REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 44 OF 2017

BOAZ WARUKU...PETITIONER

VERSUS

KENYA UNIVERSITIES & COLLEGES CENTRAL

PLACEMENT SERVICE...1ST RESPONDENT

THE KENYA NATIONAL EXAMINATION COUNCIL ....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

EDUCATION, SCIENCE & TECHNOLOGY.............................3RD RESPONDENT

THE ATTORNEY GENERAL...4TH RESPONDENT

JUDGMENT

1. In his petition dated 13th February, 2017, the Petitioner, Boaz Waruku, prays for judgment against the respondents in the following terms:-

> **"a) THAT there be an order invalidating the results of the 2016 KSCE (sic) national examinations.**
>
> **b) THAT there be an order directing the 2nd Respondent, under the supervision of the 3rd, to apply the system of standardization to the marking and grading of the 2016 KCSE national examinations and publish the outcome within 3 months of judgement herein.**
>
> **c) Costs of this suit.**
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> **d) Any other relief that this Honourable Court may deem fit to grant."**

2. The 1st Respondent, Kenya Universities and College Central Placement Service is a creature of the Universities Act, 2012 and is responsible for the placement of government sponsored students in universities and colleges among other functions.

3. The 2nd Respondent, the Kenya National Examination Council, is a creature of the Kenya National Examinations Council Act. Its core mandate is to oversee and conduct national examinations in Kenya.

4. The 3rd Respondent, the Cabinet Secretary, Ministry of Education, Science and Technology, is, among other duties, responsible for formulating and offering quality control of the national education policy.

5. The 4th Respondent, the Attorney General, is the principal legal adviser mandated to institute and defend legal proceedings on behalf of the Government.

6. The Petitioner's averment is that in the month of December 2016, the 2nd and 3rd respondents officially released the Kenya Certificate of Secondary Education (KSCE) examination results for that year which revealed a massive drop in the performance of the candidates.

7. It is the Petitioner's case that the performance attracted great public discourse. According to the Petitioner, although some observers attributed the poor performance to the 3rd Respondent's highly publicized clampdown on cheating, the majority of education experts, however, attributed the poor performance to the 2nd and 3rd respondents' failure to subject the process of marking and grading of the examination to standardization or moderation whereby the students' results are not simply assigned a raw figure but are moderated according to certain variables such as complexity and the population of the students among other factors.

8. The Petitioner's averment is that the explanation by the education experts was the more believable of the two theories considering the poor performance and the fact that the 3rd Respondent did not, when releasing the results, mention that the same had been subjected to standardization or moderation.

9. It is the Petitioner's case that the failure by the 2nd and 3rd respondents to subject the results to standardization or moderation had violated the Constitution and the Education Act. He identified the breaches as failure by the 2nd and 3rd respondents to publish the fact that standardization would be abandoned in the 2016 examination; subjecting the 2016 examination candidates to unfair administrative action and not giving notice or reasons for doing so; applying discriminatory and highly prejudicial standards of marking to the 2016 examination; failing to promote tertiary education; and acting against the spirit of open governance, consultation and dialogue.

10. The 1st Respondent opposed the petition through an affidavit sworn on 20th March, 2017 by its Chief Executive Officer, John Muraguri. Its defence is that it performed its duty of placement of students to universities and colleges as the 2016 KCSE results had not been cancelled. He termed the petition as an afterthought and an abuse of the court process which, if allowed, would prejudice the candidates who had attained the qualification for placement to universities and colleges. He urged this court to dismiss the petition with costs.

11. The 2nd Respondent replied to the petition through an affidavit sworn on 15th March, 2017 by its Acting Deputy Director Research and Quality Assurance Division, Andrew Francis Otieno. He averred at length on the process of the conduct of the examination and the marking of the 2016 KCSE examination. He stated that the examination processes were carried out in a professional manner in accordance with the rules and regulations of the 2nd Respondent. He also averred that the setting, sitting and marking of the 2016 KCSE examination was attended by enhanced security measures which he detailed in his affidavit.

12. At paragraph 27 of his affidavit, Mr. Otieno detailed the moderation process as follows:-

> **"THAT in preparation for the final moderation exercise of the examination at the end of the marking exercise all the Chief Examiners prepared and submitted comprehensive reports on their papers for use during awarding and grade setting of the 2016 KCSE examination. The reports detailed the following aspects in regards to the work of the candidates who sat the 2016 KCSE examination:**
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> **(a) Comparison of the current examination paper with that of the previous year;**
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> **(b) Comparison of the general standard of work of the current group of candidates with that of the previous groups for the corresponding examination papers;**
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> **(c) Flexibility of the marking scheme and whether it was exhaustive;**
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> **(d) Coverage of the syllabus and whether there were questions in the examination paper that were outside the syllabus;**
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> **(e) Level of difficulty of the question paper against the level of candidates being tested;**
>
> **(f) Ambiguity, open-endedness of questions or questions that may have been advantageous/biased to particular group of candidates;**
>
> **(g) Erroneous questions in the paper that may have affected the performance of candidates and how this was handled during marking;**
>
> **(h) Proposal for the critical grade boundaries A-, B- and D+ for discussion/consideration during the Awards meeting."**

13. At paragraph 33 of his affidavit, Mr. Otieno deposed that:-

> **"THAT the 2016 KCSE examination Awards Committee (or a Moderation Committee) met on the 27th December, 2016 for grade setting and standard fixing. The committee consisted of officers from KNEC, Directorate of Quality Assurance & Standards (DQAS) of the Ministry of Education, Kenya Institute of Curriculum Development (KICD) and all Subject Specialists. All the key stakeholders of the Awards Committee meeting were therefore present."**

14. He also averred at paragraph 35 that:-

> **"THAT the main data/documents considered in the KCSE Awards' meetings:**

(a) The Chief Examiners' reports;

(b) The performance statistics for the current and previous years for the corresponding examination papers;

(c) The marks adopted for the grade boundaries in previous years;

(d) The size of the candidature and the nature/distribution of marks of such candidature;

(e) Samples of the candidates answer scripts;

(f) Question papers and Marking Schemes."

15. Mr Otieno averred that the processes used in marking KCSE examinations in the previous years were the same processes applied in the marking of the 2016 KCSE examination. He stressed that the moderation exercise was observed throughout the examination process from the time of setting to the final stage.

16. The Petitioner swore an affidavit on 21st June, 2017 in response to the 2nd Respondent's affidavit. He averred that the mere fact that there were additional security measures did not explain the unprecedented failure in the 2016 KCSE examination and that the failure does not in any manner indicate that there was no cheating in the examination.

17. He averred that the 2nd Respondent had not adduced any evidence that there was moderation of the 2016 KCSE examination. He also deposed that normally an examination paper was left in school for the examiners to interact with before the coordination process but this was not the case in the 2016 KCSE examination.

18. The 3rd and 4th respondents opposed the petition through a replying affidavit sworn on 21st March, 2017 by the 3rd Respondent's Director of Higher Education, Jacinta A Kapiyo. Her averment is that all the stakeholders, including the Kenya National Union of Teachers (KNUT), had been consulted in respect of the 2016 KCSE examination. She also averred that the Kenya National Examination Rules, 2015, which set out the criteria for marking national examinations, were been applied to the 2016 KCSE examination. She therefore urged the court to dismiss the petition with costs terming it an abuse of the court process and malicious as it was aimed at jeopardizing the placement of students to universities and colleges.

19. The Petitioner specifically responded to the 3rd and 4th respondents' replying affidavit by swearing an affidavit on 21st June, 2017. He averred that the issue raised in the petition is that the 3rd Respondent did not consult other education stakeholders when changing the procedure for conducting the 2016 KCSE examination. He averred that KNUT was equally shocked by the results as indicated in a report attached to his affidavit.

20. The Petitioner stressed that the difference between the 2016 KCSE results and those of previous years could not be solely attributed to the curbing of cheating in the examination.

21. Further, that the 3rd Respondent did not adduce any evidence to show that it consulted stakeholders in the education sector in the conduct of the examination and that the results had been released without consulting the stakeholders.

22. In brief written submissions dated 12th February, 2018 counsel for the Petitioner submitted that the actions of the 2nd and 3rd respondents in applying a different assessment criteria on the 2016 KCSE candidates amounted to unfair administrative action. It is submitted that candidates who may have performed at the same level with the candidates in the previous years would be denied placement in universities

23. Counsel for the Petitioner submitted that the 2nd and 3rd respondents did not give reason or notice to the 2016 KCSE candidates of any changes that they intended to introduce in the marking of the examination. Further, that the 2nd and 3rd respondents had gone ahead and silently dropped the moderation and standardization of marks, and instead posted raw marks. According to counsel it was of great importance for the candidates and their teachers to know and understand the assessment criteria that was to be used in the examination as this would have aided them in their preparation for the examination.

24. Counsel for the Petitioner cited the decision in the case of **Republic v Nairobi City County Alcoholic Drinks Control and Licensing Board & another Ex parte Space Lounge Bar and Grill Limited [2017] eKLR** in support of the proposition that those making decisions which affect others should act fairly and this means affording an opportunity to the persons to be affected by the decision to be heard.

25. Counsel for the Petitioner additionally submitted that the use of a fundamentally different assessment standard for the 2016 KCSE examination from that used in the previous examinations was highly prejudicial and discriminatory to the 2016 candidates.

26. Turning to Article 35(3) of the Constitution, counsel for the Petitioner submitted that the said provision obliges the State to publicize any important information affecting the nation. He contended that the marking and grading criteria used in the assessment of the KCSE examinations is important public information and any changes should be published prior to the examinations.

27. Counsel proceeded to submit that the diverse in the performance between the 2016 KCSE examination results and the results of the previous years indicated that there was a fundamental change in the way the examination was assessed as indicated in the KNUT report. The changes, the Petitioner's counsel asserted, ought to have been made public and failure to do so violated the Constitution. The decision in **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others [2013] eKLR** was cited in support of

the assertion that the State should proactively publish information on public interest matters and provide open access to such specific information as people may require from the State.

28. It was also submitted by counsel for the Petitioner that the right to information lends credence to the national values of integrity, good governance, transparency and accountability articulated in Article 10 of the Constitution.

29. In conclusion, counsel for the Petitioner cited the decision in the case of **Marilyn Muthoni Kamuru & 2 others v Attorney General & another [2016] eKLR** and urged the court to use the powers granted to it by Article 23 of the Constitution and award appropriate remedy.

30. The 1st Respondent did not file any submissions.

31. The 2nd Respondent filed submissions dated 26th April, 2018 and identified three core issues for the determination of the court. The first issue identified is whether the petition has been overtaken by events. On this issue the 2nd Respondent submitted that following the release of the 2016 KCSE examination results on 29th December, 2016, candidates had either joined tertiary institutions, gotten employed, re-sat KCSE examinations or were engaged in other activities.

32. It is the 2nd Respondent's case that quashing the results, as prayed for by the Petitioner, would result in unimaginable confusion and injustice. Further, that although the Petitioner had claimed that the 2016 KCSE results had denied brilliant students the opportunity to join universities, he had not identified the students and the beneficiaries of the orders sought are therefore unknown.

33. Counsel submitted that re-marking the 2016 KCSE examination may result in undesirable outcomes including failure of those who had initially passed the examination. Counsel opined that the petition before the court has actually been overtaken by events and any outcome would be for academic purposes only and will not serve the best interests of the country's education system.

34. On the second issue as to whether the petition raises constitutional issues, counsel for the 2nd Respondent submitted that Rule 10 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 requires a petitioner to disclose the facts relied upon in the petition, the constitutional provision violated and the nature of injury suffered or likely to be suffered by the petitioner or the person(s) in whose name the petition is instituted.

35. Turning to the Petitioner's pleadings, the 2nd Respondent submitted that although the Petitioner averred that there was no moderation and that the performance in the examination was not affected by the stringent security measures, the Petitioner had not provided any evidence in support of the averments. Further, that even though the Petitioner had annexed two exhibits to an affidavit he swore in support of an unprosecuted application for conservatory orders, the source of the information in the articles published in the newspapers were not disclosed hence the same could not be relied upon as evidence in support of the Petitioner's allegations.

36. On its assertion that the provisions of the Constitution alleged to have been violated are not identified in the petition, the 2nd Respondent submitted that although Articles 35 and 47 of the Constitution are identified in the title of the petition as the provisions allegedly violated, nowhere in the body of the petition are the Articles mentioned and neither is the manner of their violation disclosed. This, the 2nd Respondent asserted, resulted in failure to establish a nexus between the stated constitutional provisions and the facts set out in the petition and the supporting affidavit.

37. According to the 2nd Respondent, the Petitioner has also failed to disclose how the rights of the 2016 KCSE candidates or the public at large in whose interest it is presumed he instituted the petition, had been breached or threatened with violation.

38. Counsel cited the decisions in the cases of **Anarita Karimi Njeru v Republic [1976-1980] KLR 1272; Mumo Matemu v Trusted Society of Human Rights Alliance & 6 others [2013] elk;** and **Dr. Timothy Njoya v the Attorney General & Kenya Revenue Authority [2014] eKLR** as establishing the necessity to draft constitutional petitions with reasonable precision so that the constitutional provisions violated are disclosed, the nature of violation revealed and the manner of injury declared.

39. The third issue identified by the 2nd Respondent is whether the petition is merited. The 2nd Respondent submitted that although the Petitioner had identified himself in his supporting affidavit as an educationist, he had not provided any credentials in support of the assertion. It was urged that the averments of the Petitioner have to be weighed against those of Andrew Francis Otieno who established solid academic qualifications and experience backed by his curriculum vitae.

40. The court was therefore urged to treat the evidence of the 2nd Respondent's witness with the status reserved for expert witnesses and adopt the evidence. The decision in the case of **Radhabhai Shivji v J. Yotibhala S Desai [2015] eKLR** was cited as stating that expert evidence is entitled to the highest possible regard, and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds. This court was therefore asked to find that the Petitioner did not adduce credible evidence in support of his case and dismiss the same with costs.

41. In submissions dated 15th October, 2018 the 3rd and 4th respondents urged the court to find that the petition has been overtaken by events on the ground that the 2016 KCSE examination results had already been acted on. Students had been placed to universities and colleges using the results and it would be highly prejudicial to the students and against public interest to invalidate the results.

42. Turning to another issue, counsel for the 3rd and 4th respondents submitted that the petition does not disclose any violation of constitutional rights and fundamental freedoms. The decisions in **Bethwel Allan Omondi Okal v Telkom (k) Ltd (Founder) & 9 others [2017] eKLR; Anarita Karimi Njeru v Republic [1976 – 1980] 1 KLR 1272;** and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** are cited as enunciating the principle that a person seeking a remedy in a constitutional matter should set

out with a reasonable degree of precision the violation complained of, the provisions of the Constitution said to be infringed, and the manner in which the Constitution is alleged to be infringed.

43. Counsel proceeded to submit that the Petitioner had failed to state how his rights under Articles 27, 35 and 48 of the Constitution were violated. She asserted that the Petitioner had indeed failed to identify any specific candidates whose constitutional rights and fundamental freedoms were allegedly violated by the 2016 KCSE examination results. Counsel urged the court to find that the Petitioner's pleadings did not meet the required threshold so as to give the respondents fair notice of the case they were expected to meet.

44. In answer to the merits of the petition, counsel submitted that Section 22(b) of the Education Act, Cap. 211 empowers the Cabinet Secretary to make regulations prescribing the manner in which public examinations shall be conducted, whereas Section 37 of the same Act gives the Cabinet Secretary general powers to make regulations for the better carrying out of the purposes of the Act. Further, that Section 4 of the Kenya National Examination Act provides for the composition of the Kenya National Examination Council which includes the Secretary of the Teachers Service Commission and a member representing persons with special interests. Counsel urged that there was full participation of the people in setting the 2016 KCSE examination standards as all stakeholders were represented. Further, that the Kenya National Examination Rules, 2015 which were formulated by the Kenya National Examination Council and set out the criteria for marking national examinations, and which were applied in marking the 2016 KCSE examination, were and are available for perusal by members of the public.

45. Counsel finally urged the court to reject the Petitioner's assertion that Article 27 of the Constitution was violated. She submitted that the Petitioner has not established any discrimination and neither had he demonstrated that any student was subjected to unfair administrative action resulting in violation of Article 47 of the Constitution.

46. A review of the pleadings and submissions discloses that the global question to be determined in this petition is whether the Petitioner has met the threshold for grant of the orders sought.

47. The respondents have attacked the petition both on the procedural and substantive aspects. The submission by the respondents that the law requires that a petition should state the constitutional provisions alleged to have been violated, the manner in which they are said to have been violated and the nature of injury sustained or likely to be suffered as a result of the breach or threatened violation finds support in the various authorities cited by the respondents.

48. In **Mumo Matemo (**supra) the Court of Appeal held that:

> **"(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to *Article 159* of the Constitution and the overriding objective principle under *section 1A* and *1B* of the Civil Procedure Act (Cap 21) and *section 3A* and *3B* of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle…**
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> **(43) The petition before the High Court referred to *Articles 1, 2, 3, 4, 10, 19, 20* and *73* of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.**
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> **(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."**

49. The Petitioner did not offer any resistance, even a timid one, to the respondents' submission on the issue of the inadequacy of the petition. I suspect there was no reasonable defence to the outright inadequacy of the petition. Although the title of the petition speaks about **"alleged violation of fundamental rights and freedoms under Articles 35 and 47 of the Constitution",** there is no statement in the body of the petition that these are the provisions that had been violated.

50. There appears to be an allusion that there was unfair administrative action by failure to give notice of change of the procedure for marking the examination. There is, however, no mention of the violation of the right to information. The alleged violation of the right to information only pop up in the Petitioner's submissions. Submissions however do not constitute evidence – see **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.**

51. Although the petition mentions that the respondents' actions were discriminatory and highly prejudicial to the 2016 KCSE candidates, there is no explanation as to how the discrimination and prejudice happened. The nature of injury and the persons injured by the

respondents' actions are not disclosed. The Petitioner therefore failed, in the words of **Anarita Karimi Njeru** (supra) to **"set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."**

52. The respondents are therefore correct that the petition before this court does not provide them with sufficient particulars so that they can tell what they are accused of and respond appropriately. I therefore hold and find that the petition in the manner in which it is drafted denies the petitioners the right to a fair hearing. The petition should for the stated reason be dismissed at this stage.

53. Least I be accused of being a judge left in the wilderness of procedural technicalities when the courts were migrating to the Canaan of substantive justice envisioned by the Constitution, I will proceed to consider the merits of the Petitioner's case as explained in his submissions.

54. The Petitioner contended that the 2nd Respondent introduced a new marking and grading system for its examinations without notice to the teachers and candidates hence leading to poor results and therefore prejudicing the 2016 KCSE candidates. Core to his case is the assertion that the 2016 KCSE examination results were not moderated or standardized.

55. A court decides a case based on the evidence presented to it. The Petitioner's claim that the 2016 KCSE examination were subjected to different standards vis-a-vis the previous KCSE examination was not backed by any evidence. He never produced the standards that were applied to the previous KCSE examinations and those applied to the 2016 KCSE examination so that the court could compare the standards in order to determine if there were any variations. What the Petitioner did was to make bare allegations without any evidence to back up those allegations.

56. On the other hand Mr Otieno averred on behalf of the 2nd Respondent that the respondents applied rules and regulations that were in the public domain. He also confirmed that the 2016 KCSE examination, like the previous examinations, was moderated.

57. The Petitioner made a comeback and averred that the 2nd Respondent's witness did not produce any evidence to show that there was moderation. Mr Otieno's affidavit discloses that he was part of the examination process and his averments are in connection to what he witnessed for himself. When he says there was moderation, and the Petitioner has not adduced any evidence to rebut his statement, then his evidence should be believed.

58. A petitioner who desires success should not behave like the hunter-gatherer of yore who relied on providence for his next meal. Such a person would throw a stone into a shrub hoping that a dik-dik would spring out therefrom and thus provide his next meal. The Petitioner has employed those tactics in this matter. He accused the respondents of not moderating the 2016 KCSE examination, without providing any iota of evidence in support of his allegation, and hoped that the respondents did not actually moderate the examination hence assuring the success of his petition. The respondents, and in particular the 2nd Respondent, have disappointed him by explaining in detail the procedure used to mark the examination papers and how moderation was not only carried out in the marking but also enforced during the setting of the examination papers.

59. In short, the evidence adduced before the court shows that the Petitioner's claim that the 2016 KCSE examination was not moderated is without merit. The respondents have demonstrated by way of affidavit evidence that there was moderation of the examination. In the circumstances, I find the Petitioner's case has no merit.

60. The outcome of the petition is that the same is dismissed for being defective and lacking merit. The door to public-spirited characters like the Petitioner, for bringing public interest litigation, should not be shut by making them shoulder costs. Consequently, I order that each party will meet own costs of the litigation.

Dated, signed and delivered in Nairobi this 23rd day of January 2020

W. Korir,

Judge of the High Court