REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 609 OF 2017.

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The preparation, conduct, marking and release of results, in respect to National Examinations in Kenya at both the primary (Kenya Certificate of Primary Education – KCPE) and Secondary school level (Kenya Certificate of Secondary Education – KSCE) has, in the recent past, been the subject of great public interest and debate. The integrity of the said examinations and results arising therefrom has similarly been the subject of a lot of controversy in light of numerous reports of cheating in the said examinations.

2. The above factors prompted the Ministry of Education and other stakeholders in the education sector to come up with a raft of measures and strategies geared at curbing cheating in examinations. One such measure was to mark examination scripts and release the examination results within the shortest time possible so as to avoid alleged tampering with the said results. Following the release of the examination results for the years 2016 and 2017, the petitioner herein, who describes himself as a law abiding citizen of Kenya, a public spirited individual and a human rights defender sued the respondent, a bodily corporate with perpetual succession and common seal established under Section 3 of the Kenya National Examination Council Act No. 29 of 2012, charged with the task of conducting school, post school and other examinations seeking the following specific prayers:

a) Declaration that;

i. Candidates who sit the Kenya Certificate of Primary Education or Kenya Certificate of Secondary Education Examinations, including those who sat examinations in 2016 and 2017, have a right to receive marking schemes and their marked answer sheets or certified copies of their marked sheets.

ii. By not releasing the marked answer sheets and marking schemes to candidates through their respective schools or examinations centres where they sit the Kenya Certificate Primary Education Examinations, the respondent violates the Constitution of Kenya, 2010.

iii. The abrupt and unilateral changes made without public participation in 2016 by the respondent to the examination grading policy, eliminating stages like coordination of marking scheme, filling of marks in the mark sheets, and the award ceremony are invalid and void.

iv. The use of raw scores to grade candidates and the lack of moderation by relevant awards panels at 2016 and 2017 KCPE and KSCE examinations rendered the grades awarded invalid and void.

b) An order that;

i. Compelling the respondent to release marking schemes and marked answer sheets, or certified copies of the marked sheets, for each candidate who sat the Kenya Certificate of Primary Education or Kenya Certificate of Secondary Education examinations in the year 2016 and 2017 to the respective schools or examinations centers.

ii. Compelling the respondent to revoke and call the raw 2016 and 2017 KCPE and KCSE results for moderation by the Chief

Examiners in order to ensure credible grades are awarded to all 2016 and 2017 KCSE and KCPE candidates.

iii. Compelling the respondent to always mark and process exams in full and strict compliance with the law.

iv. Compelling the respondent to bear costs of this suit.

3. The petition is supported by the petitioner's affidavit sworn on 20th December 2017, a supplementary affidavit sworn on 11th April 2012 and written submissions filed on 22nd May 2018.

The petitioner's case

4. The petitioner's case is that the respondent flagrantly violated the Constitution and the best international practices governing the conduct of public examinations in Kenya by not adhering to the due process when marking and releasing the 2016 and 2017 Kenya Certificate of Primary Education (KCPE) and the Kenya Certificate of Secondary Education (KCSE) examination results. He contends that the results released for the past 2 years did not reflect the true performance of the candidates because the respondent deliberately omitted key marking processes.

5. The petitioner states that the respondent unlawfully and deliberately broke with the tradition of subjecting raw marks to moderation before awarding grades and instead used raw marks to awards grades to students at both the 2016 and 2017 examinations thereby leading to mass failures.

6. The petitioner defined moderation as the "wisdom of elders" where past performance and other relevant factors are considered in the awarding of grades so as to ensure fairness accuracy and consistency in marking and in the provision of results which are an accurate reflection of performance.

7. The petitioner contended that the Kenya National Union of Teachers (KNUT) is on record as having stated that the said examination results were not moderated during marking, and that the marking scheme was not discussed and adopted by the examiners as one uniform grading system to be applied in all subjects thereby negatively affecting the mathematics and science students. He argued since moderation takes time after the marking of the examinations, the results could not be released immediately after they are marked.

Petitioner's submissions

8. The petitioner submitted that it is totally unacceptable for the respondent to conduct the 2 examinations without any regard to accountability and transparency. In this regard, the petitioner faulted the respondent for not releasing the marked answer sheets to the candidates and schools/examination centres. He further stated that he was alarmed and aggrieved by the unconscionable use of 'raw marks' to award grades that resulted in mass failures at the 2016 and 2017 national examinations.

9. The petitioner further argued that the respondent's actions violated the provisions of the Constitution and especially Articles 4(2) 10, 19, 33, 35, 46, and 50 and 232. He contended that there was mass failure at the 2016 and 2017 examinations which was unscientifically attributed to the then Minister for Education Dr. Fred Matiang'i having curbed or even eliminated rampant cheating in the examinations and that the failure rates at the 2016 and 2017 examinations were placed in the range of 85% to 90% thereby resulting in poor transition rates to the next level and condemning at least one million children to a bleak future or no future at all. For the argument that the use of raw marks to award grades amounted to a gross violation of Article 47 of the Constitution, the petitioner relied on the decision in the case of **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR** in which the Court of Appeal held that:

> ***"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) of the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."***

10. For the argument that marking schemes and marked answer sheets should be released to candidates and schools, the petitioner relied on the provisions of Article 33 and 35 of the Constitution and cited several authorities including the case of **Central Board of Secondary Education (CBSE) vs Aditya Bandopadhyang & Others [2011] 8 SCC 497** wherein the Supreme Court of India framed and determined questions on an examiners right to information including the right to inspect evaluated answer books in public examination and the role of the examining body in holding such information.

Respondent's case

11. The respondent opposed the petition through the replying affidavit of **MERCY G. KAROGO**, the respondents acting Chief Executive Officer, dated 12th February 2018, wherein she averred that the respondent's mandate to conduct national public, academic, technical examinations within Kenya at basic and tertiary levels is provided for under Section 10 of Kenya National Examination Council Act No. 29 of 2012 and that the respondent conducts all its examinations in full adherence to the Constitution and the Act together with the attendant Rules and Regulations. She also averred that the KCSE examination process was carried out in a professional manner and in full compliance with the Constitution, the Act and the KNEC Rules of 2015. She further stated that adequate quality and security measures were put in place in all the examination processes from the stage of development of the tests to the release of examination results so as to ensure fairness, equality, objectivity, independence, and professionalism in the entire process. She attached a copy of the KNEC marking regulations to her

replying affidavits as annexure **"MGK1"** and added that the marking of the 2017 KSCE examination was strictly in accordance with the said KNEC marking regulations and the Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules of 2015 (hereinafter **"the Rules"**) as contained in Legal Notice No. 131 of 2015 (annexure **"MGK2"**). She also gave a detailed explanation of the process undertaken in the preparation of the marking scheme, marking of dummy scripts, coordination of examiners, conveyor belt system of marking, the checking and crosschecking of marked scripts.

12. She further stated that the respondent conducted the 2017 KCSE examination awards and grade setting exercise in a ceremony in which all the key stake holders for the Awards Committee and international observers were represented. She maintained that the Awards and Grade setting panel deliberated on the performance of candidates and took into consideration the effect of factors other than learners' knowledge and aptitude that warrant a slight adjustment of marks at which the intermediate grade boundaries had been previously set.

13. In response to the petitioners claim that marking schemes and answer sheets should be released to all the candidates and their respective schools, the respondent deponent referred to Rule 19 of the Rules which stipulate that:

> ***"Examination scripts shall not be accessible to any candidate, institution, teacher or any other third party representing the interest of the candidate once the script has been marked."***

14. She cautioned that an order for the release of marking schemes and answer sheets will compromise the security of the national examinations. She further stated that the respondent disseminates a feedback report to schools for each examination so as to give a report on the examination conduct, general performance, questions asked, the correct answers and the most popular answers given by the candidates. She reiterated that the KCSE examination results released on 20th December 2017 underwent all the KNEC processes and procedures from the test development, administration, marking, processing and release of examination results and that the results are credible and the true reflection of the capabilities of the candidates.

15. She was of the view that the allegations and prayers sought in the petition would interfere with the institutional independence of KNEC, an independent institution mandated to test and assess the quality of education in Kenya and to safeguard nationally and internationally accepted certification standards under the Kenya National Examination Council Act No. 29 of 2012.

Respondents submissions

16. At the hearing of the petition, **Miss Ndirangu**, learned counsel for the respondent submitted that under the right to access to information, Section 42 of the KNEC Act read together with Rule 19 of the Rules clearly show that the respondent has no obligation to give information under Article 35 of the Constitution as granting access to such information would compromise the integrity of the examinations, the examinations process and the privacy of the individual candidates.

17. Counsel referred to the provisions of Article 24 of the Constitution that allows for the limitation of the right to access to information which right she maintained is not absolute. For this argument counsel relied on the decision in the case of **CO & 87 Others vs Kenya National Examination Council & Another [2017] eKLR** where, when faced with a similar scenario on alleged right to access to marked examination scripts, the court held;

> ***"The petitioner's main grievance appears to be hinged on Article 35 of the Constitution alleging that the respondent violated their right to information. It is therefore important to explore further this claim. Article 35 of the Constitution on access to information, can only be limited as provided in Article 24 of the Constitution, which provides that:***
>
> ***Article 24" (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and the only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, 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***
>
> ***c) The nature and extent of the limitation***
>
> ***d) The need to ensure that the enjoyment of rights and fundamental freedoms by an 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."***
>
> ***On the other hand, Section 42 of the Kenya National Examination Council Act No. 29 provides:***
>
> ***"(2) The Council being a public entity shall be under no obligation contemplated under Article 35 of the Constitution to give such information as would, in the opinion of the Council-***
>
> ***a) Compromise the integrity of any examination administered by the council.***
>
> ***b) Compromise the examination process; or***

c) Compromise the right to privacy of any individual."

18. Counsel also cited the case of **Kenya National Examination Council and the Republic Exparte Kemunto Regina Ouro [2010] eKLR** wherein the Court of Appeal held:

> ***"In view of the above rule mandamus could not properly issue. It is against the law to require an authority to do what is contrary to the law. Besides by ordering the council to release results, the superior court may have meant that a grade other than "Y" be awarded to each respondent which would mean that the court would have acted outside its powers by issuing orders of mandamus. Mandamus issues to compel performance of a public duty imposed by law. The law does not mandate the council to act against its rules. So, contrary to submissions by Professor Muma, that the council should have released the results of other subjects the council could not do so without breaching Rule 9, aforesaid. Notwithstanding the fact that the recommendation made by the management committee was to cancel the results for the affected subject namely Chemistry, all the respondent candidates having sat for eight subjects each of them did not qualify to be graded. Hence the cancellation of all the results. In view of the foregoing an order of mandamus was improperly granted."***

19. Reliance was further placed in the Indian case of **Maharashtra State Board vs Kurmarsheth & Others [1985] CLR 1083** where the Supreme Court of India observed that:

> ***"….the conduct of examinations is a highly specialized exercise requiring men possessing technical expertise and rich experience. The process has worked for many years and unless it is shown that the system is fundamentally flawed and there is a better system which may be used in place thereof, this court will be reluctant to suggest a different and untested system, moreso because it does not possess the requisite technical expertise."***

20. Counsel further submitted that the term "raw" marks does not exist in the respondent's marking system as provided for under the law and faulted the petitioner for lacking the requisite understanding of procedures undertaken by the respondent in the marking of examinations which system is based on criterion reference.

Analysis and determination

21. I have considered the pleadings filed herein, the submissions by the parties and the authorities that they cited. I note that the following are the issues for determination: -

> **1. Whether the applicant's right under article 35 of the constitution was violated.**
>
> **2. Whether there was moderation of exam marks.**
>
> **3. Whether the respondent's statutory regulations are unconstitutional.**
>
> **4. Whether the petitioner's constitutional rights were violated.**

Article 35 of the Constitution

22. The petitioner's claim was that students who sit examinations together with their parents have constitutionally guaranteed rights to access the marked answer sheets or certified copies of marked answer sheets, after the release of the results, together with the marking schemes. He further contended that the teachers have a right to access for the purposes of gauging, their pupils' performance in order to prepare for the future by taking remedial action in order to ensure the verification and validation of marks and enhance credibility of the national examinations. The petitioner's case was that these measures will prevent the cooking or fixing of results to achieve undisclosed collateral purposes and to make the process versatile, reliable and as transparent as possible. According to the petitioner, failure to do this negates the letter and spirit of article 10, 35,47,50,53 and 55 of the Constitution.

23. On the above claims, the Respondent averred rule 19 of the Kenya National Examinations release of results and certification rules of 2015 provides that "***the examination scripts will not be accessible to any candidate, institution, teacher or any other third party representing the interest of the candidate once the script has been marked".*** The respondent's case was that any directive to release marking schemes or answer scripts will compromise the security of the national examinations. The Respondent explained that it disseminates a feedback report to schools for each examination which report serves to guide schools in their preparations for future examinations and the orders sought by the petitioner are premature as the council intends to release the report by March 2018.

24. Article 35 of the Constitution stipulates as follows:

> ***35. (1) Every citizen has the right of access to—***
>
> ***(a) Information held by the State; and***
>
> ***(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.***

25. Courts have held that the right to access information is the lynchpin upon which other rights are founded. The Constitutional Court of South Africa observed as follows on the right to access information in the case of **Brummer v Minister for Social Development 2009 (II) BCLR 1075 (CC)**

'access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.'

26. In the instant case, it was not disputed that the Respondent is a state body. Article 260 of the Constitution defines the term 'State' as '***the collectivity of offices, organs and other entities, comprising the government of the Republic of Kenya.***'

27. The question that this court is seized with for determination is whether the petitioner has a right to access the information in the respondent's custody. In examining whether there has been a violation of Article 35 the court needs to take into account the fact that the right to access information is not an absolute right and may be limited by dint of the provisions of Article 24 of the Constitution.

28. In order to actualize the right to access information under Article 35, Parliament enacted the ***Access to Information Act***, **2016** as the enabling Act that provides for the procedure to be adopted when seeking information from the state. The question that comes to mind is whether the petitioner complied with the said Act before filing this petition. Section 7 of the Act designates the Chief Executive Officer of a public entity to be an information access officer; section 8 requires that the application for information be made in writing in either English or Kiswahili. Section 9 on the other hand deals with the processing of the application which must be within 21 days or less on from the date of the receipt of the application.

29. A perusal of the court record does not show if the petitioner or anyone else, for that matter, complied with the procedure for obtaining the information that was allegedly sought from the respondent. I find that the petitioner did not demonstrate that he wrote to the respondent seeking to be supplied with the said information and that the respondent failed to supply him with such information so as to justify his claim that his right to access information was violated.

30. Needless to say, the right to information is not an absolute right as section 6 of the Access to Information Act provides the various exceptions on which access to information may be denied. The said section stipulates as follows: -

Limitation of right of access to information

1. Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to-

a) Undermine the national security of Kenya;

b) Impede the due process of law;

c) Endanger the safety, health or life of any person;

d) Involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;

e) Substantially prejudice the commercial interests including intellectual property rights, of that entity or third party from whom information was obtained;

f) Cause substantial harm to the ability of the Government to manage the economy of Kenya;

g) Significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

h) Damage a public entity's position in any actual or contemplated legal proceedings; or

i) Infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.

31. In the instant case, as I have already noted in this judgment, Rule 19 of the Kenya National Examinations (Release of Results and Certification) Rules of 2015 provides that "***the examination scripts will not be accessible to any candidate, institution, teacher or any other third party representing the interest of the candidate once the script has been marked".***

32. My finding is that the above rule is in tandem with the provisions of section 6 of the Access to Information Act and Article 24 of the Constitution that place limitation on the right to access information which right is clearly not absolute. In the instant case, I find that the limitation is properly founded on the basis that the release marking schemes or answer scripts will compromise the security of the national examinations. I further find that the said limitation is lawful, reasonable and does not amount to violation of the right to access information.

33. Having found that the petitioner did not discharge the burden of proof that he made a written request for information sought and the respondent, after the lapse of 21 days, refused to provide the same, I also find that the petitioner's claim that he was denied access to information is premature and lacks in merit.

34. Furthermore, it is to be noted that apart from Rule 19 of the Rules which is clear on the issue of non-accessibility of examination scripts to candidates or third parties, section 42 of the Kenya National Examinations Act is also categorical on the kind of information that the

respondent is obligated to give. The said section stipulates as follows:

> ***"(2) The Council being a public entity shall be under no obligation contemplated under Article 35 of the Constitution to give such information as would, in the opinion of the Council-***
>
> ***a) Compromise the integrity of any examination administered by the council.***
>
> ***b) Compromise the examination process; or***
>
> ***c) Compromise the right to privacy of any individual."***

35. Having regard to the above provisions and guided by the decision of the Court of Appeal in the case of **Kenya National Examination Council vs Republic Exparte Regina Ouru** (supra), I find that the prayer for orders of mandamus compelling the respondent to release marking schemes and marked answer sheets to the candidates and their respective schools/examination centres cannot properly be issued in this case as to do so would be contrary to the law. In this regard, I find that the respondent cannot release the marked scripts without breaching Rule 19 aforesaid.

Moderation of marks

36. The petitioner laid out a myriad of allegations against the Respondent over the claim that the marks that they released in respect to the impugned examinations were 'raw' marks that were neither moderated nor standardized.

37. Sections 107 and 109 of the Evidence Act are clear on the bearer the burden of proof in civil matters.

Section 107 stipulates as follows:

> ***Burden of proof***
>
> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

38. Section 109 of the Evidence Act on the other hand clearly states that:

> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

39. In the case of **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** the Court of appeal made the following observation:

> ***"The Supreme Court of Kenya in Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 others -Petition No. 2B of 2014; [2014] eKLR had occasion to illuminate how the legal and evidentiary burden of proof is applied in the law of evidence. The Court analyzed the application of Sections 107 and 112 of the Evidence Act.***
>
> ***50. Section 107 of the Evidence Act provides:***
>
> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him."***
>
> ***51. In considering the application of the concept of shifting burden of proof, the Supreme Court expressed itself as follows:***
>
> ***"[187] But Section 112 of the Evidence Act is not to be invoked without regard to the preceding sections, especially Section 107 (1) and (2) of the same Act which provide as follows:***
>
> ***"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of facts it is said that the burden of proof lies on that person"***
>
> ***"[189] Section 112 of the Evidence Act…is an exception to the general rule in Section 107 of the same Act.***
>
> ***Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof."***

40. In the instant case, an examination of the allegations made by the petitioner shows that he has not provided proof with regard to any of

the claims. Going by the above stated provisions of the Evidence Act it goes without saying that it is incumbent upon a party who makes allegations to prove them. I note that in the petitioner's supplementary affidavit, he appears to be shifting the burden of proof to the respondent to show that the 'raw marks' were not used in the grading of the exams. This cannot be the case as has been demonstrated by the Evidence Act and the case law. The petitioner did not prove that he has a special relationship with the Respondent so as to enable him shift the burden of proof as provided for in section 115 of the Evidence Act while Section 112 of the Evidence Act is also not available to him as he has not discharged his burden of proof to the extent that it can now be pronounced that it has shifted.

41. This court notes that petitioner relied on various newspaper articles and cuttings in order to advance the allegations made in the petition. The Court of appeal made the following observations with regard to newspaper cuttings in the case of **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**

> ***"44. On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cuttings, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper. On a comparative basis, in the Indian case of Laxmi Raj Shetty -v- State of Tamil Nadu 1988 AIR 1274, 1988 SCR (3) 706, the Supreme Court held that a newspaper is not admissible in evidence."***

42. Going by the dictum in the above cited case, I find that in the absence of the maker of the statement by the petitioner the statements made in the newspaper articles remain hearsay. I therefore find that the evidence tabled by the petitioner in form of newspaper articles and the media printouts are insufficient to discharge the high burden placed on him by the law to prove his allegations.

43. Still, on the issue of moderation of examination marks, the petitioner faulted the Respondent for failing to conduct an award ceremony for grading of students for the impugned examinations. According to the petitioner, this resulted in meaningless raw marks being released for two years in succession. He claimed that the unreasonable and arbitrary decision resulted in mass failure in the range of 85% and 90% in both the KCPE and KCSE exams thereby leading to very poor transition rates to the next level of education which amounted to condemning one million children to no future at all.

44. In his submissions, he describes moderation as 'wisdom of elders' where past performance and other external factors are considered in order to attain similar standard where applicable when compared to examination papers. He relied on the document titled '***our quick analysis of KCSE of 2016 – the glaring shortcomings by the Kenya National Union of Teachers (KNUT)'.***

45. He accused the respondent of making abrupt and unilateral changes to the examination grading policy, eliminating stages like coordination of the marking scheme, filling marks in the mark sheet and the award ceremony as being responsible for the current mess.

46. He argued that the failure to submit to parliament the abrupt and unilateral changes for scrutiny and approval and without public participation the respondent was in violation of section 11(1) of the statutory instruments Act no 23 of 2013. He accused the Respondent of hurriedly marking releasing and posting raw marks or scores without crosschecking, verification, validation standardisation and moderation.

47. The Respondent, on the other hand, maintained that the marking of the KCSE regulation was in accordance with the KNEC marking regulation and the Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules of 2015.

48. The respondent argued that the marking schemes were securely developed, moderated, the answer scripts were marked through the conveyor belt system which enhances objectivity, integrity and fairness in marking candidates' scripts; that senior examiners quality assure the marking process by coordinating a minimum 10% of the candidates answer scripts marked in their respective papers. Therefore, the system adopted ensures candidates are scored fairly and marks are consistent and reliable. The respondent contended that the chief examiner, his assistant, team leader, senior examiner ensure accuracy by ensuring the process is above board.

49. The respondent described the awarding and grade setting of the KCSE examinations as a process used to mitigate the effect of factors other than learner's knowledge and aptitude on performance and all the complexities are considered in arriving at the set intermediate grade boundaries which is achieved at the awards and grade setting panel meeting where candidate's performance statistics are discussed. This according to her was conducted for the 2017 KCSE where all key stake holders for the awards committee meeting were present which included officers from the Directorate of quality assurance & standards of the ministry of education and all subject specialists. According to the respondent, the awarding was therefore in accordance with international standards.

50. My finding on the above issues is that an interrogation of the report christened ***'our quick analysis of KCSE of 2016 – the glaring shortcomings by the Kenya national union of teachers (KNUT)'*** which was produced by the petitioner as one of his annexures cannot be authenticated as it is not only unsigned but also does not show the date when it was delivered and to whom it was addressed or its intended purpose. This court cannot therefore be expected to rely on a report whose origin and purpose is unknown and I therefore find that the petitioner did not discharge the burden of proof in this regard.

51. The petitioner further relied on an article authored by one Professor Ogula which he also attached to his affidavit in support of his argument on moderation of results. This court finds that the said article is quite a peculiar occurrence as it shows that it was specifically tailored for this litigation. The petitioner did not establish if the said article has been published or subjected to peer review, which are critical steps towards the validation of academic writing. In this regard, I find that the statements and findings made in the said article cannot be adopted by this court as a representing the true picture regarding the issue of moderation of examination results. It is my humble view that the statements made therein remain allegations which have not been backed by the requisite cogent proof.

52. The petitioner also alleged that there was failure to place before parliament, the abrupt and unilateral changes to the marking and grading of students and that the same are contrary to the Statutory Instrument Act. The petitioner did not however point out the instrument or legislation on which the same is based for this court's consideration.

53. It must be noted that the burden of proof at all material times rests with the petitioner. The Supreme Court discussed the subject of the burden of proof in civil matters in the case of **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR** and held:

> ***"[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."***

54. In the instant case, I find that the attempt, by the petitioner, through the supplementary affidavit, to assert that it was incumbent on the respondent to show the system that they used in the grading, in the face of their denial of the petitioner's allegations cannot suffice in law.

Constitutionality of the statutory regulations

55. The petitioner also contended that the Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules of 2015 are void for not meeting the threshold in article 24 of the constitution for limiting the enjoyment of rights and fundamental freedoms enshrined in the Bill of rights. He further argued that they are also void for having been enacted through a process that violated the Statutory Instruments Act.

56. The Court of Appeal discussed the subject of precision of pleadings in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** and stated as follows:

> *"(41)* ***We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."***

57. In the present case, the petitioner submitted that the rules were enacted without regard to Article 10, 47,129,153(4) (a) and 232(1) (d) of the Constitution and sections 4,5,6,7 and 8 of the Statutory Instruments Act. He argued that there was no public participation, regulatory impact statements were not prepared, and that there was no parliamentary scrutiny. He further stated that the respondent did not get the Parliament's certification exempting the statutory instrument from scrutiny pursuant to section 14 of the Statutory Instruments Act.

58. In a rejoinder, the Respondent submitted that the KNEC Act grants the council power to make regulations pursuant to which the rules being challenged amongst others were enacted. The respondent maintained that the rules were subjected to participation when the same were presented to stake holders on 23rd December 2013 and to the parliamentary committee on education. The respondent's case was that the threshold of public participation is not rigid and depends on each circumstance unique to the peculiar nature of the issue at hand which was couched on the security and integrity of the exam system. The respondent cited the case of **Republic vs. County Government of Kiambu Ex-parte Robert Gakuru & another [2016] eKLR** for the proposition that what is required is that reasonable opportunity be accorded to stake holders.

59. Since the issue before me is the *constitutionality* of legislation, it is important to reiterate the applicable principles. In the Supreme Court of India in **Hambardda Wakhana v Union of India Air** [1960] AIR 554 it was held that:

> ***"In examining the constitutionality of a statute, it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."***

60. Considering the principle stated in the above cited case, it is a requirement that anyone challenging the constitutionality of legislation must prove that the legislature did not act in accordance with the law in enacting the impugned legislation. That there is a presumption of constitutionality of statutes is therefore not in doubt. This position was affirmed by the Court of Appeal of Tanzania in **Ndyanabo v Attorney General** [2001] E. A 495, which was a restatement of the law in the English case of **Pearlberg v Varty** [1972] 1 WLR 534. In the former, the Court held that:

> ***"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative."***

61. It is therefore clear that the constitutionality of legislation is a *rebuttable presumption;* and only where the Court is satisfied that the legislation fails to meet the constitutional muster can the court declare the law unconstitutional. Turning to the claim that there was no public participation in the enactment of the impugned rules, I find that it was not enough for the petitioner to merely claim that there was no public participation. The petitioner was required to demonstrate that indeed, public participation was not observed in the entire process of the enactment of the impugned rules that governed the marking of the contested examinations. In achieving this, nothing would have been easier

than for the respondent to either obtain documentation or an index from parliament to ascertain this contention. In this case, no material was placed before me to prove that there was no public participation and I therefore find that the claim was not proved to the required standards or at all.

Violation of the petitioner's constitutional rights.

62. The petitioner claimed that the actions of the respondent violated several articles of the Constitution namely; Articles 1(1)2(1) (2), 3 10(2), 35, 47, 232 and 259(1) of the Constitution. I however note that apart from pointing out the various articles allegedly violated, the petitioner did not demonstrate, with a degree of specificity the nature of the violation and the manner of such violation. I therefore find that no contravention of constitutional rights has been established in the present case.

63. Courts had held the view that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any). (See **John Kimanu vs Town Clerk, Kangema NBI Pet. No. 1030 OF 2007**)

64. For the above reasons and in view of my analysis of the facts of this case and the law as shown above, I find that the petitioner has failed to prove his case against the Respondent to the required standard. In sum I find that it lacks merit and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 29th day of November 2018

W. A. OKWANY

JUDGE

In the presence of:

No appearance of parties

Court Assistant – Kombo