by a female employee, who was issued with an ultimatum by her employer to cover up the tattoo on her arm or risk losing her employment.<sup>174</sup> The employer's assertion was not only discriminatory based on appearance but also gender, because a male employee at the same office had a similarly placed tattoo but was not required to cover it.<sup>175</sup> The employer asserted that clients found tattoos on women distasteful, and an indicator that they were either 'prostitutes, or on drugs or from a broken home'.<sup>176</sup> The court ruled in favour of the employee based on gender discrimination, however, it did not address appearance discrimination.<sup>177</sup>

The Kenyan case of *Martha Wanjiru Mungai v Board of Management Pioneer School*<sup>178</sup> also illustrates the intersection between appearance discrimination and sexism. Mungai, the claimant, and a school teacher sued her employer for wrongful dismissal and failure to pay her terminal benefits after she was summarily dismissed.<sup>179</sup> In response to the claimant's suit, her employer claimed that among other frivolous reasons, Mungai's employment was terminated because she '*dressed indecently while in school despite the fact that she was teaching in a boys' school, and the dressing would distract both the students and her co-workers...*'<sup>180</sup>

Mungai, in accordance with hostile sexism, was summarily dismissed without due procedure, and her benefits withheld as punishment for her alleged indecent dressing. According to the school, it simply wanted to 'protect the boys' she taught and her male co-workers from any 'distraction'.<sup>181</sup> Appearance discrimination and sexism even in the workplace continues to overly sexualize the woman's body, while punishing her for the reactions of the men. Appearance discrimination and its interaction with sexism continues to reinforce the notion that, creating a distraction free environment for the men is prioritized over a woman's rights, security, and now financial independence.

---

<sup>173</sup> *Hub Folding Box Company v. Massachusetts Commission Against Discrimination* 52 MassApp Ct 1104 (2001).

<sup>174</sup> *Ibid.*, para 1.

<sup>175</sup> *Ibid.*, para 1.

<sup>176</sup> *Ibid.*, para 1.

<sup>177</sup> *Ibid.*, para 2.

<sup>178</sup> *Martha Wanjiru Mungai v Board of Management Pioneer School* [2020] eKLR.

<sup>179</sup> *Ibid.*, para 1.

<sup>180</sup> *Ibid.*, para 2.

<sup>181</sup> *Ibid.*, para 2.

As evidenced by section 2.3.4, institutions have found a novel way of advancing sexism through its intersection with appearance discrimination. Consequently, this intersection continues to thwart any efforts by anti-discrimination laws to eradicate sexism.

### 2.3.5 Religion and Culture

The right to religion and culture is vital to an individual's sense of identity and personal belief.<sup>182</sup> Religion and culture can be expressed in various ways including through dressing and grooming. Society comprises of diverse cultures and religions, as a result, our institutions should reflect this diversity without any discrimination or preference. This section discusses how appearance discrimination intersects with both religion and culture, and the effects of these intersections.

#### *I. Schools*

In Kenyan schools, appearance discrimination and its intersection with religion and culture has been a source of contention, therefore, leading to an influx of disputes in the Kenyan courts. Students adorning dreadlocks or hijabs have often experienced limitations in their exercise of religion and culture, because their appearance falls outside the accepted rules and regulations prescribed by the school.

The case of *Republic v Head Teacher, Kenya High School & Another Ex-Parte SMY*<sup>183</sup> is an example of how appearance discrimination intersects with religion. A mother to a minor instituted a representative suit on behalf of her daughter and 48 other Muslim students in Kenya High School. The suit was premised on the fact that Muslim students in the school were prohibited from wearing a hijab, hence, infringing on their freedom of religion contrary to the Constitution of Kenya.<sup>184</sup>

The decision to prohibit hijabs in the school violated the freedom of religion for the 48 Muslim students. The court in this matter held that if the school allowed the Muslim students to wear their hijabs in accordance with their religion, other students would get the impression that Muslim students were being favoured.<sup>185</sup> Additionally, the court opined that allowing hijabs in the school would open the floodgate for other religions to enforce dress codes and grooming standards, as

---

<sup>182</sup> Viviers, 2016: 897.

<sup>183</sup> *Republic v Head Teacher, Kenya High School & Another Ex-Parte SMY* [2012] eKLR.

<sup>184</sup> Article 32, Constitution of Kenya 2010.

<sup>185</sup> *Republic v Head Teacher, Kenya High School & Another Ex-Parte SMY* [2012] eKLR at 19.

prescribed by their religions.<sup>186</sup> The need for uniformity in schools according to the court, outweighed the freedom of religion.<sup>187</sup>

In Kenya, hairstyles such as dreadlocks and headwraps have both cultural and religious significance. Rastafarianism in particular, is considered both a religion and culture in Kenya.<sup>188</sup> However, some schools impose dress codes and grooming practices that ban headwraps and dreadlocks, hence, significantly increasing the probability of dress code violations by these students.

In the case of *J W M (alias P) v Board of Management O High School*,<sup>189</sup> P a 15-year-old girl, was admitted to O High School where she indicated that she was a Rastafarian in the administrative documents. P was admitted to the school, issued with an admission number, and even allowed to attend classes. In conformity with P's culture/religion, she adorned dreadlocks, which she had covered during the admission process.<sup>190</sup> The teachers later discovered she had dreadlocks and she was asked to cut them. When P failed to comply, she was sent home and asked to return only after she had complied with the school's regulations, which prohibited dreadlocks.<sup>191</sup>

P's parents tried to dialogue with the school with an aim of reaching a mutually beneficial agreement, however, the school refused to engage in any discussion with her parents.<sup>192</sup> It is on this foundation, that a suit was instituted based on the grounds that the school discriminated against P because of her religion/culture when they suspended her, and that her freedom of religion was being infringed upon by requiring her to shave her dreadlocks. The court in this case ruled in favour of the applicant and directed the school to readmit P while allowing her to keep her dreadlocks as a manifestation of her Rastafarian faith.<sup>193</sup>

---

<sup>186</sup> Ibid., at 19.

<sup>187</sup> Ibid., at 23.

<sup>188</sup> See *J.K (Suing on Behalf of CK) v Board of Directors of R School & another* [2014] eKLR para 44 -48.

<sup>189</sup> *J W M (alias P) v Board of Management O High School & 2 others* [2019] eKLR.

<sup>190</sup> Ibid., para 4 (a).

<sup>191</sup> Ibid.

<sup>192</sup> Ibid., para 20.

<sup>193</sup> Ibid., para 61.

## II. Workplace

The USA case of *Hedum v Starbucks Corp*<sup>194</sup> illustrates the intersection between appearance discrimination and religion. In the above case, Hedum was employed as a barista at Starbucks. During her employment, Hedum wore a Wiccan cross around her neck in conformity with her religion, being the Wiccan religion.<sup>195</sup> According to Hedum, the store manager constantly criticized her for adorning the Wiccan cross, and in some instances even asked her to remove the religious necklace or cover it up with her shirt.<sup>196</sup> Lastly, the assistant manager advised that it would be beneficial for Hedum's career if she stopped adorning the religious necklet.<sup>197</sup>

Hedum's employment was later terminated, and she sued for wrongful termination based on various grounds including religious discrimination. In support of her claim for discrimination based on religion, Hedum provided evidence that she was constantly harassed for wearing the Wiccan cross to work, while other employees who adorned the Christian cross necklace were not subjected to adverse commentary, or required to cover up or remove the religious ornament.<sup>198</sup> The court ruled in favour of Hedum because she had established a prima facie case in support of her claim on religious discrimination.<sup>199</sup>

In Kenya, the right to culture in the workplace once again intersects with appearance discrimination through white supremacy notions. African modes of dressing and grooming are vital in expressing our pride in Kenyan culture, however, institutions such as the workplace continue to emphasize on the western notions of professionalism. In the eloquent words of Nobel Prize winner Wangari Maathai, 'if we are going to give our people a sense of pride, a sense of self-respect and identity, we need to reclaim our culture. People who wear African dresses are trying to look for some identity. They're trying to define themselves.'<sup>200</sup>

As deliberated earlier, the Kenyan legislature has been a war front when it comes to appearance discrimination as it intersects with race and culture. Recently, Senator Ledama Ole Kina attended

---

<sup>194</sup> *Hedum v Starbucks Corp* 546 F Supp 2d 1017 D Or (2008).

<sup>195</sup> *Ibid.*, at 1019.

<sup>196</sup> *Ibid.*, at 1019.

<sup>197</sup> *Ibid.*, at 1019.

<sup>198</sup> *Ibid.*, at 1019.

<sup>199</sup> *Ibid.*, at 1028.

<sup>200</sup> Driscoll, 2003.

a parliamentary sitting in the Maasai traditional attire which represents his culture.<sup>201</sup> A fellow Senator aggrieved by Senator Ole Kina's choice of dressing, raised a point of order claiming that Hon. Ole Kina was in contravention of the prescribed dress code required in Parliament.<sup>202</sup>

The Senate Speaker Hon. Lusaka ruled in favour of Senator Ole Kina by stating that the Constitution of Kenya protects the right to culture, as a key tenant of the country.<sup>203</sup> He further stated that it would be atrocious to kick out Senator Ole Kina for wearing a traditional attire used to internationally represent the rich culture of Kenya.<sup>204</sup> While the progressive ruling by Hon. Lusaka is applauded as a step in the right direction, institutions all over Kenya continue to infringe on the right to culture. The war is far from over as the said ruling only applies to the Senate.<sup>205</sup>

Religion and culture are legally protected because they are intrinsic to the expression of a person's individuality. Appearance discrimination and its intersection with both religion and culture continues to expose marginalized groups to discrimination, therefore, frustrating anti-discrimination laws.

## 2.4 Conclusion

Anti-discrimination laws have created an environment where overt discrimination cannot thrive, as a result, institutions have formulated creative ways of expressing the residual social norms and stereotypes that emanate from direct discrimination.<sup>206</sup> Dress codes and grooming practices seem fair and inobtrusive at face value, however, these policies have created a habitable environment for the rise of a new form of discrimination known as appearance discrimination.

Appearance discrimination has proven formidable due to its ability to camouflage as a purely social and ethical issue. Additionally, its frequent intersection with other forms of discrimination makes it more perilous. Appearance discrimination has also allowed institutions to circumvent the current anti-discrimination laws which govern discrimination based on sex, race, religion, and culture.<sup>207</sup> While appearance discrimination seems trivial and inconsequential at face value, the

---

<sup>201</sup> Mwangi, 2020.

<sup>202</sup> Mwangi, 2020.

<sup>203</sup> Article 11, Constitution of Kenya 2010.

<sup>204</sup> Mwangi, 2020.

<sup>205</sup> Mwangi, 2020.

<sup>206</sup> Wax, 1999: 1130.

<sup>207</sup> Rhode, 2009: 1033.

effects of this form of discrimination continues to deteriorate the legal protections put in place to maintain equality and equity, one fabric at a time.

## CHAPTER THREE

*'It might seem pointless to argue that the [physically unappealing] are worthy of rights-based protection in a society preoccupied with the eradication of discrimination based on race, gender, sexual orientation, religion, and culture. However, to ignore negative stereotyping and resulting disparate treatment of those deviating from socially ingrained standards of attractiveness is to turn a blind eye to the very nature of discrimination and its consequences.'*<sup>208</sup>

### 3.0 Introduction

John Locke described the law as a tool used to preserve and enlarge individual rights and freedoms.<sup>209</sup> According to the social contract theory, as advanced by Locke, the government is obligated to uphold and protect the rights of individuals through the law, provided that the individual rights are not detrimental to others.<sup>210</sup> Additionally, the law ought to equally protect all individuals by creating a balance between conflicting individual liberties and/or collective liberties.<sup>211</sup> Appearance discrimination is extremely injurious to various individual rights and freedoms, despite the minimal to no repercussions on other people's rights. This chapter seeks to explore whether Kenyan law, sufficiently protects against appearance discrimination in a bid to provide equal protection to all persons and protect individual rights and freedoms.

Chapter two discussed how appearance discrimination as an individual concept propagates inequality and discrimination, and how its intersection with other forms of discrimination continues to provide a loophole for institutionalized discrimination, based on legally protected characteristics. Having established the perilous effects of appearance discrimination in the previous chapters, chapter three explores the legal protections afforded by Kenyan law to victims of appearance discrimination, and whether the provided protections adequately negate the serious effects of appearance discrimination.

Chapter three begins by examining the legal protection afforded to appearance discrimination in Kenya both as an individual concept and once it intersects with other forms of discrimination. The above section delves into the rights and freedoms applicable to the regulation of appearance

---

<sup>208</sup> Pieterse, 2000: 121.

<sup>209</sup> Locke and others, 2003: 27.

<sup>210</sup> Taieb, 2020.

<sup>211</sup> Queiroz, 2018: 1.

discrimination as stipulated by the Kenyan Constitution and legislation. Section 3.2 examines the legal protections afforded to appearance discrimination in the USA, for purposes of comparing American law to Kenyan law. This dissertation chose the USA legal regime because of its progressive local laws, which are ideal for assessing the efficacy of Kenyan law.

Section 3.3 juxtaposes the protections under the Kenyan legal regime to the protections under the United States legal regime. This juxtaposition exposes the inadequacy of Kenyan law and highlights how Kenyan law can improve its efficacy in protecting against appearance discrimination. Consequently, this chapter proposes that Kenyan law should emulate American local laws by operationalizing the current laws, and enacting progressive legislation that explicitly protects against appearance discrimination.

### 3.1 Legal Underpinning in Kenya

#### 3.1.1 The Constitution of Kenya

The Constitution of Kenya<sup>212</sup> (hereinafter the Constitution) starts by expressing itself as the supreme law of the land, which binds all persons and all State organs at both levels of government.<sup>213</sup> Additionally, any law that is inconsistent with the Constitution is prescribed as null and void.<sup>214</sup> It is imperative to begin the Kenyan analysis by stipulating that, the Constitution has a very extensive Bill of Rights, from which the protection against appearance discrimination can be inferred.

##### *I. The Constitution of Kenya and Appearance Discrimination*

The Constitution lays out several national values which include ‘...*human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized*’.<sup>215</sup> These national values, according to the Constitution, should act as a guide for all persons, State organs, and State officers ‘when applying and interpreting the Constitution, enacting, applying, and interpreting any legislation, and making or implementing any public decisions’.<sup>216</sup>

---

<sup>212</sup> Constitution of Kenya, 2010.

<sup>213</sup> Ibid., Article 2 (1).

<sup>214</sup> Ibid., Article 2 (4).

<sup>215</sup> Ibid., Article 10.

<sup>216</sup> Ibid., Article 10.

Chapter four of the Constitution also provides for the Bill of Rights which ‘forms an integral part of Kenya’s democratic state’.<sup>217</sup> The Bill of Rights lays a basis for non-discrimination, by stipulating that ‘*every person is equal before the law and has the right to equal protection and equal benefit of the law*’.<sup>218</sup> This article further stipulates that both men and women enjoy equal rights and opportunities in various spheres such as the economic, social, political, and cultural spheres.<sup>219</sup> In addition, Article 27 prohibits the direct or indirect discrimination of individuals based on various grounds which include race, sex, religion, culture, dress, conscience, or belief.<sup>220</sup> The prohibition of discrimination based on dress forms an integral part of this dissertation, as discussed later on in this chapter.

The Constitution also provides that every individual is entitled to enjoy ‘the right to freedom of conscience, religion, thought, belief, and opinion’.<sup>221</sup> This right entitles every individual or community to practice, worship, or manifest their religion in public or private without any undue repercussions by institutions.<sup>222</sup> The freedom of conscience, religion, thought, belief, and opinion prohibits the compulsion of any person to engage or act in any manner contrary to their belief or religion.<sup>223</sup>

Additionally, and subject to certain exceptions,<sup>224</sup> the Constitution provides for ‘the right to freedom of expression which includes the freedom to seek, receive or impart information or ideas and freedom of artistic creativity...’<sup>225</sup> Lastly, the Constitution protects the right to culture<sup>226</sup> and specifically entrenches the rights of marginalized groups, by mandating the State to put in place affirmative action programmes designed to ‘*develop [the] cultural values, languages and practices*’ of the marginalized communities.<sup>227</sup>

---

<sup>217</sup> Ibid., Article 19.

<sup>218</sup> Ibid., Article 27 (1).

<sup>219</sup> Ibid., Article 27 (3).

<sup>220</sup> Ibid., Article 27 (4).

<sup>221</sup> Ibid., Article 32 (1).

<sup>222</sup> Ibid., Article 32 (2) and (3).

<sup>223</sup> Ibid., Article 32 (4).

<sup>224</sup> Ibid., Article 33 (2).

<sup>225</sup> Ibid., Article 33 (1).

<sup>226</sup> Ibid., Article 44.

<sup>227</sup> Ibid., Article 56.

### 3.1.2 Legislation

This section explores specific institutional legislation in a bid to ascertain whether they give effect to any constitutional principles, or provide for additional legal principles that would be applicable in the regulation of appearance discrimination.

#### *I. Educational Laws*

In addition to the rights discussed above, the Constitution provides for specific rights applicable to educational institutions. The Constitution provides that ‘every child has the right to free and compulsory basic education’.<sup>228</sup> Additionally, the Constitution protects children from abuse, all forms of violence, and inhuman treatment and punishment.<sup>229</sup> Lastly, the Constitution also stipulates that the best interest of the child shall be a paramount consideration in any matter involving a child.<sup>230</sup> Consequently, the Children’s Act,<sup>231</sup> and the Basic Education Act<sup>232</sup> were enacted to give effect to the rights protected under the Constitution.

##### *a) The Children’s Act*

The new Children’s Act<sup>233</sup> just came into force in July 2022, to give effect to the rights and freedoms of children as provided for in the Constitution.<sup>234</sup> The Act starts by stipulating that ‘the best interest of the child, shall be the primary consideration in any action concerning the welfare of a child, which is undertaken by any institution whether public or private’.<sup>235</sup> Additionally, a child is entitled to express their opinion and to have that opinion considered, in any matter that affects their rights.<sup>236</sup>

In accordance with the Constitution, the Children’s Act prohibits any form of discrimination based on ‘age, origin, **sex, religion... race**, disability, **tribe**, residence or local connection or any other status.’<sup>237</sup> (emphasis mine) The Children's Act also stipulates that any differentiation perpetuated

---

<sup>228</sup> Ibid., Article 53 (1).

<sup>229</sup> Ibid., Article 53 (1).

<sup>230</sup> Ibid., Article 53 (2).

<sup>231</sup> Children Act, 2022.

<sup>232</sup> Basic Education Act, 2013.

<sup>233</sup> Children Act, 2022.

<sup>234</sup> Ibid., Section 3.

<sup>235</sup> Ibid., Section 8.

<sup>236</sup> Ibid., Section 8.

<sup>237</sup> Ibid., Section 9.

to uphold the child's best interest shall not amount to discrimination.<sup>238</sup> However, this differentiation must not limit the rights of a child as stipulated under the Constitution and the Act.<sup>239</sup>

The right to free, compulsory, and basic education,<sup>240</sup> the right of a child to participate in non-harmful cultural practices,<sup>241</sup> and the right to thought, conscience, religion, and religious education<sup>242</sup> are also provided in the Children's Act. The Children's Act also stipulates that the right to religious guidance and education, shall not limit or hinder the enjoyment of any basic rights and freedoms guaranteed by the Constitution.<sup>243</sup> Lastly, the Act protects children from 'any form of torture and cruel, inhuman or degrading treatment or punishment'.<sup>244</sup>

#### b) The Basic Education Act

The Basic Education Act<sup>245</sup> begins by setting out the governing principles of the Act which include:

‘... (e) protection of every child **against discrimination within or by an education department or education institution on any ground** whatsoever;

(o) promoting **respect for the right of the child's opinion** in matters that affect the child;

(p) **elimination of gender discrimination, corporal punishment**, or any form of cruel and inhuman treatment or torture; and

(s) **non-discrimination, encouragement and protection of the marginalized**, persons with disabilities and those with special needs...<sup>246</sup> (emphasis mine)

In conformity with the freedom from discrimination under the Constitution, the Basic Education Act also provides that *‘a school or person responsible for admission shall not discriminate against*

---

<sup>238</sup> Ibid., Section 10.

<sup>239</sup> Ibid., Section 10.

<sup>240</sup> Ibid., Section 13.

<sup>241</sup> Ibid., Section 14.

<sup>242</sup> Ibid., Section 15.

<sup>243</sup> Ibid., Section 15 (2).

<sup>244</sup> Ibid., Section 25.

<sup>245</sup> Basic Education Act 2013.

<sup>246</sup> Ibid., Section 4.

any child seeking admission on any ground, including ... gender, sex, religion, race ... or ...culture.<sup>247</sup> Additionally, the Basic Education Act prescribes that *'no pupil shall be subjected to torture and cruel, inhuman or degrading treatment or punishment, in any manner, whether physical or psychological'*.<sup>248</sup>

## II. Employment Laws

The right to fair labour practices<sup>249</sup> is enshrined in the Constitution and forms the basis for the main legislation governing the employment sector in Kenya, which is the Employment Act.<sup>250</sup>

### a) Employment Act

The purpose of the Employment Act includes 'defining the fundamental rights of employees and providing the basic conditions of employment for employees'.<sup>251</sup> The Employment Act begins by stipulating that an employer should *'promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice'*.<sup>252</sup>

Additionally, the Employment Act mimics the Constitution by prescribing that: 'No employer shall discriminate **directly or indirectly**, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of **race**, colour, **sex**, language, **religion**, political or other opinion, nationality, **ethnic** or social origin, disability, pregnancy, mental status, or HIV status;

(b) in respect of **recruitment, training, promotion, terms and conditions of employment, termination of employment** or other matters arising out of the employment'.<sup>253</sup> (emphasis mine)

The rule against discrimination under the Employment Act is however subject to certain exceptions such as affirmative action or preference for an employee because of an inherent job requirement.<sup>254</sup>

---

<sup>247</sup> Ibid., Section 34 (2).

<sup>248</sup> Ibid., Section 36 (1).

<sup>249</sup> Article 41, Constitution of Kenya 2010.

<sup>250</sup> Employment Act, 2007.

<sup>251</sup> Ibid., Preamble.

<sup>252</sup> Ibid., Section 5.

<sup>253</sup> Ibid., Section 5 (3).

<sup>254</sup> Ibid., Section 5 (3).

Lastly, the Act articulates that an employee's race, sex, or religion shall not constitute a valid reason for any adverse employment action such as dismissal or a disciplinary penalty.<sup>255</sup>

### 3.1.3 Discussion on the Legal Foundation of Appearance Discrimination in Kenya

The Constitution, which is the supreme law of the land, informs all other relevant institutional legislations as shown above. As a result, this section discusses the Kenyan legal foundation of appearance discrimination in three parts: 1) the legal protection afforded to appearance discrimination as an individual concept, 2) the legal protection afforded to appearance discrimination based on its intersection with other forms of discrimination and 3) the legal protection applicable to both appearance discrimination as an individual concept, and when it intersects with other forms of discrimination.

#### *I. Appearance Discrimination as an Individual Concept*

##### *a) Freedom from Discrimination Based on Dress*

The Kenyan Constitution explicitly prohibits against discrimination based on dress.<sup>256</sup> The freedom from discrimination based on dress has only been invoked or litigated upon in the case of *Lucy Nyambura & another v Town Clerk, Municipal Council of Mombasa*.<sup>257</sup> In this case, the Petitioners were arrested and arraigned in court for '*loitering in a public place for immoral purposes contrary to section 258 (m) of the Mombasa Municipal By-laws*'.<sup>258</sup> According to the Petitioners, their arrest was allegedly informed by their mode of dressing.<sup>259</sup> To counter the charges brought against them, the Petitioners relied on various legal cannons including discrimination based on dress as stipulated by the Constitution.<sup>260</sup> While the court acknowledged reliance on this provision by the Petitioners, the court refrained from pronouncing itself on the freedom from discrimination based on dress.<sup>261</sup>

Apart from the *Lucy Nyambura case*,<sup>262</sup> no other case relating to or intersecting with the concept of appearance discrimination has invoked the protection of discrimination based on dress. Having

---

<sup>255</sup> Ibid., Section 46 (g).

<sup>256</sup> Article 27 (4), Constitution of Kenya 2010.

<sup>257</sup> *Lucy Nyambura & another v Town Clerk, Municipal Council of Mombasa & 2 Others* [2011] eKLR.

<sup>258</sup> Ibid., at 2.

<sup>259</sup> Ibid., at 2.

<sup>260</sup> Ibid., at 7.

<sup>261</sup> Ibid., at 7 and 13.

<sup>262</sup> Ibid.

no clear judicial indication of when discrimination based on dress would be actionable, this paper argues that this provision could be interpreted as an explicit prohibition of appearance discrimination.

The scope of the freedom from discrimination based on dress can only be understood by first defining what ‘dress’ means, then applying the Constitutional principles of interpretation to the meaning. The term dress is defined as *‘apparel or clothing, the covering, adornment, or appearance appropriate or peculiar to a particular time, or to add decorative details or accessories to [something]’*.<sup>263</sup> The word ‘dress’ is also applied in the context of hair. To ‘dress’ hair is defined as *‘to arrange (the hair) by combing, brushing, or curling’*.<sup>264</sup>

The interpretation of the freedom from discrimination based on dress must also follow the Constitutional rules of interpretation, which state that ‘The Constitution shall be interpreted in a manner that:

- a. promotes its purposes, values, and principles;
- b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. permits the development of the law; and
- d. contributes to good governance.’<sup>265</sup>

Additionally, the case of *Kenya Human Rights Commission v Communications Authority of Kenya*<sup>266</sup> stipulates that the Constitution cannot be interpreted in the same manner as legislation. The court in the abovementioned case, quoted the late Mahomed AJ who described the Constitution as *‘a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, and the articulation of the values bonding its people and disciplining its government’*.<sup>267</sup> As a result, the Constitution must be interpreted in a *‘broad, liberal and purposive’* manner which highlights *‘the spirit and tenor of the Constitution’*.<sup>268</sup> Lastly, the court held that *‘[when] interpreting constitutional rights, close scrutiny should be given to the language of the*

---

<sup>263</sup> Merriam-Webster ‘Dress’ n.d 1 and 3.

<sup>264</sup> Merriam-Webster ‘Dress’ n.d 6 (b) (1).

<sup>265</sup> Article 259 (1), Constitution of Kenya 2010.

<sup>266</sup> *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR.

<sup>267</sup> *Ibid.*, para 47.

<sup>268</sup> *Ibid.*, para 47.

*Constitution itself, in ascertaining the underlying meaning and purpose of the provision in question.*<sup>269</sup>

The literal definition of dress coincides with appearance discrimination based on mutable characteristics. The term ‘Apparel or clothing’ in the literal definition of dress, relates to the mode of dressing, while ‘adding decorative details or accessories’ relates to the modes of grooming such as tattoos or piercings, which are considered accessories or decorative details to an individual’s appearance. Lastly, the term dress in relation to hairstyles is also defined as ‘to arrange (the hair) by combing, brushing, or curling’.<sup>270</sup> It is, therefore, reasonable to conclude that the freedom from discrimination based on dress, encompasses all mutable characteristics including hairstyles, tattoos, piercings, and choice of dressing.

Additionally, the application of the principles of constitutional interpretation as prescribed by Article 259 of the Constitution and the case of *Kenya Human Rights Commission v Communications Authority of Kenya*,<sup>271</sup> also supports the conclusion that the right to freedom from discrimination based on dress, can be interpreted to mean an individual’s mode of dressing and grooming. Courts have declared themselves on the matter of constitutional interpretation by stating that the Constitution must be interpreted in a ‘broad, liberal and purposive’ manner.<sup>272</sup> Dress, on the other hand, is also defined to include clothing, arranging of hair, decorative details, and accessories. The interpretation of the freedom from discrimination based on dress in a liberal, broad, and purposive manner, agrees with the assertion that the aforesaid freedom should cover the entire concept of appearance discrimination based on mutable characteristics, including grooming practices such as hairstyles, body art, and piercings.

The broad interpretation discussed above, also adheres to the constitutional mandate to interpret the Bill of Rights in a manner that promotes the rule of law and human rights, the development of the law, and constitutional values. The interpretation of the freedom from discrimination based on dress as an explicit prohibition of appearance discrimination, upholds human rights such as the freedom of expression, and the freedom from discrimination based on various grounds such as sex,

---

<sup>269</sup> Ibid., para 47.

<sup>270</sup> Merriam-Webster ‘Dress’ n.d 6 (b) (1).

<sup>271</sup> *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR.

<sup>272</sup> Ibid., para 47.

race, religion, and culture. It also promotes national values such as the principle of inclusiveness, equity, equality, human rights, and non-discrimination. Lastly, it compels Kenyan law to develop and regulate this increasing form of discrimination. It is reasonable to therefore conclude, that the freedom from discrimination based on dress, extends its protection to all aspects of appearance discrimination based on mutable characteristics, for example, dressing and grooming which includes hairstyles, piercings, and body art.

#### b) Other Grounds

According to the legislative language of Article 27 of the Constitution, the list of grounds for non-discrimination are not exhaustive. This non-exhaustive quality is evidenced by the use of the term ‘includes’ which is defined by the Constitution to mean ‘includes, but is not limited to’.<sup>273</sup> This suggests that the courts can infer other grounds not explicitly mentioned under the Constitution.

The Constitution further stipulates that it should be interpreted in a manner that promotes its values and principles, advances the rule of law and the human rights provided under the Bill of Rights, and allows for the development of the law.<sup>274</sup> In accordance with these rules of interpretation and the legislative language of Article 27, appearance discrimination can be reasonably inferred as one of the grounds not exclusively mentioned by the Constitution.

The inference of appearance discrimination as a ground for non-discrimination aligns with the constitutional rules of interpretation because it promotes the Bill of Rights, and advances and develops the rule of law to accommodate an emerging form of discrimination, which continues to undermine the Bill of rights. Lastly, the discussed interpretation also advances the national values and principles prescribed by the Constitution.

### *II. Appearance Discrimination and its Intersection with Other Forms of Discrimination*

Appearance discrimination circumvents the legal protection afforded by anti-discrimination laws, and provides an avenue for institutions to perpetuate discrimination based on protected characteristics.<sup>275</sup> As extensively discussed in chapter two, appearance discrimination intersects with other protected forms of discrimination such as sex, race, religion, and culture. This

---

<sup>273</sup> Article 259 (4) (b), Constitution of Kenya 2010.

<sup>274</sup> Article 259 (1), Constitution of Kenya 2010.

<sup>275</sup> Rhode, 2009: 1033.

intersection not only violates the national values of Kenya upon which the Constitution should be interpreted, but also the specific rights provided for under the Bill of Rights.

Dressing and grooming as discussed in chapter two, correlates to the expression of religion, culture, race, and gender. Choice of dressing and grooming can be used to communicate one's gender, especially in circumstances where it does not coincide with one's sex.<sup>276</sup> Moreover, certain dressing and grooming practices specifically relate to an individual's expression and practice of religion (hijab in Muslims), culture (dreadlocks in Rastafarians), and race (protective hairstyles used by black girls such as braids). Each intersection is discussed below on an individual basis.

#### a) Intersection with Sex

Appearance discrimination has been used to marginalize women through the propagation of dress codes and grooming policies that are rooted in sexism as discussed in chapter two. Institutions impose sexist dress codes and grooming practices that sexualize women, either by reinforcing gender norms on how a woman should look or appear (for example, mandating that employees wear makeup or high heels), or policing what women wear (for example, length checks that specifically target girls in schools).

In schools, these sexist dress codes and grooming policies disproportionately affect girls by disrupting their education when asked to leave class, and exposing them to an increased probability of dress code violation.<sup>277</sup> In the workplace, sexist dress codes and grooming policies restrict professional advancement by placing a glass ceiling on women, who are judged for their appearance rather than their qualifications.<sup>278</sup> Lastly, sexist dress codes and grooming policies endanger both girls and women by exposing them to archaic social norms that promote the rape culture and victim blaming as discussed in chapter two.<sup>279</sup>

Appearance discrimination is therefore, regulated when it intersects with sex as elucidated by the provisions of the Constitution and Kenyan legislation. This regulation is afforded because

---

<sup>276</sup> The World Health Organization differentiates sex and gender as follows: 'Sex is the different biological and physiological characteristics of males and females, such as reproductive organs, chromosomes, hormones while gender is the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men'. See 'Sex and Gender' n.d.

<sup>277</sup> Martin and Brooks, 2021: 2.

<sup>278</sup> Glick and Fiske, 2011: 530.

<sup>279</sup> Leighton, 2017.

appearance discrimination violates the freedom from discrimination based on sex, and the right to equal protection by the law as encompassed under the Constitution and various legislation. Lastly, appearance discrimination violates the principles of non-discrimination and protection of the marginalized, equality, equity, and social justice as provided under the national values.

#### b) Intersection with Race and Culture

Institutions perpetuate racist notions by prescribing rules of professionalism that demean Kenya's rich and diverse culture, hence, exposing marginalized communities to scrutiny and discrimination for failing to conform to western standards of professionalism. The obsession with western standards of professionalism undermines the expression of racial, cultural, and ethnic diversity in Kenya, therefore, offending the freedom from discrimination based on race, the right to culture, and the right to equal protection by the law.

Additionally, appearance discrimination as it intersects with race, offends the principles of non-discrimination and protection of the marginalized, equality, inclusiveness, equity, and social justice. The Constitution and the various legislations discussed above, require the elimination of discrimination based on race without delay, and the promotion of cultural and ethnic diversity. Appearance discrimination can therefore be regulated when it intersects with race as shown by the provisions of the Constitution and Kenyan legislation as discussed earlier.

#### c) Discrimination Based on Religion and Culture

The Constitution provides for an individual's right to religion<sup>280</sup> and culture.<sup>281</sup> The right to religion includes the right to practice and manifest religion without any unjustified repercussions, as well as not to be coerced into acting in any manner that contradicts one's belief or religion.<sup>282</sup> The right to culture, on the other hand, mandates the State to put in place affirmative action programmes designed to develop cultural and ethnic values, languages, and practices.<sup>283</sup>

Institutions have cited reasons such as maintaining an educational or professional environment through homogeneity, when justifying dress codes.<sup>284</sup> The preference for homogeneity in

---

<sup>280</sup> Article 32, Constitution of Kenya 2010.

<sup>281</sup> Ibid., Article 44.

<sup>282</sup> Ibid., Article 32 (4).

<sup>283</sup> Ibid., Article 56.

<sup>284</sup> Mahajan, 2007: 165.

institutions may seem neutral at face value, however, such preference indirectly discriminates against persons who identify with a religion or culture that requires the physical manifestation of their beliefs. Some religions and cultures do not require the daily or constant physical manifestation of their faith, culture, and belief through dressing or grooming practices. On the other hand, some religions such as Islam, and cultures such as Rastafarianism, require adherence to prescribed dressing and grooming rules. Homogeneity, therefore, indirectly discriminates against religions and cultures that prescribe dressing and grooming rules and unfairly favours cultures and religions that do not have appearance specifications.<sup>285</sup>

Promoting an educational or professional environment in institutions through homogeneity restricts the right to practice one's religion and/or culture. These policies, therefore, offend the right to culture and the freedom of religion as protected under the Constitution and legislation as discussed above. Prescribing dress codes and grooming practices that prohibit religious or cultural expression also amounts to coercing an individual to act in a manner that contradicts their belief, religion, or culture, hence, contradicting the principle of non-discrimination and protection of marginalized communities under the national values. Appearance discrimination is therefore regulated when it intersects with religion and culture, as elucidated by the provisions of the Constitution and Kenyan legislation.

#### d) Proof of Discrimination

Discrimination under the Kenyan Constitution can be indirect or direct. The court in the case of *Gichuru v Package Insurance Brokers Ltd*<sup>286</sup> distinguished between direct and indirect discrimination, by defining direct discrimination as 'treating someone less favourably because they possess an attribute such as race, sex, or religion [as] compared to someone without that attribute in the same circumstances'.<sup>287</sup> Indirect discrimination, on the other hand, was defined as 'setting a condition or requirement which is a smaller proportion of [what] those with the attribute are able to comply with, without a reasonable justification'.<sup>288</sup>

---

<sup>285</sup> Mahajan, 2007: 165.

<sup>286</sup> *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (eKLR) (22 October 2021) (Judgment).

<sup>287</sup> *Ibid.*, para 6.

<sup>288</sup> *Ibid.*, para 6.

The court in *Gichuru v Package Insurance Brokers Ltd*<sup>289</sup> further laid out the differences between indirect and direct discrimination. The court held that direct discrimination requires ‘a causal link between the less favourable treatment and the protected characteristic’, while indirect discrimination requires ‘a causal link between the provision, criterion or practice and the particular disadvantage suffered by the group and the individual’.<sup>290</sup>

A claimant suing under direct discrimination must prove 1) that the differentiation complained about, amounts to discrimination.<sup>291</sup> One can successfully prove that the differentiation amounts to discrimination, if it is based on a specified and legally protected characteristic for example, sex.<sup>292</sup> The Claimant must also show a correlation between the discrimination and the protected characteristic.<sup>293</sup> 2) The discrimination has to be unfair, which is evidenced by the effect suffered by the Claimant.<sup>294</sup> The requirement that the discrimination must be unfair, aims to exclude affirmative action. The court recognizes that when proving discrimination, one may have to look into the motivation or intention of the person or institution perpetuating the unfair discrimination.<sup>295</sup> Lastly, 3) the claimant must prove that the unfair discrimination cannot be justified by a legal and reasonable aim or purpose.<sup>296</sup>

On the other hand, to successfully claim under indirect discrimination a Claimant must 1) identify the alleged discriminatory criteria, or provision applicable and 2) identify a pool that shall be used to compare the applicable disadvantage inflicted, for purposes of determining the issue of disparate impact.<sup>297</sup> Additionally, 3) the Claimant must show the personal disadvantage occasioned by the alleged discriminatory criteria or provision, and 4) show that the said criteria or policy cannot be objectively justified by an authentic reason or aim.<sup>298</sup> Lastly, if the court finds that the

---

<sup>289</sup> Ibid., para 8 (b).

<sup>290</sup> Ibid., para 8 (b).

<sup>291</sup> *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR para 90.

<sup>292</sup> *Al Yusra Restaurant Ltd v Kenya Conference of Catholic Bishops & another* [2017] eKLR para 83.

<sup>293</sup> Ibid., para 83 and 86.

<sup>294</sup> *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR para 90.

<sup>295</sup> *Al Yusra Restaurant Ltd v Kenya Conference of Catholic Bishops* [2017] para 88.

<sup>296</sup> *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR para 93 and 94.

<sup>297</sup> *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (eKLR) (22 October 2021) (Judgment) para 7.

<sup>298</sup> Ibid., para 7.

discriminatory policy advances the achievement of a legitimate aim, it will consider whether the achievement of the legitimate aim is proportionate to the means used.<sup>299</sup>

An individual affected by appearance discrimination based on its intersection with any of the discussed protected forms, must therefore, determine whether the discrimination was direct or indirect, then ensure that the intersection meets the criteria specified above. Direct discrimination protects against overt prejudice, while indirect discrimination protects against subtle prejudice.

### *III. Rights Generally Applicable to Both Appearance Discrimination as an Individual Concept and When Appearance Discrimination Intersects with Other Protected Forms of Discrimination.*

#### *a) Right to Education and Fair Labour Practices*

The right to education is protected under the Constitution and reiterated under educational legislation. Appearance discrimination affects the right to education when students are taken out of class or suspended for dress code violations. Consequently, the violation of the right to education translates into a ripple effect that affects the grades and performance of the punished students.<sup>300</sup> As discussed in chapter two, appearance discrimination predominantly affects marginalized persons such as girls and those from marginalized communities. Suspending or removing students from class simply because of their choice of dressing and grooming, therefore, continues to entrench inequality by compromising the education of children from vulnerable groups.

The Constitution also provides for the right to fair labour practices<sup>301</sup> in the workplace, which is reiterated in employment laws. The right to fair labour practices includes the right to reasonable working conditions,<sup>302</sup> which are violated by the imposition of dress codes and grooming practices that disproportionately affect vulnerable groups such as women, or persons from marginalized cultures and religions. Individuals from marginalized groups are, therefore, exposed to dress codes and grooming practices that unfairly curb their gender, religious, and cultural expression, hence creating a hostile work environment for them.

---

<sup>299</sup> Ibid., para 7.

<sup>300</sup> Whitman, 2020: 72.

<sup>301</sup> Article 41(1), Constitution of Kenya 2010.

<sup>302</sup> Ibid., Article 41(2).

Appearance discrimination equally violates the principle of equality and equity by glorifying appearance in institutions, at the expense of academic qualifications and job experience which are the only relevant characteristics in schools and workplaces. The arbitrary adoration of appearance as discussed in chapter two, denies employees and students who do not conform to the societal and institutional perception of professionalism, access to education, and equality in employment. When the focus in an institution shifts from academic achievement or job qualification to appearance, the principles of equality and equity are undermined since individuals are judged on irrelevant characteristics. As a result, the right to education, fair labour practices, and non-discrimination as provided in the Constitution and various institutional legislations are violated.

#### b) Freedom of Expression

The freedom of expression under the Constitution protects the right to ‘seek, receive or impart information or ideas as well as artistic creativity’.<sup>303</sup> The term impart means to ‘communicate information to someone’.<sup>304</sup> Appearance can be used as a powerful tool of communication, for example, an individual can use appearance to communicate their religion, culture, gender, and sexuality to the public.<sup>305</sup> Additionally, dressing and grooming has been used as a tool of communicating an individual’s opinions on political, social, and economic matters.<sup>306</sup> The freedom of expression can therefore be infringed upon when one’s dressing or grooming is intended to communicate a message.

#### IV. Conclusion

An institution’s arbitrary regulation of dressing and grooming practices contradicts the essence of anti-discrimination laws. As discussed above, appearance discrimination infringes on Kenya’s national values, especially the principles of non-discrimination and protection of the marginalized, inclusiveness, social justice, equality, and equity. The arbitrary restriction on dressing and grooming practices by institutions, also offends the rights provided under the Bill of Rights such as freedom from discrimination, freedom of conscience, religion, thought, belief, and opinion as well as the right to equal protection by the law, and right to culture.

---

<sup>303</sup> Ibid., Article 33.

<sup>304</sup> Cambridge Dictionary ‘Impart’ n.d.

<sup>305</sup> Mahajan, 2007: 165.

<sup>306</sup> *Tinker v Des Moines Independent Community School District* 393 U.S. 503, 506 (1969).

A victim of appearance discrimination in Kenya can, therefore, pursue legal recourse for appearance discrimination in the following ways:

- i. Appearance discrimination as an individual concept can arguably be enforced under the freedom from discrimination based on dress, as stated under the Constitution. Despite the lack of jurisprudence on this right, the law of constitutional interpretation supports the inference that appearance discrimination falls under the protection of this right.
- ii. The grounds for discrimination under the Constitution are not exhaustive, therefore, a victim of appearance discrimination can argue that this form of discrimination can be inferred as an implied right.
- iii. Freedom of expression can be invoked in circumstances where the victim of appearance discrimination intended to communicate a message, such as their social, or political opinion, and/or their religion, culture, or gender.
- iv. When appearance discrimination intersects with other forms of discrimination as protected by the Constitution, one can sue because they were discriminated upon, based on legally protected characteristics such as sex, race, religion, and culture. The complainant would therefore invoke the right to non-discrimination based on the protected characteristic, for example, sex or race, and/or the right to religion or culture. Additionally, the complainant can also rely on the freedom from discrimination based on dress.
- v. The right to education and the right to fair labour practices can also be invoked in support of appearance discrimination claims.

Lastly, it is imperative to note that the Constitution stipulates that most rights and freedoms are not absolute,<sup>307</sup> therefore, the rights and freedoms discussed above are subject to constitutional limitations. However, the discussed rights can only be limited according to the parameters set out by the Constitution.<sup>308</sup> Any right or freedom stipulated under the Constitution should only be limited if that limitation is reasonable and justifiable in an open and democratic society, ‘...based on human dignity, equality, and freedom, [and] taking into account all relevant factors, including-

- a. the nature of the right or fundamental freedom;
- b. the importance of the purpose of the limitation;

---

<sup>307</sup> Article 25, Constitution of Kenya 2010.

<sup>308</sup> Ibid., Article 24.

- c. the nature and extent of the limitation;*
- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*<sup>309</sup>

Although the rights and freedoms in support of appearance discrimination can be limited, these limitations must satisfy the above constitutional parameters. An individual can therefore fully enjoy the full range of rights and freedoms, unless an institution can prove that the said rights should be limited under the discussed constitutional parameters.

## 3.2 Legal Underpinning in the United States of America

### 3.2.1 The Constitution

The Constitution of the United States of America (hereinafter the US Constitution)<sup>310</sup> establishes a federal system of government that gives particular powers to the federal government and the remainder to the States.<sup>311</sup> The States, on the other hand, can choose to delegate some of their powers to local governments such as municipalities or counties.<sup>312</sup> The US Constitution forms the basis for all federal and state law and as a result, must be interrogated to understand the foundation of the protections, afforded to appearance discrimination victims.

#### *I. First Amendment*

The First Amendment of the US Constitution provides for the freedom of expression.<sup>313</sup> The Supreme Court has interpreted the freedom of expression to include both verbal speech and non-verbal speech/ expressive conduct.<sup>314</sup> The Supreme Court has further expressed what amounts to expressive conduct under the First Amendment as, any conduct that ‘is sufficiently imbued with elements of communication’.<sup>315</sup>

---

<sup>309</sup> Ibid., Article 24.

<sup>310</sup> Constitution of the United States of America, 1787.

<sup>311</sup> Federal Judicial Center, n.d.

<sup>312</sup> ‘State and Local Government’ n.d.

<sup>313</sup> Amendment I, Constitution of the United States of America 1787.

<sup>314</sup> Murray, 2013: 18.

<sup>315</sup> *Texas v Johnson* 491 U.S. 397 (1989) at 404.

Additionally, the court stipulated that expressive conduct need not be ‘succinctly articulable’,<sup>316</sup> however, one must prove ‘1) the intent to convey a particular message and 2) that under the surrounding circumstances, there exists a great likelihood that the message would have been understood by those viewing it’.<sup>317</sup> Appearance discrimination can therefore, be enforced under the freedom of expression if it meets the criteria of expressive conduct.

## *II. Fourteenth Amendment*

The Fourteenth Amendment comprises of two clauses namely the due process clause and the equal protection clause. The due process clause stipulates that ‘no State shall deprive any person of life, liberty, or property, without due process of law’, while the equal protection clause instructs that ‘no State shall deny to any person within its jurisdiction the equal protection of the law’.<sup>318</sup> A number of complainants claiming discrimination based on appearance, have successfully been initiated under the equal protection clause (hereinafter EPC).<sup>319</sup>

The Supreme Court has held that discrimination based on sex<sup>320</sup> and race<sup>321</sup> also violates the constitutional right to equal protection under the law. Therefore, when appearance discrimination intersects with other protected forms of discrimination, the Fourteenth Amendment may be invoked.

### 3.2.2 Federal Legislation

#### *I. Educational Laws*

##### a) Title IV of the Civil Rights Act of 1964

Title IV of the Civil Rights Act 1964 (hereinafter Title IV) provides for the freedom from discrimination of any child in public education based on race, colour, religion, sex, or national origin.<sup>322</sup> The Attorney General is empowered by Title IV to institute a civil suit on behalf of a victim of discrimination if 1) the suit has merit, 2) the Attorney General issues a notice to the offending educational institution and is satisfied that the institution has had enough time to correct

---

<sup>316</sup> *Hurley v Irish American Gay, Lesbian & Bisexual Group of Boston* 515 U.S. 557 (1995) at 569.

<sup>317</sup> *Spence v Washington* 418 U.S. 405 (1974) at 410-411.

<sup>318</sup> Amendment XIV Section 1, Constitution of the United States of America 1787.

<sup>319</sup> Skerry, 2020.

<sup>320</sup> *Reed v Reed* 404 U.S. 71 (1971) at 76-77.

<sup>321</sup> *Brown v Board of Education of Topeka* 347 U.S. 483 (1954) at 495.

<sup>322</sup> Section 407 [42 U.S.C. 2000c-6] and Section 409. [42 U.S.C. 2000c-8], Title IV of the Civil Rights Act 1964.

the conditions of the complaint but did not, and 3) the complainant is unable to institute and maintain a suit for purposes of obtaining legal relief.<sup>323</sup> The Attorney General’s right to institute a suit, however, does not negate the ‘right of any person to sue for or obtain relief in any court against discrimination in public education’.<sup>324</sup> Therefore, when appearance discrimination intersects with other protected forms of discrimination in schools, Title IV may be relied upon.

#### b) Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 (hereinafter Title IX) outlaws discrimination based on sex.<sup>325</sup> Courts have held that for a student to enjoy the protection afforded under Title IX, they must show ‘1) they were excluded from participation in, denied the benefits of, or subjected to discrimination of an educational program or activity, 2) that the educational institution was receiving federal financial assistance at the time, and 3) that the discrimination caused harm’.<sup>326</sup> Therefore, discrimination against a student based on the intersection of sex and appearance discrimination may be actionable under Title IX, if the claimant meets the specified criteria.

#### c) The Equal Educational Opportunities Act of 1974

The Equal Educational Opportunities Act of 1974 (hereinafter EEOA) aims to provide equal educational opportunity for all children enrolled in public schools, by eliminating discrimination based on race, colour, sex, or national origin.<sup>327</sup> The EEOA outlaws discrimination perpetuated by an educational institution through deliberate segregation, assignment of schools, transfer of students whether voluntary or otherwise, or failure to take affirmative steps in institutions where segregation once occurred.<sup>328</sup> Therefore, the intersection between appearance discrimination and other protected forms of discrimination, maybe enforced through the EEOA.

---

<sup>323</sup> Section 407 [42 U.S.C. 2000c–6] (a), Title IV of the Civil Rights Act 1964.

<sup>324</sup> Section 409 [42 U.S.C. 2000c–8], Title IV of the Civil Rights Act 1964.

<sup>325</sup> Section 1681 (a), Title IX of the Education Amendments of 1972 20 U.S.C. § 1681 – 1688.

<sup>326</sup> *Peltier v Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460 (E.D.N.C. Mar. 30, 2017) at 3.

<sup>327</sup> Section 1701 and Section 1703, Equal Educational Opportunities Act of 1974.

<sup>328</sup> Section 1703, Equal Educational Opportunities Act of 1974.

## II. Employment Laws

### a) Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (hereinafter Title VII) seeks to eliminate the main forms of discrimination perpetuated by employers, employment agencies, and/or labour organizations.<sup>329</sup> The forms of discrimination criminalized by Title VII, include race, colour, sex, religion, and national origin.<sup>330</sup> Title VII comprehensively regulates against the aforementioned forms of discrimination in the employment sector, during ‘*hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other terms or conditions and privileges of employment.*’<sup>331</sup>

Discrimination claims are premised on two significant concepts namely, disparate treatment and disparate impact, as discussed below.

#### i. Disparate Treatment

Disparate treatment can be defined as the intentional, prejudicial, and/or unfair treatment by an employer towards an employee, as compared to other employees, because the former belongs to a protected class due to their sex, religion, race, or national origin.<sup>332</sup> The Supreme Court in the locus classicus case of *McDonnell Douglas Corp. v Green*,<sup>333</sup> stipulated the test required for an employee to successfully prove disparate treatment. An employee claiming under disparate treatment must (1) show that they belong to a protected class, (2) show that they are qualified for the position (3) adduce evidence that they suffered adverse treatment in their place of employment because of their protected class, despite being qualified and (4) that the discriminatory treatment towards them was intentional and deliberate.<sup>334</sup>

#### ii. Disparate Impact

The doctrine of disparate impact as entrenched in the case of *Griggs v Duke Power*,<sup>335</sup> outlaws the formulation, promulgation, and enforcement of neutral employment rules and policies whose

---

<sup>329</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>330</sup> Section 703. [42 U.S.C. 2000e-2], Title VII of the Civil Rights Act of 1964.

<sup>331</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>332</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>333</sup> *McDonnell Douglas Corp. v Green* 411 U.S. 792 (1973) at 802.

<sup>334</sup> *Ibid.*, at 802.

<sup>335</sup> *Griggs v Duke Power Co.*, 401 U.S. 424 (1971) at 424-425.

effect leads to an unequal, prejudicial, and adverse impact on some employees based on protected characteristics such as race, sex, and religion.<sup>336</sup> The law, however, provides that an employer can adduce evidence to show that the policy is business related and/or necessary for business operation.<sup>337</sup>

Disparate impact unlike disparate treatment, does not require the employee to prove the employer's intent to discriminate. The law mandates that the employee proves (1) the existence of a neutral policy, standard, or practice, (2) whose impact adversely and disproportionately affects employees based on their protected characteristics.<sup>338</sup> It is imperative to note that the employees under a protected group such as sex, race, or religion must demonstrate that the employer has placed an unequal burden on their group, as compared to the other groups.<sup>339</sup> Furthermore, no reasonable explanation or legitimate business necessity should adequately justify the disputed policy.<sup>340</sup> Upon proving the discussed criteria, a victim of appearance discrimination as it intersects with any other protected form of discrimination can invoke Title VII in the enforcement of their rights.

### 3.2.3 State Legislation

#### *I. CROWN Act*

The CROWN Act which is an acronym for 'Creating a Respectful and Open World for Natural Hair' was first enacted by the State of California.<sup>341</sup> The CROWN Act aims to 'ensure protection against discrimination based on race-based hairstyles, by extending statutory protection to hair texture and protective styles such as braids, locs, twists, and knots in the workplace and public schools'.<sup>342</sup> Initially, the CROWN Act was a State legislation in California, meaning it was only applicable in that State. However, other States have enacted statutes modelled along the CROWN Act. As of February 2023, 20 States have enacted individual versions of the CROWN Act.<sup>343</sup>

Additionally, the US House of Representatives approved a federal version of the CROWN Act and sent it to the Senate for consideration (hereinafter the Bill). The Bill would have become federal

---

<sup>336</sup> Elane, 1988: 417.

<sup>337</sup> Cavico, Muffler and Mujtaba, 2012 :791.

<sup>338</sup> *Griggs v Duke Power Co.*, 401 U.S. 424 (1971) at 431. See further Zuck, 1989: 535-539.

<sup>339</sup> Elane, 1988: 417.

<sup>340</sup> Cavico, Muffler and Mujtaba, 2012: 791.

<sup>341</sup> CROWN Act, S.B. 188, 2019 Leg., Reg. Sess. (California 2019).

<sup>342</sup> Chasity, 2021: 29.

<sup>343</sup> The CROWN Act, 2022.

law which binds all States, if it was passed by the US Senate and signed by the President.<sup>344</sup> However, the Senate Republicans blocked the passage of the CROWN Act, therefore entrenching institutional racism based on appearance, specifically through hairstyles.<sup>345</sup>

The CROWN Act recognized that individuals of African descent are subjected to discrimination in schools and workplaces, for their hair texture and hairstyles based on systemic and institutionalized racism, racial biases, and stereotypes.<sup>346</sup> Consequently, the Act intended to create ‘a clear and comprehensive law [that] addresses the systematic deprivation of education, employment, and other opportunities, based on hair texture and hairstyles that are commonly associated with race or national origin’.<sup>347</sup> Additionally, the Act ‘intended to prevent educational, employment, and other decisions, practices, and policies generated by or reflecting negative biases and stereotypes related to race or national origin’.<sup>348</sup>

The rejection of the federal version of the CROWN Act by the Senate Republicans means that only 20 States are bound by their individual versions of the CROWN Act.

### 3.2.4 Local Laws

#### *I. Urbana (Illinois)*

The City of Urbana in Illinois enacted the City of Urbana Municipal Code in 1979, which regulates appearance discrimination by stipulating that:

‘It is the intent of the City of Urbana in adopting this article, to secure an end, in the city, to discrimination, including, **but not limited to**, discrimination by reason of **race**, colour, creed, class... **religion, sex... personal appearance...** or **any other discrimination based upon categorizing or classifying a person rather than evaluating a person's unique qualifications relevant to an opportunity** in housing, **employment**, credit or access to public accommodations.’<sup>349</sup> (emphasis added)

---

<sup>344</sup> States News Service, 2022.

<sup>345</sup> Ibid.

<sup>346</sup> Section 2(b) CROWN Act of 2020, H.R. 5309, 116<sup>th</sup> Cong. (2020).

<sup>347</sup> Section 2(b)(2) CROWN Act of 2020, H.R. 5309, 116<sup>th</sup> Cong. (2020).

<sup>348</sup> Section 2(b)(4) CROWN Act of 2020, H.R. 5309, 116<sup>th</sup> Cong. (2020).

<sup>349</sup> Section 12-37 City of Urbana Municipal Code.

The above-described provision starts by providing a non-exhaustive list through the phrase ‘not limited to’. Additionally, this provision explicitly includes personal appearance as one of the qualities an individual should not be discriminated against. Lastly, it highlights the intent of all anti-discriminatory laws which is evaluating an individual based on the qualifications necessary for the opportunity in question.

The Urbana Municipal Code defines personal appearance as:

‘The outward appearance of any person, irrespective of sex, with regard to **bodily condition or characteristics**, such as weight, height, facial features, or **other aspects of appearance**. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.’<sup>350</sup>(emphasis added)

The City of Urbana adopts a slightly comprehensive definition of physical appearance to include ‘bodily characteristics or other aspects of appearance’.<sup>351</sup> The phrase other aspects of appearance can be interpreted to mean mutable characteristics such as dressing, grooming, hairstyles, body art, and piercings. However, the Code specifies that discrimination based on appearance is acceptable for the ‘requirement of cleanliness, uniforms, or prescribed attire’ when seeking admission in a public accommodation provided the requirement is uniformly applied, or for employees in their place of employment, when it is necessary for a business purpose.<sup>352</sup>

## *II. District of Columbia (Washington DC)*

The District of Columbia also known as Washington DC is not a state but a district, which doubles up as the capital city of the USA. This district explicitly regulates against appearance discrimination, by forbidding discrimination based on personal appearance as stipulated in the District of Columbia Code:

‘It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of

---

<sup>350</sup> Section 12-39 City of Urbana Municipal Code.

<sup>351</sup> Section 12-39 City of Urbana Municipal Code.

<sup>352</sup> Section 12-39 City of Urbana Municipal Code.

individual merit, including, **but not limited to**, discrimination by reason of race, colour, religion, national origin, sex, age, marital status, **personal appearance**, sexual orientation, **gender identity or expression**... and place of residence or business.’<sup>353</sup> (emphasis mine)

The DC Code further defines personal appearance as:

‘...the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, **manner or style of dress, and manner or style of personal grooming, including, but not limited to, hairstyle and beards**. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose; or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual.’<sup>354</sup>(emphasis mine)

The District of Columbia Code adopts an inclusive approach with appearance discrimination based on mutable characteristics. The reference to bodily condition or characteristics seems to protect against appearance discrimination based on immutable characteristics, while reference to the manner of dressing or personal grooming seems to outlaw appearance discrimination based on mutable characteristics.

Nevertheless, the freedom from discrimination based on personal appearance is not absolute as elucidated above. The DC Code highlights some exceptions which may warrant appearance discrimination such as the ‘requirement of cleanliness and uniformity when equally applied to the public, or all employees when a reasonable business purpose exists, or for the protection of any person’s health, welfare or safety’.<sup>355</sup>

The incorporation of exceptions ensures that the law balances the rights of an individual/ employee vis a vis, the rights of the public, and/or the employer depending on the circumstances. The public’s right to health, welfare, or safety is prioritized over an individual’s right to expression, while an

---

<sup>353</sup> Chapter 14, Section 2-1401.01, District of Columbia Code.

<sup>354</sup> Chapter 14, Section 2-1401.02 (22), District of Columbia Code.

<sup>355</sup> Chapter 14, Section 2-1401.02 (22), District of Columbia Code.

employer is afforded the right to discriminate based on appearance if it is necessary for the business.

### *III. Howard County, Maryland*

The Civil Rights Code of Howard County in Maryland State prohibits appearance discrimination by providing that:

‘The Howard County Government shall foster and encourage the growth and development of Howard County so that all persons shall have an equal opportunity to pursue their lives free of discrimination. Discrimination practices [are] based upon race, creed, religion, handicap, colour, sex... [and] **personal appearance...**’<sup>356</sup> (emphasis added)

The Howard Civil Rights Code adopts an inclusive definition of personal appearance by stipulating that:

‘Personal appearance is the outward appearance of a person with regard to **hairstyle, facial hair, physical characteristics or manner of dress**. It does not relate to a requirement of cleanliness, uniforms or prescribed attire, when uniformly applied, for admittance to a public accommodation or to a class of employees.’<sup>357</sup>

The definition above explicitly includes appearance discrimination based on mutable characteristics by incorporating ‘hairstyle, facial hair, and manner of dressing’,<sup>358</sup> however, the list prescribed seems to be exhaustive therefore locking out characteristics such as body art. Additionally, the law in Howard County also prescribes for exceptions to the freedom of discrimination based on appearance. The Civil Rights Code of Howard County allows appearance discrimination in circumstances where the ‘requirement of cleanliness, uniforms or prescribed attire is required for admittance to a public accommodation or to a class of employees, provided these rules are uniformly applied’.<sup>359</sup>

---

<sup>356</sup> Title 12, Subtitle 2, Section 12.200, Howard Civil Rights Code.

<sup>357</sup> Title 12, Subtitle 2, Section 12.201 (XV), Howard Civil Rights Code.

<sup>358</sup> Title 12, Subtitle 2, Section 12.201 (XV), Howard Civil Rights Code.

<sup>359</sup> Title 12, Subtitle 2, Section 12.201 (XV), Howard Civil Rights Code.

#### IV. *Madison, Wisconsin*

The Madison Code Ordinances regulates the propagation of appearance discrimination by providing that:

‘The practice of providing equal opportunities in housing, employment, public accommodations, and City facilities to persons without regard to **sex, race, religion**, colour, national origin or ancestry... **physical appearance**... [or] familial status... is a desirable goal of the City of Madison and a matter of legitimate concern to its government.’<sup>360</sup> (emphasis mine)

Additionally, the Madison Ordinance further defines physical appearance as:

‘Physical appearance means the outward appearance of any person, irrespective of sex, with regard to **hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance**. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.’<sup>361</sup> (emphasis added)

The definition of physical appearance as adopted by the Madison Ordinance incorporates appearance discrimination based on mutable characteristics through the explicit reference to ‘hairstyle, beards, manner of dress... [and] other aspects of appearance’.<sup>362</sup> Appearance based on immutable characteristics is also included through phrases such as ‘weight, height [and] facial features’.<sup>363</sup>

Moreover, the Madison Ordinance also provides for exceptions to appearance discrimination in the ‘requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.’<sup>364</sup>

---

<sup>360</sup> Section 39.03(1), Madison Code of Ordinances.

<sup>361</sup> Section 39.03(2), Madison Code of Ordinances.

<sup>362</sup> Section 39.03(2), Madison Code of Ordinances.

<sup>363</sup> Section 39.03(2), Madison Code of Ordinances.

<sup>364</sup> Section 39.03(2), Madison Code of Ordinances.

### 3.2.5 Conclusion

In conclusion, federal law in the US does not explicitly provide for appearance discrimination unless it intersects with other protected forms of discrimination. However, State law and local laws explicitly protect against appearance discrimination. It is imperative to note that State and local laws only bind the specific States and municipalities that have enacted the highlighted.

## 3.3 The Juxtaposition of USA and Kenyan Law

### 3.3.1 Right to Equal Benefit of the Law

The Fourteenth Amendment in the US Constitution provides for equal protection of the law, which has been invoked in cases where appearance discrimination intersects with other protected forms of discrimination. An appropriate example is the case of *Peltier v Charter Day School Inc.*,<sup>365</sup> where the girls in a public school in North Carolina instituted a suit against Charter Day School, claiming that the school's dress code discriminated against girls. The dress code strictly required girls to only wear skirts as compared to their male counterparts who were allowed to wear shorts or trousers.<sup>366</sup> The girls wanted the option of wearing trousers, especially in cold seasons. The complainants argued that the mandatory skirt requirement for girls forced them 'to wear clothing that was less warm and comfortable than the pants their male classmates were permitted to wear [and] restricted [their] physical activity, and distracted them from learning'.<sup>367</sup> The Court ruled in favour of the complainants by stating that the school had failed to offer any evidence showing a comparable burden on the boys, thus offending the Fourteenth Amendment.<sup>368</sup>

The Kenyan Constitution also stipulates that '*every person is equal before the law and has the right to equal protection and equal benefit of the law*'.<sup>369</sup> The application of the equal protection clause to appearance discrimination and its intersection with other protected forms of discrimination in the USA, can be persuasively used to guide the interpretation of the equal protection clause in Kenya. It is, however, imperative to note that the USA jurisprudence on the equal protection provision is only persuasive, not mandatory in Kenya.

---

<sup>365</sup> *Peltier v Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460 (E.D.N.C. Mar. 30, 2017).

<sup>366</sup> *Ibid.*, at 584.

<sup>367</sup> *Ibid.*, at 584.

<sup>368</sup> *Ibid.*, at 597.

<sup>369</sup> Article 27 (1), Constitution of Kenya 2010.

### 3.3.2 The Freedom of Expression

The First Amendment of the US Constitution provides for the freedom of expression.<sup>370</sup> According to the US Supreme Court, freedom of expression protects both verbal speech and non-verbal speech or expressive conduct.<sup>371</sup> The Supreme Court has further stipulated that expressive conduct under the First Amendment need not be succinctly articulated,<sup>372</sup> as long as there exist elements of communication within the conduct in question.<sup>373</sup> To prove sufficient elements of communication, the complainant must have intended to communicate a particular message, which would have been highly likely to be understood by the persons seeing the complainant.<sup>374</sup> The locus classicus case of *Tinker v Des Moines Independent Community School District*<sup>375</sup> as discussed earlier, gives us an indication of when appearance discrimination may be regulated via the freedom of expression. The court upheld the students' freedom of expression, by stipulating that the school violated the First Amendment when they suspended students for wearing a black armband in silent protest of the Vietnam war.<sup>376</sup>

In Kenya, the freedom of expression has modestly been invoked in suits relating to appearance discrimination. The case of *J W M (alias P) v Board of Management O High School*,<sup>377</sup> is an example of the few times a victim of appearance discrimination, invoked the freedom of expression. In this case, a student was sent home and asked to shave off her dreadlocks contrary to her Rastafarian religion and/or culture. The student instituted a suit that invoked the freedom of expression among other rights,<sup>378</sup> however, the court refrained from addressing the freedom of expression but instead determined the suit in relation to the right to religion.<sup>379</sup>

Kenyan courts have abstained from applying the freedom of expression in matters revolving around appearance discrimination. The US on the other hand has brilliantly formulated jurisprudence on how the freedom of expression can be interpreted and applied in matters relating

---

<sup>370</sup> Amendment I, Constitution of the United States of America 1787.

<sup>371</sup> Murray 2013: 18.

<sup>372</sup> *Hurley v Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) at 569.

<sup>373</sup> *Texas v Johnson*, 491 U.S. 397 (1989) at 404.

<sup>374</sup> *Spence v Washington*, 418 U.S. 405 (1974) at 410-11.

<sup>375</sup> *Tinker v Des Moines Independent Community School District* 393 U.S. 503 (1969).

<sup>376</sup> *Ibid.*, at 509.

<sup>377</sup> *J W M (alias P) v Board of Management O High School & 2 others* [2019] eKLR.

<sup>378</sup> *Ibid.*, para 4(a).

<sup>379</sup> *Ibid.*, para 61.

to appearance discrimination. This paper proposes that the Kenyan courts should adopt the jurisprudence formulated by the US courts to curb appearance discrimination where appropriate.

### 3.3.3 Justiciability of Appearance Discrimination

The US federal law does not explicitly protect against appearance discrimination. However, various States, municipalities, and counties have formulated and enacted laws that explicitly protect against appearance discrimination. Additionally, 20 American States have enacted individual versions of the CROWN Act, which are binding in those States. Although State law and local law only binds the specific States, municipalities, or counties in which the law is enacted, the availability of these protections in some jurisdictions is a step in the right direction.

The intersection between appearance discrimination and other forms of discrimination is equally well protected, based on the freedom of expression, freedom of religion, and equal protection of the law. Additionally, the US legislation extensively protects its employees and children against discrimination based on protected characteristics such as sex, race, religion, and national origin.

In Kenya, ‘appearance discrimination’ is not explicitly prohibited by the Constitution or any other legislation. The Constitution, however, provides for the freedom from discrimination based on dress. This freedom, as extensively discussed in section 3.1.3, should be interpreted as a form of protection against appearance discrimination. Kenyan courts are, nevertheless, notorious for interpreting the Constitution in a narrow and restrictive manner. For example, the court may choose to interpret the freedom from discrimination based on dress as a protection only available to specific religious apparel, such as hijabs. This restricted interpretation would negate other grooming practices such as hairstyles, tattoos, and piercings, and other intersections such as race and sexism.

Until the Kenyan courts interpret the freedom from discrimination based on dress, its application to appearance discrimination as advanced in section 3.1.3, remains merely speculative. This uncertainty surrounding the scope of the freedom from discrimination based on dress, renders appearance discrimination largely unregulated in Kenya.

The protection from appearance discrimination and its intersection with other forms of discrimination in Kenya, is inferred from several rights and freedoms such as the freedom of expression, freedom from non-discrimination based on sex, race, religion, and culture, freedom of

religion, right to culture and other institutionally based rights such as the right to education and fair labour practices. The national values and principles, also support the protection of employees and students from appearance discrimination. These constitutional rights are also replicated in Kenyan legislation.

While the Kenyan legal regime extensively offers an array of fundamental human rights and freedoms, the USA legal regime provides better justiciability for appearance discrimination. Various State and local laws in the USA, explicitly protect against appearance discrimination. This explicit protection not only curbs appearance discrimination efficiently, but also provides the *locus standi* needed to institute a suit claiming appearance discrimination.

In Kenya, persons exposed to appearance discrimination as an individual concept (without any intersection with the protected characteristics), have no explicit protection, they can only rely on implied protections. Additionally, victims of appearance discrimination as it intersects with the protected characteristics can only sue based on those protected characteristics, not appearance discrimination.

The Kenyan legal regime should draw inspiration from the local laws in the USA including the CROWN Acts, by explicitly protecting against all aspects of appearance discrimination including hairstyles, tattoos, and piercings, as well as all intersecting characteristics such as race, sex, religion, and culture. The District of Columbia Code is an excellent example of what Kenyan law should emulate. It starts by explicitly prohibiting discrimination based on personal appearance, which is defined in a non-exhaustive manner, and includes an individual's manner or style of dress and personal grooming. Additionally, the District of Columbia has also enacted an individual version of the CROWN Act, which regulates discrimination based on race-based hairstyles. The extensive protection provided by the District of Columbia covers all aspects of appearance discrimination. Kenya should emulate the District of Columbia when interpreting and operationalizing the 'freedom from discrimination based on dress', and enacting legislation that explicitly prohibits against appearance discrimination.

### 3.4 Conclusion

Section 3.1 has extensively discussed how appearance discrimination as a concept, as well as its intersection with other forms of discrimination, is regulated in the Kenyan legal regime. The legal protection afforded to appearance discrimination as an individual concept emanates from implied,

as opposed to explicit provisions. Furthermore, uncertainty looms on whether the Kenyan courts will interpret the freedom from discrimination based on dress, as an explicit protection against appearance discrimination.

The protection afforded to appearance discrimination as it intersects with other forms of discrimination, provides a slightly better framework for victims of appearance discrimination. The victims of appearance discrimination can only obtain legal recourse, if they can prove they were discriminated upon based on a protected characteristic. This protection, though commendable, is still deficient. Anti-discrimination laws based on protected characteristics, such as race, sex, religion, and culture, are specifically formulated to protect those characteristics, not appearance discrimination. Instituting suits based on appearance discrimination and its intersection with the protected characteristics, exposes the victims to injustice when those suits fail to meet the evidentiary burden required by the law.

Kenyan law, therefore, continues to expose marginalized persons and groups to discrimination based on appearance discrimination as an individual concept. Additionally, marginalized persons are still exposed to discrimination based on protected characteristics, since appearance discrimination has been used to circumvent anti-discrimination laws. It is, therefore, imperative for Kenya to operationalize the freedom from discrimination based on dress, in a manner that prohibits against appearance discrimination. Additionally, Kenya must enact legislation that explicitly and conclusively prohibits against appearance discrimination. This legislation will provide the ‘constitutional freedom from discrimination based on dress’, the ‘teeth’ it needs to curb appearance discrimination.

## CHAPTER FOUR

*'People don't like to admit prejudice is real unless they can pinpoint some bigoted boogey man behind the curtain, but the truth is, sometimes it is invisible. [Invisibility] doesn't make [prejudice] any less dangerous.'*<sup>380</sup>

### 4.0 Introduction

Chapter one introduced the concept of appearance discrimination. It started by exploring the halo effect, which is the misconstrued belief that 'what is beautiful is good'.<sup>381</sup> The halo effect associates positive character traits with attractive individuals and negative traits with 'less' attractive individuals. Appearance discrimination derives its premise from the halo effect because it also associates attractive individuals with competence, intelligence, and other positive character traits. Chapter one further established that appearance discrimination is based on a spectrum ranging from mutable to immutable characteristics. This dissertation solely explores appearance discrimination based on mutable characteristics.

Chapter two started by discussing the social dominance theory which explored how appearance discrimination is propagated and maintained in society. Thereafter, chapter two discussed how appearance discrimination manifests in institutions as an individual concept, and through its intersection with other forms of discrimination. The discussion on the manifestation of appearance discrimination whether as an individual concept or through its intersection with other forms of discrimination, extensively demonstrated the detrimental effects of this form of discrimination and disproved the notion that appearance discrimination is a trivial social issue.

Once the misguided belief that 'appearance discrimination is frivolous' was disproved, chapter three explored the various ways in which Kenyan law protects against appearance discrimination. The protection against appearance discrimination in Kenya was then juxtaposed to the legal regime in the USA, for purposes of assessing the efficiency of the Kenyan legal regime. As extensively discussed, the current legal regime governing appearance discrimination in Kenya is marred by uncertainty and implied protections, as opposed to explicit protections. The freedom from discrimination based on dress has the ability to protect against appearance discrimination if

---

<sup>380</sup> All Rise, Season 1 Episode 12 2019. Quoted by Simone Missick acting as Lola Carmichael.

<sup>381</sup> Viviers, 2014.

interpreted progressively, however, the scope of this freedom remains unclear due to lack of jurisprudence.

The only explicit recourse available to the victims of appearance discrimination in Kenya is when appearance discrimination intersects with other legally protected characteristics, such as race, sex, religion, or culture. Nevertheless, it is imperative to note that even when appearance discrimination intersects with other legally protected forms of discrimination, Kenyan law still provides inadequate protection because these laws were not intended to protect against appearance discrimination.

Chapter four aims to provide Kenya with the necessary recommendations needed to effectively formulate a legal regime that adequately protects against appearance discrimination. Section 4.1 starts by discussing the steps the Kenyan legal regime should take to effectively regulate against appearance discrimination. Based on the recommendations discussed in section 4.1, section 4.2 proposes and formulates a draft statute that the Kenyan legal regime can adopt. Finally, this chapter makes concluding remarks to this dissertation.

## 4.1 Recommendations

### 4.1.1 Maximizing on the constitutional freedom from discrimination based on dress

The Constitution of Kenya is commended for its progressive Bill of Rights which includes the right to freedom from discrimination.<sup>382</sup> Article 27 of the Constitution explicitly prohibits against the direct or indirect discrimination of individuals based on various grounds which includes dress.<sup>383</sup> As discussed extensively in chapter three, the Kenyan courts have not pronounced themselves on the scope of the freedom from discrimination based on dress. Additionally, the freedom from discrimination based on dress has not been explained by constitutional experts, nor have there been any scholarly writings about this freedom. Consequently, this dissertation utilized the rules of constitutional interpretation as laid out by the Constitution itself and the Kenyan courts, in a bid to understand the scope of the freedom from discrimination based on dress.

As discussed in chapter three, an analysis of the literal definition of ‘dress’ reveals that it encompasses both dressing and grooming which are the components of appearance discrimination

---

<sup>382</sup> Article 27, Constitution of Kenya 2010.

<sup>383</sup> Article 27 (4), Constitution of Kenya 2010.

based on mutable characteristics. The term ‘Apparel or clothing’ in the literal definition of dress, relates to the mode of dressing, while ‘adding decorative details or accessories’ relates to the modes of grooming such as tattoos or piercings, which are considered accessories or decorative details to an individual’s appearance. Lastly, the term dress in relation to hairstyles is defined as ‘to arrange (the hair) by combing, brushing, or curling’.<sup>384</sup> The literal definition of dress relates to all aspects of appearance discrimination including hairstyles, therefore, the freedom from discrimination based on dress can be interpreted as an explicit prohibition against appearance discrimination.

The second consideration in understanding the scope of the freedom from discrimination based on dress, is the constitutional rules of interpretation laid out by the Constitution. The Constitution of Kenya mandates that its provisions should be interpreted in a manner that ‘*promotes its purposes, values, and principles, advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights, and permits the development of the law*’.<sup>385</sup> As extensively discussed in chapter three, the interpretation that ‘the freedom from discrimination based on dress explicitly prohibits against appearance discrimination’, observes the above constitutional principles of interpretation.

The last consideration is the constitutional rules of interpretation laid out by Kenyan courts. Kenyan courts have pronounced themselves on the matter of constitutional interpretation by stipulating that, the Constitution must be interpreted in a ‘*broad, liberal and purposive*’ manner which highlights ‘*the spirit and tenor of the Constitution*’.<sup>386</sup> Nevertheless, Kenyan courts are still notorious for interpreting the Constitution in a narrow and restrictive manner, despite the discussed requirements of constitutional interpretation. Although the three considerations discussed above agree with the position that freedom from discrimination based on dress should be interpreted in a manner that explicitly protects against appearance discrimination, this interpretation remains speculative at best until the Kenyan courts enforce the said freedom as discussed in this dissertation. This dissertation recommends that Kenyan courts adopt a broad, liberal, and purposive interpretation to the freedom from discrimination based on dress, by interpreting this freedom as an explicit prohibition against appearance discrimination.

---

<sup>384</sup> Merriam-Webster ‘Dress’ n.d 6 (b) (1).

<sup>385</sup> Article 259 (1), Constitution of Kenya 2010.

<sup>386</sup> *Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR para 47.

#### 4.1.2 Explicit protection against appearance discrimination by legislation

As elucidated above, the Constitution of Kenya provides for the freedom from discrimination based on dress, which can be interpreted as a prohibition against appearance discrimination. However, due to lack of jurisprudence on the freedom from discrimination based on dress in Kenya, and the likelihood of Kenyan courts adopting a restrictive interpretation to the said freedom, it is imperative that legislation strengthens the protection against appearance discrimination through explicit prohibition. The express prohibition by legislation would supplement the uncertainty the Constitution has created around the scope of the freedom from discrimination based on dress. Additionally, expressly prohibiting appearance discrimination through legislation provides an opportunity for Parliament to lay out the extent of the protections offered to appearance discrimination, and any exceptions applicable to this right.

This dissertation, therefore, recommends that the Kenyan Parliament should formulate and enact an Act explicitly prohibiting against appearance discrimination. The Act should also be formulated in a manner that operationalizes the freedom from discrimination based on dress, as an explicit protection against appearance discrimination. The proposed Act will be a guidepost for the Kenyan courts when interpreting the freedom from discrimination based on dress. Section 4.2 of this chapter suggests a draft of the proposed Act, namely the Prevention of Appearance Discrimination Act, which may be adopted by the Kenyan Parliament.

#### 4.1.3 Balancing conflicting legal rights

In formulating a statute that explicitly protects against appearance discrimination, Parliament should evaluate and balance any existing and conflicting interests. As discussed in chapter three, appearance discrimination affects an array of individual rights and freedoms in Kenya such as freedom from discrimination based on sex, race, religion, culture, and dress, freedom of expression, right to religion, right to culture, and in some instances the right to fair labour practices, and the right to education. Institutions, however, argue that the protection against appearance discrimination also promotes the overregulation of the institutional freedom to act in their best interest. For example, expecting employees to look professional.

As discussed in chapter three, local laws in the USA balance the existing conflicting interests by providing for exceptions to the freedom from appearance discrimination. The exceptions stipulated by American local laws include:

- I. ‘the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose; and
- II. when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare, or safety of any individual or the public.’<sup>387</sup>

These exceptions find an appropriate balance between protecting individual rights and freedoms and promoting public safety, health, and welfare. The exceptions also protect legitimate business interests that may be affected by an individual’s appearance. However, it is imperative to note that for an employer to invoke the reasonable business purpose defense, the employer must show that appearance is necessary to perform the required job.<sup>388</sup> For example, modelling. The reasonable business purpose defense does not protect customer preference for a specified appearance, and/or obtaining business profits.<sup>389</sup>

The Kenyan Parliament must also strike a balance between individual rights and freedoms vis-a-vis public and institutional rights. This dissertation, therefore, recommends that the Kenyan Parliament explicitly protect against appearance discrimination, but provide for exceptions that aim to protect reasonable business purposes, and public health, safety, and welfare.

#### 4.1.4 Prohibition of appearance discrimination in institutional laws

As discussed in the previous chapters, institutions have utilized appearance discrimination as a tool to circumvent the existing anti-discrimination laws, propagate unequal social hierarchies, and oppress already marginalized groups and communities.<sup>390</sup> Chapter three specifically elucidated how appearance discrimination affects various rights and freedoms in Kenya. Consequently, this dissertation recommends the harmonization of institutional laws to the proposed Prevention of Appearance Discrimination Act. The harmonization shall entrench the freedom from appearance discrimination and ensure that institutions do not utilize dress codes and grooming policies, as a tool to perpetuate inequality and appearance discrimination.

---

<sup>387</sup> Chapter 14, Section 2-1401.02 (22), District of Columbia Code.

<sup>388</sup> See *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993) at 800.

<sup>389</sup> *Ibid.*

<sup>390</sup> Rhode, 2009: 1033.

In Kenya, educational laws such as the Children’s Act,<sup>391</sup> and Basic Education Act,<sup>392</sup> and employment laws such as the Employment Act<sup>393</sup> should be harmonized to the proposed Prevention of Appearance Discrimination Act, by including the express prohibition of appearance discrimination in the said institutional laws.

#### 4.1.5 Civic Education

Appearance discrimination as discussed in chapters one and two, is a perilous form of discrimination because it is largely influenced by our subconscious, therefore, making it hard to acknowledge or realize as it happens.<sup>394</sup> This dissertation has dedicated four chapters to proving the detrimental effects of appearance discrimination on individual rights and freedoms, as well as in society. Moreover, the misconceived notion that appearance discrimination is just but a trivial social issue has consistently been debunked throughout this dissertation. Unfortunately, this flawed lens of viewing appearance discrimination continues to permeate society and the legal system. Consequently, this dissertation recommends that civic education on the detrimental effects of appearance discrimination be conducted in public institutions, starting with the Kenyan Judiciary and the Legislature. Additionally, institutions such as schools and workplaces, and civil society, should be educated on the effects of appearance discrimination.

Civic education will enable the legislature to formulate the proposed Prevention of Appearance Discrimination Act from an informed point of view, and guide the judiciary on how to adequately enforce the Act. Furthermore, civic education shall also educate individuals on their rights and freedoms and how appearance discrimination affects these rights and freedoms. Lastly, once the proposed Prevention of Appearance Discrimination Act comes into force, civic education shall be necessary to create awareness of the protections afforded by that Act.

#### 4.2 Proposed Legislation

This section formulates a draft legislation that intends to govern appearance discrimination in Kenya, upon evaluating the US local laws, their strengths and weaknesses, and how appropriate

---

<sup>391</sup> Children Act, 2022.

<sup>392</sup> Basic Education Act, 2013.

<sup>393</sup> Employment Act, 2007.

<sup>394</sup> Viviers, 2016: 897.

the applicability of those laws would be in Kenya. The proposed Act was informed and formulated based on the US local laws and the recommendations discussed in section 4.1 above.

*The Prevention of Appearance Discrimination Act*<sup>395</sup>

*An Act of Parliament to give effect to Article 27 (4) of the Constitution specifically, the freedom from discrimination based on dress; to uphold the national values and principles mandated by Article 10 of the Constitution; to uphold the Bill of Rights as entrenched in the Constitution; to make provision for the prevention of appearance discrimination, to regulate against the propagation of appearance discrimination and its intersection with other forms of discrimination; and for any other connected purposes.*

## **PART I – PRELIMINARY**

### **1. Short Title**

This Act may be cited as the Prevention of Appearance Discrimination Act.

### **2. Interpretation**

***‘Appearance discrimination’*** means the unfair and prejudicial treatment of an individual, based on their personal appearance or physical characteristics.

***‘Dress or Dressing’*** means a person’s choice of clothes, accessories, and/or hairstyle irrespective of sex, which includes but is not limited to clothing, body art, piercings, and/or any other accessories, with or without any religious, cultural, or racial significance.

***‘Dress codes’*** means any rules, standards, and policies established by any institution, whether public or private, intended to regulate the dressing and grooming of an individual or group of individuals at any given time.

***‘Grooming’*** means an individual’s choice of hairstyle, accessories and/or any other bodily adornment which includes but is not limited to body art, piercings, and ornaments, with or without any religious or cultural significance.

***‘Personal appearance’*** means the external appearance of an individual, irrespective of their sex, race, religion, or culture, but in regard to their bodily condition or characteristic

---

<sup>395</sup> The proposed Act is informed by the USA local laws discussed in Chapter 3 and adopted to encompass the needs and laws of Kenya.

which includes but is not limited to their choice of dressing, personal grooming, hairstyle, beard, body art, and/or piercings.<sup>396</sup>

### **3. Application and Interpretation**

- (1) This Act binds all state organs, public officers, all institutions and/or organizations whether public or private, and all persons within the Republic of Kenya.
- (2) This Act shall be interpreted in line with the Bill of Rights and the national values and principles stipulated under the Constitution of Kenya.

### **4. Objective of the Act**

- (1) This Act acknowledges that appearance discrimination continues to perpetuate inequality, unequal access to opportunities and the marginalization of vulnerable groups and communities. Consequently, this Act aims to –
  - a) Give effect to the freedom from discrimination based on dress as stipulated under Article 27 (4) of the Constitution of Kenya;
  - b) Create a clear and comprehensive law that addresses the systematic deprivation of opportunities relating to education, employment, and any other areas based on appearance discrimination, as well as its intersection with any other forms of discrimination;<sup>397</sup>
  - c) Create enforceable legal standards that address the widespread incidences of appearance discrimination in state offices, schools, workplaces, housing, and any other contexts;
  - d) Prevent any decisions, practices, and policies that perpetuate negative and unfair biases and stereotypes based on an individual’s appearance;
  - e) Provide remedies for the harm suffered by any individual as a result of discrimination based on appearance.

---

<sup>396</sup> Definition constructed and adapted from the District of Columbia Code, City of Urbana Municipal Code and Madison Code of Ordinances.

<sup>397</sup> Provision constructed and adapted from Section 2(b) of the CROWN Act of 2020, H.R. 5309, 116<sup>th</sup> Cong. (2020).

## **PART II – SAFEGUARDS AGAINST APPEARANCE DISCRIMINATION**

### **5. Prohibition against Appearance Discrimination**

- (1) The State shall not discriminate, whether directly or indirectly, against any person based on their personal appearance.
- (2) Both the National and County governments shall direct their efforts and resources towards eliminating appearance discrimination within the Republic of Kenya, in areas including but not limited to health, employment, education, housing, public accommodation, and any other facets of the lives of its citizens.
- (3) No person or institution whether public or private, shall directly or indirectly discriminate against any person based on their personal appearance.
- (4) Despite subsections (1) and (3), the right to freedom from discrimination based on personal appearance shall be subject to the exceptions specified under section 9 of this Act.

### **6. Appearance Discrimination in Employment**

- (1) No employer shall discriminate against an employee, whether potential or current, based on their personal appearance, in any decision relating but not limited to apprenticeships, training, hiring, promotion, compensation, discharge, and transfer, as well as any other terms, privileges, or conditions of employment.
- (2) Employers shall formulate and enforce employment policies, rules, and standards aimed at promoting equal opportunity and eradicating appearance discrimination in workplaces.
- (3) Employers shall formulate internal mechanisms equipped to investigate and resolve complaints raised by any employee based on appearance discrimination.
- (4) If the complaint under subsection (3) has merit, the employer shall take all reasonable steps to ensure that appearance discrimination is eradicated, and the employee compensated for any loss or injury incurred as a result of appearance discrimination.

### **7. Appearance Discrimination in Education**

- (1) No educational institution, whether public or private, shall discriminate against a prospective or current student based on their personal appearance, in any decision or opportunity relating to education.

- (2) Subject to the provisions of the Children’s Act, school administrators shall take clear and reasonable precautions to ensure that no school rule, policy, and standard promotes discrimination based on appearance.
- (3) School administrators shall establish internal mechanisms aimed at investigating and resolving any complaints based on appearance discrimination, raised by a student, parent, or guardian.
- (4) If the complaint under subsection (3) has merit, the school administrator shall take all reasonable steps to ensure that appearance discrimination is eradicated, and measures reasonably formulated to prevent the reoccurrence of appearance discrimination.

## **8. Intersectionality of Appearance Discrimination**

- (1) This Act acknowledges that appearance discrimination intersects with other rights and freedoms including but not limited to the freedom from discrimination based on race, sex, religion, and culture.
- (2) No provision under this Act shall be construed to limit the enforcement of any other right or freedom, simply because the said right or freedom is also violated as a result of its intersection with appearance discrimination.

## **9. General Exceptions**

- (1) Personal appearance shall not relate to or include –
  - a) ‘the requirement of cleanliness, uniforms, or prescribed standards, when uniformly applied for admittance to a public accommodation, or when uniformly applied to a class of employees for a reasonable business purpose or students for a reasonable educational purpose;
  - b) or when such bodily conditions or characteristics, style or manner of dress or personal grooming presents a danger to the health, welfare, or safety of any individual or the public.’<sup>398</sup>
- (2) Any person or institution charged with discrimination based on appearance, may escape liability under this Act provided they can reasonably prove reliance on any of the exceptions stipulated under subsection (1) above.

---

<sup>398</sup> Provision constructed and adapted from Chapter 14, Section 2-1401.02 (22) District of Columbia Code.

## **PART III – ENFORCEMENT**

### **10. Enforcement**

- (1) Any individual has the right to institute court proceedings claiming that the freedom from appearance discrimination has been violated.
- (2) If the individual under subsection (1) successfully proves appearance discrimination, he/she shall be liable to any remedies the court deems fit under the prevailing circumstances, including, but not limited to punitive damages.

### **11. Civic Education**

- (1) The National and County governments shall formulate and enforce measures and strategies aimed at educating the public about the nature and effects of appearance discrimination, as well as the protections afforded by this Act.
- (2) Institutions such as schools and workplaces shall also be mandated to carry out trainings about the nature and effects of appearance discrimination, as well as the rights protected under this Act.

### **12. Harmonization of Laws**

- (1) Parliament shall take reasonable measures to harmonize the existing employment and educational laws with this Act, within 180 days after this Act comes into force.

## **4.3 Conclusion**

Appearance discrimination as elucidated by this dissertation, is a cloaked but perilous form of discrimination that entrenches inequality and prejudicial social hierarchies. Appearance discrimination manifests in two ways, namely: 1) as a new and individual concept that permeates so subtly, that it is dismissed by the Kenyan legal regime. 2) Through its intersection with other protected forms of discrimination, which creates a loophole for the circumvention of anti-discriminatory laws in Kenya.

The misguided notion that appearance discrimination is an insignificant issue undeserving of legal protection, has thoroughly been disproved and critiqued by this dissertation. The extensive discussion of the effects of appearance discrimination, both as an individual concept and through its intersection with other forms of discrimination, has shed light on the perilous nature of appearance discrimination. Individual rights and freedoms, as well as marginalized groups, remain

largely unprotected against the detrimental effects of appearance discrimination. Kenyan law has, therefore, been proven deficient in adequately protecting against appearance discrimination.

Kenya must now emulate the progressive approach utilized by the USA. Kenya must interpret the freedom from discrimination based on dress, as an explicit prohibition against appearance discrimination. Additionally, Kenya must also enact legislation that expressly prohibits against appearance discrimination, and operationalizes the freedom from discrimination based on dress. These recommendations will solidify the efficiency of Kenyan law in protecting against appearance discrimination, and adequately protect the victims of appearance discrimination.

## **BIBLIOGRAPHY**

### **International Instruments**

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD).

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

### **National Laws**

#### **I. Kenyan Laws**

Basic Education Act, 2013.

Children Act, 2022.

Constitution of Kenya 2010.

Employment Act, 2007.

#### **II. United States of America Laws**

City of Urbana Municipal Code.

Constitution of the United States of America 1787.

CROWN Act, S.B. 188, 2019 Leg., Reg. Sess. (California 2019).

CROWN Act of 2020, H.R. 5309, 116<sup>th</sup> Cong. (2020).

District of Columbia Code.

Equal Educational Opportunities Act of 1974.

Howard Civil Rights Code.

Madison Code of Ordinances.

Title IX of the Education Amendments 1972.

Title IV of the Civil Rights Act 1964.

Title VII of the Civil Rights Act of 1964.

### Books

Locke J and others, *Two Treatises of Government* (Thomson Gale 2003).

Rhode Deborah, *The Beauty Bias* (6th edn, Oxford University Press, USA 2010) 25.

### Journals

Aghasaleh, Rouhollah 'Oppressive Curriculum: Sexist, Racist, Classist, and Homophobic Practice of Dress Codes in Schooling' (2018) 22 *Journal of African American Studies* 95.

Alston, Ken 'Freedom of Expression and School Dress Codes: South African and International Perspectives' (2006) 10 *Australia & New Zealand Journal of Law & Education* 83.

Blumell, Lindsey and Mulupi, Dinfin "Newsrooms Need the Metoo Movement." Sexism and the Press in Kenya, South Africa, And Nigeria' (2020) *Feminist Media Studies* 1.

Broussard, Kristin and Harton, Helen 'Tattoo or Taboo? Tattoo Stigma and Negative Attitudes Toward Tattooed Individuals' (2017) 158 *Journal of Social Psychology* 1.

Cavico, Frank and Muffler, Stephen and Mujtaba, Bahaudin 'Appearance Discrimination, Lookism and Lookphobia in the Workplace' (2012) 28 *Journal of Applied Business Research (JABR)* 791.

Chasity, Henry 'Knot Today: A Look at Hair Discrimination in the Workplace and Schools' (2021) 46 *Thurgood Marshall Law Review* 29.

Crenshaw, Kimberle 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139.

Crenshaw, Kimberle 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241.

Dion, Karen and Berscheid, Ellen and Walster, Elaine 'What is Beautiful is Good.' (1972) 24 *Journal of Personality and Social Psychology* 285.

Elane, Judith 'Employment Discrimination—Business Necessity and BFOQ Exceptions to Title VII Extended to Unmarried, Pregnant Youth Services Workers Serving as Role Models. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).' (1988) 11 *University of Arkansas at Little Rock Law Review* 417.

Flagg, Barbara "'Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent' (1993) 91 *Michigan Law Review* 953.

Gilbert, B. Christopher 'We Are What We Wear: Revisiting Student Dress Codes' [1999] *Brigham Young University Education and Law Journal* 3.

Glick, Peter and Fiske, T. Susan 'Ambivalent Sexism Revisited' (2011) 35 *Psychology of Women Quarterly* 530.

Harbach, J. Meredith 'Sexualization, Sex Discrimination, and Public School Dress Codes' (2016) 50 *University of Richmond Law Review* 1039.

Gabriella, Hoose 'Redressing Dress Codes: The Effects of Sexualized School Dress Codes' (2018) 7 *Dissenting Voices* 47.

James, R. Heather 'If You Are Attractive and You Know It, Please Apply: Appearance Based Discrimination and Employer Discretion' (2008) 42 *Valparaiso University Law Review* 629.

Kang, M. John 'Deconstructing the Ideology of White Aesthetics' (1997) 2 *Michigan Journal of Race and Laws* 283.

Klare, E 'Power/Dressing: Regulation of Employee Appearance' (1992) 26 *New England Law Review* 1395.

Knipp, Hannah and Stevenson, Rae "'A Powerful Visual Statement": Race, Class, and Gender in Uniform and Dress Code Policies In New Orleans Public Charter Schools' (2021) 37 *Affilia* 79.

Maestriperi, Dario and Henry, Andrea and Nickels, Nora 'Explaining Financial and Prosocial Biases in Favor of Attractive People: Interdisciplinary Perspectives from Economics, Social Psychology, and Evolutionary Psychology' (2016) 40 *Behavioral and Brain Sciences* 1.

Mahajan, Ritu 'The Naked Truth: Appearance Discrimination, Employment, and the Law' (2007) 14 *Asian American Law Journal* 165.

Martin, L. Jennifer and Brooks, N. Jennifer 'Loc'D and Faded, Yoga Pants and Spaghetti Straps: Discrimination in Dress Codes and School Pushout' (2021) 16 *International Journal of Education Policy and Leadership* 2.

Murray, Eoghan Patrick 'Constitutional Challenges to Gender-Restrictive School Dress Codes in the Ninth Circuit' (2013) 8 *The Modern American* 18.

Patton, Owens Tracey 'Hey Girl, Am I More Than My Hair?: African American Women and Their Struggles With Beauty, Body Image, And Hair' (2006) 18 *NWSA Journal* 24.

Pavlakakis, Alyssa and Roegman, Rachel 'How Dress Codes Criminalize Males and Sexualize Females of Color' (2018) 100 *Phi Delta Kappan* 54.

Pieterse, Marius 'Discrimination through the Eye of the Beholder' (2000) 16 *South African Journal of Human Rights* 121.

Queiroz, Regina 'Individual Liberty and the Importance of the Concept of the People' (2018) 4 *Palgrave Communications* 1.

Rhode, L. Deborah 'The Injustice of Appearance' (2009) 61 *Stanford Law Review* 1033.

Sidanius, Jim and Levin, Shana and Pratto, Felicia 'Consensual Social Dominance Orientation and its Correlates Within the Hierarchical Structure of American Society' (1996) 20 *International Journal of Intercultural Relations* 385.

Steinle, T. Allison 'Appearances and Grooming Standards as Sex Discrimination in the Workplace' (2006) 56 *Catholic University Law Review* 261.

Streeter, Sybil 'Waist–Hip Ratio and Attractiveness New Evidence and a Critique of “A Critical Test”' (2003) 24 *Evolution and Human Behavior* 88.

Viviers, Damian 'Dress Codes, Grooming Standards and South African Employment Law: Comparative Insights on Workplace Discrimination Based on Mutable Appearance Characteristics' (2016) 133 *South African Law Journal* 897.

Warhurst, Chris and others 'Lookism: The New Frontier of Employment Discrimination?' (2009) 51 *Journal of Industrial Relations* 131.

Waring, Peter 'Keeping Up Appearances: Aesthetic Labour and Discrimination Law' (2011) 53 *Journal of Industrial Relations* 193.

Wax, L. Amy 'Discrimination as Accident' (1999) 74 *Indiana Law Journal* 1130.

Whitman, Marie Gretchen 'A Curricular Critique of School Dress Codes' (2020) 93 *The Clearing House: A Journal of Educational Strategies, Issues and Ideas* 72.

Willis, Janine and Todorov, Alexander 'First Impressions: Making Up Your Mind After a 100-Ms Exposure to a Face' (2006) 17 *Psychological Science* 592.

Zehnter, K. Miriam and others 'Belief in Sexism Shift: Defining a New Form of Contemporary Sexism and Introducing the Belief in Sexism Shift Scale (BSS Scale)' (2021) 16 *PLOS ONE* 1.

Zuck, S. 'Shifting Burdens of Proof under Disparate Impact Analysis: Conflict and Problems of Characterization,' (1989) 27 *Duquesne Law Review* 535.

## Reports

Task Force on the Sexualization of Girls, 'Report of the APA Task Force on the Sexualization of Girls' (American Psychological Association 2007)

<https://www.apa.org/pi/women/programs/girls/report-full.pdf> accessed 21 August 2022.

## Online Sources

Achieng Garnett, 'The Racist Legacy of Kenyan Schools' Short Hair Policies - Women's Media Center' (*Womensmediacenter.com*, 2019) <https://womensmediacenter.com/fbomb/the-racist-legacy-of-kenyan-schools-short-hair-policies> accessed 21 August 2022.

Alinejad, Masih, 'Nationwide Protest Against Compulsory Hijab' (*My Stealthy Freedom*, 2022) <https://www.mystealthyfreedom.org/topics/news/white-wednesdays/> accessed 16 July 2022.

'Arrested Teen Teacher Called the Police for Wearing Bandana to School' (*Mail Online*, 2018) <https://www.dailymail.co.uk/news/article-6070967/Teen-claims-teacher-called-police-wearing-bandana-school.html> accessed 20 August 2022.

'BBC News | World | Africa | Kenya Mps Fight 'Colonial' Dress Code' (*News.bbc.co.uk*, 2003) <http://news.bbc.co.uk/2/hi/africa/3070131.stm> accessed 21 August 2022.

Cambridge Dictionary, 'Impart' <https://dictionary.cambridge.org/dictionary/english/impart> accessed 2 November 2022.

Chappell Bill and Hernandez Joe, 'Why Iranian Women Are Burning Their Hijabs after the Death of Mahsa Amini' (*NPR* September 21, 2022) <https://www.npr.org/2022/09/21/1124237272/mahsa-amini-iran-women-protest-hijab-morality-police> accessed 10 October 2022.

Crawley Mike, 'New Freedoms Awaken Kenyan Culture' (*The Christian Science Monitor*, 2003) <https://www.csmonitor.com/2003/0804/p10s01-woaf.html> accessed 21 August 2022.

Donovan Laura, 'Teens are Fighting Sexist Dress Codes With this Brilliant Hashtag' (*ATTN*: 2015) <https://archive.attn.com/stories/2871/high-school-dress-codes-distraction> accessed 16 June 2022.

Driscoll Gwendolyn, 'Nation's Legislators Ask, Do Clothes Make the Kenyan?' (*Los Angeles Times*, 2003) <https://www.latimes.com/archives/la-xpm-2003-jun-04-fg-jammies4-story.html> accessed 21 August 2022.

Federal Judicial Center, 'The U.S. Legal System: A Short Description' [https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U\\_S\\_Legal\\_System\\_English07.pdf](https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U_S_Legal_System_English07.pdf) accessed November 2, 2022.

Hatam Nassim, 'Why Iranian Women are Wearing White on Wednesdays' (*BBC News*, 2017) <https://www.bbc.com/news/world-middle-east-40218711> accessed 16 June 2022.

'Intersectionality' <https://www.merriam-webster.com/dictionary/intersectionality> accessed 18 August 2022.

Jones Nathan, 'Is Physical Appearance Really the Most Influential Factor on the Environment?' (*Personalityresearch.org*) <http://www.personalityresearch.org/papers/popkins2.html> accessed 16 June 2022.

Macha Ndesanjo, 'Kenya: Schoolgirl Skirts-How Short is Too Short?' (*Global Voices*, 2012) <https://globalvoices.org/2012/07/26/kenya-netizens-debate-culture-modernity-and-miniskirts/> accessed 21 August 2022.

Merriam-Webster, 'Dress' <https://www.merriam-webster.com/dictionary/dress#dictionary-entry-2> 1 and 3 (noun) accessed 2 November 2022.

Merriam-Webster, 'Dress' <https://www.merriam-webster.com/dictionary/dress> 6(b) (1) (verb) accessed 2 November 2022.

Musyoka Michael, 'Education Ministry Petitioned Over Hairstyles Ahead of Reopening' (*Kenya.co.ke*, 2020) <https://www.kenya.co.ke/news/56482-students-petition-education-ministry-ahead-reopening> accessed 22 August 2022.

Mwangi Denis, 'Parliament Dress Code Changed for First Time Since 1963' (*Kenya.co.ke*, 2020) <https://www.kenya.co.ke/news/59027-parliament-dress-code-changed-first-time-1963> accessed 21 August 2022.

News Blaze, 'Mother to Form One Girl Allegedly Killed at Gatanga School Narrates Horrifying Story, Asks for Justice. - Newsblaze.Co.Ke' (*Newsblaze.co.ke*) <https://newsblaze.co.ke/mother-to-form-one-girl-allegedly-killed-at-gatanga-school-narrates-horrifying-story-asks-for-justice/> accessed 18 August 2022.

Ngugi Lynn, 'Who Killed My Daughter? The Deputy Principal Beat Ebby on the Night of Her Death' (2022) <https://www.youtube.com/watch?v=LC7MKVJY7kc> accessed 18 August 2022.

Njoroge Naomi, '16-Year-Old Girl Takes Own Life after Being Asked to Shave Her Hair as Punishment' (*K24 TV* September 29, 2022) <https://www.k24tv.co.ke/news/girl-kills-self-asked-to-shave-hair-81175/> accessed 30<sup>th</sup> September 2022.

Nyambura Maryanne, 'Form 3 Girl Kills Herself after Being Ordered to Shave Her Hair as School Punishment' (*Citizen Digital* September 29, 2022) <https://www.citizen.digital/news/form-three-student-commits-suicide-after-being-ordered-to-shave-head-by-teacher-n306555> accessed 30<sup>th</sup> September 2022.

Santos Indhira, and Seol Bookang, '#Mydressmychoice: Tackling Gender Discrimination and Violence in Kenya One Tweet at a Time' (*World Bank Blogs*, 2015) <https://blogs.worldbank.org/developmenttalk/mydressmychoice-tackling-gender-discrimination-and-violence-kenya-one-tweet-time> accessed 16 June 2022.

'Sex and Gender' (*Council of Europe*) <https://www.coe.int/en/web/gender-matters/sex-and-gender> accessed November 3, 2022.

'Skirting Around the Dress Code For Girls' (*Nation*, 2012) <https://nation.africa/kenya/news/skirting-around-the-dress-code-for-girls--821378> accessed 21 August 2022.

'State and Local Government' (*The White House* July 12, 2022) <https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government/> accessed November 2, 2022.

States News Service. 'Senate Republicans Block Passage Of Crown Act'. (*States News Service*, December 2022) <https://advance-lexis-com.ezproxy.uct.ac.za/document/?pdmfid=1516831&crd=1935a02e-0464-4f15-bd7c-188ae1a7514a&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A673B-83S1-JCBF-S4F1-00000-00&pdcontentcomponentid=8058&pdteaserkey=sr2&pditab=allpods&ecomp=zznyk&earg=sr2&prid=566ca3bf-b6bd-44ce-a45c-879da6d4392c#:~:text=advance%2Dlexis%2Dcom.ezproxy.uct.ac.za/api/document%3Fcollection%3Dnews%26id%3Durn%3AcontentItem%3A673B%2D83S1%2DJCBF%2DS4F1%2D00000%2D00%26context%3D1516831> accessed 3 February 2023.

The CROWN Act, <https://www.thecrownact.com/> accessed 2 February 2023.

The Nation Media Group, '#Deathinthedorm: Hospital CCTV Footage Shows Ebbie Samuels' 'Last Moments' (2019) <https://www.youtube.com/watch?v=p9ykh2Z1rCM> accessed 18 August 2022.

### Other Resources

All Rise, Season 1 Episode 12 (Directed by Greg Spottiswood and others CBS 2019).

Leighton, Nicole Kristen *Perceptions of Dress Code Compliance* (2017) (LLM thesis, University of North Dakota).

Skerry, Elizabeth "'Dress Coded" A Distraction and Disruption: Sex-and-Race-Based Discrimination and Speech Restriction in Public School Dress Codes' (2020) (Upper-Level

Writing Requirement Research Papers 48

[https://digitalcommons.wcl.american.edu/stu\\_upperlevel\\_papers/48](https://digitalcommons.wcl.american.edu/stu_upperlevel_papers/48) American University Washington College of Law).

Taieb, Rajab 'Comparison of Social Contract Theory of Jean-Jacques Rousseau, Thomas Hobbes, and John Locke' (2020).

Viviers, John Damian *A Comparative Labour Law Perspective on Categories of Appearance-Based Prejudice in Employment* (2014) (LLM thesis, University of the Free State).

Zakas, C. Nicholas *The Eye of The Beholder: Appearance Discrimination in the Workplace* (2005) (LLM thesis, Endicott College 2005).

### Government Publications

The National Assembly, 'Appropriate Dress in the Chamber and in Committees' (2019) <http://www.parliament.go.ke/sites/default/files/2019-03/13.03.2019%20-%20Appropriate%20Dress%20Code%20in%20the%20Chamber%20and%20in%20Committees.pdf>.

The Speaker Rules of Kenya, 2018.

### List of Cases

#### I. Kenyan Case Law

*Al Yusra Restaurant Ltd v Kenya Conference of Catholic Bishops & another* [2017] eKLR.

*Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (eKLR) (22 October 2021) (Judgment).

*J W M (alias P) v Board of Management O High School & 2 others* [2019] eKLR.

*Kenya Human Rights Commission v Communications Authority of Kenya & 4 others* [2018] eKLR.

*Lucy Nyambura & another v Town Clerk, Municipal Council of Mombasa & 2 Others* [2011] eKLR.

*Martha Wanjiru Mungai v Board of Management Pioneer School* [2020] eKLR.

*Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR.

*Republic v Head Teacher, Kenya High School & Another Ex-Parte SMY* [2012] eKLR.

## II. American Case Law

*Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

*Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993).

*Brown v Board of Education of Topeka*, 347 U.S. 483 (1954).

*DeGraffenreid v General Motors* 413 F Supp 142 (E D Mo 1976).

*Griggs v Duke Power Co.*, 401 U.S. 424 (1971).

*Hedum v Starbucks Corp* 546 F Supp 2d 1017 D Or (2008).

*Hollins v. Atlantic Company, Inc.* 188 F 3d 652 6th Cir (1999).

*Hub Folding Box Company v. Massachusetts Commission Against Discrimination* 52 MassApp Ct 1104 (2001).

*Hurley v Irish American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

*Jespersen v Harrah's Operating Co Inc* 392 F.3d 1076 (9th Cir. 2004).

*McDonnell Douglas Corp. v Green* 411 U.S. 792 (1973).

*Peltier v Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460 (E.D.N.C. Mar. 30, 2017).

*Reed v Reed*, 404 U.S. 71 (1971).

*Spence v Washington*, 418 U.S. 405 (1974).

*Texas v Johnson*, 491 U.S. 397 (1989).

*Tinker v Des Moines Independent Community School District* 393 U.S. 503 (1969).