



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 1 OF 2017

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22(2) AND 22(3), 23, 24 AND 165 OF
THE CONSTITUTION**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOM SECURED AND GUARANTEED UNDER ARTICLES 35, 47, 50(1) (B), 53(1) (B),
53(2) AND 55(A) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE KENYA NATIONAL EXAMINATIONS COUNCIL ACT NO. 29 OF
2012 SECTION 3(2), 10(1) AND 10(2), 10A, 11(C), 48**

AND

**IN THE MATTER OF: THE BASIC EDUCATION ACT NO. 13 OF 2013, SECTIONS 4, 18, 30
AND 31**

AND

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015,
SECTION 2, 3(1) (C), 4(1), 4(4)(A) AND 6**

AND

**IN THE MATTER OF: THE KENYA NATIONAL EXAMINATIONS COUNCIL MARKING
INSTRUCTIONS TO EXAMINERS REF/KNEC/FA/MAR/2016/001 REGULATION 1, 2 AND 2.1**

AND

**IN THE MATTER OF: THE KENYA NATIONAL CERTIFICATE OF PRIMARY EDUCATION
RESULTS RELEASED ON 1ST DECEMBER, 2016 AND THE ANOMALIES THEREIN**

BETWEEN

C O & 87 OTHERS.....PETITIONERS

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT

AND

OKIYA OMTATAH OKOITI.....INTERESTED PARTY

JUDGMENT

The Petition

1. By a Petition dated 3rd January, 2017 eighty eight (88) Petitioners claiming to be parents of 88 candidates who sat for the Kenya Certificate of Primary Education Examination (KCPE) at [particulars withheld] Primary School (the school) have brought an action for relief under the Constitution claiming that their rights have been violated by the Respondent.

2. The Respondent herein (“*the council*”) is a body corporate with perpetual succession and common seal established under Section 3 of the Kenya National Examination Council Act No. 29 of 2012 as Revised in 2016, (“*the Parent Act*”).

3. The functions of the Respondent as set out under Section 10(1) of the Kenya National Examination Council Act No. 10 of 2012 include to *inter alia*:

- Set and maintain examination standards and conduct national examinations within Kenya of basic and tertiary education levels.
- Advise the government on any policy decision that is relevant to or has implication on the functions of the council or the administration of examinations in Kenya.
- Make rules regulating the conduct of examinations and all purposes incidentals thereto.
- Give the cabinet secretary in-charge of Education, Science and Technology data regarding the performance in co-curriculum activities of institutions of basic education for release of examinations.

4. The Respondent by virtue of the powers accorded to it under the Parent Act offered and administered the Kenya Certificate of Primary Education to all Class 8 pupils in Kenya between the 31st day of October 2016 to the 3rd day of November 2016 and released the results on the 1st of December 2016 through the cabinet secretary in-charge of Education, Science and Technology.

5. The Petitioners herein had children who sat the said examinations at [particulars withheld] Primary School, which is a community school run by [particulars withheld] Parents Club to which the Petitioners are members and which was examination center number 0xxx7 in the said examination. After the release of the results the school was said to have a mean score of 337.35 a fact which the Petitioner alleges did not reflect the performance of the school and its pupils in the previous years where it scored 388.66 in 2015, 377.22 in 2014, 368.94 in 2013, 356.45 in 2012, 376.82 in 2011 and 369.96 in 2010, 383.65 in 2009, 390.45 in 2008 and 348.52 in 2005.

6. The Petitioners allege that the results did not conform with the individual child abilities when set against the monthly test results of the year 2016 by the said pupils which ranged from 363.48, 392, 399, 391, 379, 393, 387, 400.36, 396.04 and 372, for the period between January, 2016 to December, 2016.

7. The Petitioners allege that there was an anomaly in the tallying of the examination results and identified the following anomalies:

Index Number	Name	Anomally
xxx049	A A A	Error in Maths two (==) signs indicating exams not done
xxx010	N D M	32% in Kiswahili which was too low considering his performance
xxx003	N I S	Unconverted science marks
xxx026	A K A	Unconverted science marks
xxx002	R N V	Too low marks to match her ability
xxx013	M M K	Too low marks to match her ability
xxx011	N L C	Too low marks to match her ability
xxx008	M I T	Missing SSTRE marks
xxx029	O G O	Missing Kiswahili marks

8. The Petitioners chose *inter alia* the aforesaid as a test case to test the veracity of the results that their candidates had been given and on the 7th day of December 2016 wrote to the Respondent and the Cabinet Secretary Ministry of Education, Science and Technology requesting that all the scripts for the Petitioners children be cross checked, with a view to retallying the marks.

9. The Petitioners allege that the Respondent did not respond to the issues that had been raised by the Petitioners and subsequently the Petitioners through [particulars withheld] Primary School management committee members, the school principal, one class eight teacher and representatives from the Petitioners went to Nairobi where they met the Cabinet Secretary and the Permanent Secretary for Education, Science and Technology and some officers of the Respondent and upon a physical scrutiny of some of the examination papers the following was allegedly discovered:

Index Number	Pupil's Name	Scores with errors	Corrected scores
xxx049	A A A	Error in Maths two equal signs(==) signs indicating exams not done	Corrected to 81%
xxx010	N D M	32% in Kiswahili	77% A-
xxx008	M I T	Missing SSTRE marks	81% A
xxx029	O G O	Missing Kiswahili marks	64 B

10. Upon realizing that there were so many anomalies the Petitioners requested the Respondent to avail all answer sheets for the Petitioners' children for cross checking but the request was turned down despite the demonstration of anomalies in the test exercise.

11. From the sample verification exercise done, the Petitioners strongly believe that the optical machine (an instrument used to mark multiple choices examination) did not capture some answers from the candidates or someone maliciously messed up with the optical machine hence this affected the integrity of

the tallying process after examination had been carried with a lot of transparency and accountability.

12. It is the Petitioners' case that the marking and release of the Kenya Certificate of Primary Education Examination 2016 was done in a haste compared to the other years and this may account for the various errors of commission and omission in tabulating and tallying of the results. For example, the results for [particulars withheld] Primary and [particulars withheld] Schools, which also had errors which the Respondent rectified after intense pressure, was as follows:

Initial Score	Changed Marks	Rectified marks by the Respondent
21 E	76 A-	From 353 to 408
18 E	74 B	From 338 to 394
16 E	76 A-	From 353 to 413
23 E	76 A-	From 353 to 406
16 E	73 B+	From 324 to 381

13. Similarly, the Petitioners state that in Malindi, a child of index number xxx021 namely A D J's initial results from the Respondent indicated that he got 301 marks scoring 52-C in English, 60-B in Mathematics, 55-C in Kiswahili, 70-B+ in Science and 63-B- in Social Studies and Religious Education. After sometime the result was downloaded indicating the same child index number xxx021 with a total of 191 having scored 27-D in English, 18-E in Kiswahili, 46-C in Mathematics, 58-C+ in Science and 42-C- in Social Studies and Religious Education.

14. The Petitioners' aver that the above enumerated incidences of errors of commission and omission, and a new system of handling exams having been adopted, it is prudent and reasonable to demand a scrutiny of the answer sheets as it is common knowledge that new systems are bound to experience teething problems. The Petitioners' aver that auditing the examination results as demanded by the Petitioners can be a basis of improving the integrity of the national examination for public good.

15. The Petitioners further aver that other than the normal marking of examination answer scripts, the following was not done by the Respondent;-

- Checking of marked answer scripts to ensure validity, reliability and accuracy of mark allocation.
- Verification and adjudication of captured marks.

16. It is alleged that the said failure was contrary to Paragraph 2.1.1 and 2.1.3 of the Marking Instructions for Kenya National Examination Council Examiners Ref: KNEC/EA/FA/MAR/2016/001.

17. The Petitioners now allege that the Respondent has refused to do the following for the Petitioners despite demand and evidence that there were anomalies both of commission and omission in the manner in which the optical marking and the tallying of results was done;-

- Availing of the answer sheets in the presence of the Respondent officers for verification of what was done using the optical machine.
- Checking of the marked answer scripts to ensure validity, reliability and accuracy of marks allocation.
- Verification and adjudication of captured marks.
- Senior examiners marking report provided for under regulation 1.8.9 of the Marking Instructions for Kenya National Examination Council examiners.

Matters complained of

18. The Petitioners contend that the marks awarded to their children do not reflect their ability nor the school's general performance over the years. The Petitioners contend that there is substantial evidence from the partial scrutiny done that shows there is a general inaccuracy in the tallying of the marks, which affects the integrity of the process.

19. The Petitioners contend that it's imperative that the marked examination scripts be checked to ensure validity, reliability and accuracy of the tallying and results. The Petitioners further contend that for transparency and accountability in the process verification and adjudication of captured marks be done which can be achieved by a physical manual checking of the works of the optical machine as it springs out errors based on the shade marked by the candidate.

20. The Petitioners' case is that the Respondent has despite requests by the Petitioners to do the verification and re-tally of the marks refused, failed and or neglected to do so and despite being given apportionment for the doing of the needful the same has not been carried out by the Respondent.

21. The Petitioners' case is that the actions of the Respondent have infringed and continue to infringe their children's constitutional rights and freedoms specifically Article 10, 35, 47, 50, 53 and 55 of the Constitution and the right to education provided under the Basic Education Act.

22. The Petitioners alleged that pursuant to the foregoing the Respondent has committed constitutional breaches as follows:

(a) Failure by the Respondent to uphold the values and principles of good governance, transparency and accountability contrary to Article 10(2) (k).

(b) Denial by the Respondent to allow them free access to information contrary to Article 35(1).

(c) Refusal by the Respondent to accord them right to a fair administrative action contrary to Article 47.

(d) Failure to accord them a fair hearing contrary to Article 50(1).

(e) Failure to accord their children the right to basic education contrary to Article 53(1) (b).

Prayers

The Petitioners pray for the following orders:

(a) A declaration that the Petitioners' children rights under Article 10, 43,47, 50 and 53 of the Constitution have been violated by the Respondent.

(b) An order of mandamus and or mandatory injunction compelling the Respondent to avail the examination scripts of the children who sat for the Kenya Certificate of Primary Education Examination 2016 at [particulars withheld] Primary School being examination center number 0xxx7 for the following matters be done urgently;-

(i) Checking of marked answer scripts of the Petitioners children in 2016 Kenya Certificate of Primary Education Examination to ensure validity, reliability and accuracy of allocation of marks.

(ii) Verification and adjudication of the Petitioners children captured marks.

(iii) Compelling the Respondent to produce the Petitioners children 2016 Kenya Certificate of Primary Examination answer scripts for cross checking to ascertain that there was no wrong doing or wrong entries done and that proper conversions of the marks into percentages are done.

(iv) That where the Respondent finds any anomaly following the foregoing, the Respondent rectifies such anomaly.

(v) Provide the senior examiners marking report provided for under regulation 1.8.9 of the Marking Instructions for Kenya National Examination Council examiners.

(vi) That the Respondent be compelled to rectify any errors of commission and omission that may be discovered during the scrutiny, audit and verification exercise herein in the presence of the Petitioners' representatives and in particular the principal and some teachers from the affected examination center and or school.

(c) Costs

The Petition is supported by affidavit of HUSSEIN SHARIFF sworn on 3rd January, 2017 and his Further Affidavit sworn on 23rd February, 2016.

Interested Party

23. On 10th January, 2017 Mr. Okiyah Omtatah was joined to these proceedings as Interested Party. Pursuant to that joinder the Interested Party filed a supporting affidavit to the Petition sworn by the Interested Party on 13th January, 2017 in support of the Petition. The Interested Party also filed 1st and 2nd Further Affidavits both sworn on 28th February, 2017.

24. The Interested Party alleges that contrary to the requirement in the regulations that exams should be up to date and free from error, the testing, marking, and, announcement of results of the 2016 Kenya Certificate of Primary Education did not conform with these regulations. He alleges that the papers had conceptual and typographical errors, and the results announced were full of mistakes.

25. The Interested Party alleges that there were blunders in testing of the exams and gave many examples including that of Question No. 30 of the KCPE 2016 Kiswahili Paper which contained the word "*misguide*" while such a word does not exist in Kiswahili.

26. The Interested Party also alleges that there were blunders in the marking of the exams and cites various examples of this including one where Index No. 0xxxxxxx10 ([particulars withheld] Primary School, Mombasa) was given 32% in Kiswahili but upon follow up made by the school, an error was established and rectified and the correct result of 77% given to the pupil.

27. The Interested Party alleged that as a result of the Respondent's actions many children had been traumatised by the results of the 2016 KCPE exams and prayed that as a form of indemnification the affected pupils be allowed to join their first choice secondary schools of choice.

The Response

28. The Respondent opposed the Petition vide a Replying Affidavit sworn by WILSON CHELIMO on 17th February, 2017 and another replying Affidavit to the Supporting Affidavit of the Interested Party.

29. The Respondent's case is that irrespective of the constitutional guarantee of right to information the Respondent is under no obligation to give any information which in its opinion would:

- (a) Compromise the integrity of the examinations it administers,
- (b) Compromise the examination process, or
- (c) Compromise the right to privacy of any individual.

30. The Respondent states that the marking of Kenya Certificate of Primary Education (KCPE) examination for the year 2016 in respect of which the Petitioners have raised issues was regulated by the **Kenya National Examinations Council (Management of Examinations) Rules 2015** and upon marking examinations the Respondent was expected to issue a candidate with provisional examination results and the Respondent could correct the information given in the provisional examination results before issuance of a certificate on the examination. As per these regulations, the Respondent alleges that queries regarding examination results should be submitted to the Respondent by the heads of primary schools for school candidates and through the County Director of Education for private candidates within thirty (30) working days from the date of the release of examination results. Any queries received after thirty (30) working days from the date of release of examination results will still be processed but at a fee. (The Respondent annexed **Exhibit “WKC1”** being an extract from the Regulations.

Background to the 2016 Examination

31. The Respondent provided a detailed background to the 2016 KCPE examinations at pages 8-9 of its replying affidavit sworn on 17th February 2017 where it is explained the preparations made by the Council for the examination and also how the students were tutored on how to use OMR (Optical Mark Reader) answer sheets. At pages 9-10 of the replying affidavit the Respondent explains how the answers sheets pertaining to the KCPE examination were marked to ensure diligence. The marking, the Respondent states, involved two processes; scoring of objective answer sheets by use of Optical Mark Reader Machines and use of teachers who are trained as examiners to mark English composition and Kiswahili Insha.

32. To ensure that there was effective coordination, the Respondent alleges that all marking centres for English Composition and Kiswahili Insha were located within a radius of fifty kilometers from Nairobi and upon completion of the marking, candidates' results were taken through a process which involved conversion of candidates' raw scores to standardized scores.

Standardization of scores meant converting the raw marks of each paper in the KCPE examination into a standard score so that the mean and standard deviation of the papers are identical. The actual conversion is that the expected mean is fifty (50) and the standard deviation is fifteen (15). Second, merging of the standardized scores to subjects with more than one paper, that is English, Kiswahili, Kenya Sign Language and Social Studies and Christian Religious Education (CRE)/Islamic Religious Education (IRE). Third, grading and totaling of each candidate's marks and lastly, release of candidates' examination results.

33. The Respondent through a replying affidavit sworn under protest on 17th February 2017 admits receiving a letter dated 2nd December 2016 from the Principal of [particulars withheld] Primary School in which the school requested for verification of examination marks awarded to eight candidates of the school. On the same day, the Respondent alleges that the Chairman of the school **T K** together with the School's Principal and two other persons who introduced themselves as School Board members went to the Respondent's offices and raised two issues vis; some results on certain papers were missing with respect to certain candidates and they had a general concern on the School's results since the mean grade of the School had dropped below 340 marks.

34. The Respondent states that its officers informed the representatives from the School that the issues complained of were not unique because at the material time the Respondent had already received queries on behalf of eighty four (84) candidates which were being addressed and that the common anomalies were to be blamed squarely on the candidates as at the time of taking the exams, several candidates declared themselves "*Absent*" by shading the wrong eclipse, others wrote the wrong index numbers while majority shaded the wrong eclipse in the index numbers. (**Respondent Exhibit “WKC 6” is a sample of examination answer sheet to help the Court appreciate the common mistakes which were committed by the candidates**).

35. The Respondent treated the issues raised by the School as queries within the context of the Kenya National examination Council Regulations on Certificate of Primary Education and proceeded to handle

them as follows:

(a) Candidate index number xxx10 (N D M) was awarded thirty two (32) marks in Kiswahili objective answer sheet. This was corrected by establishing the mistake committed by the candidate and awarding him the seventy seven (77) marks which he obtained.

(b) Candidate index number xxx49 (A A A) did not have marks in Mathematics and in Science due to incorrect shading of the index number. The case was addressed and the candidate was awarded eighty one (81) marks in Mathematics and sixty two (62) in Science.

(c) As for the candidates the School alleged to have been awarded low marks, the Respondent verified and confirmed that the marks given were genuine. These candidates are; R N V – index number xxx002, N I – index number xxx003, N L C – index number xxx011, R M C – index number xxx012, M M K – index number xxx013 and W C W – index number xxx041

(d) The Respondent also addressed the missing scores for candidate index number xxx8 (M I T) and xxx29 (O G O) upon which candidate index xxx8 scored eighty one (81) on SSR and index twenty nine (xxx29) obtained sixty one (61) marks in Kiswahili.

36. The Respondent states that no further queries were received from the school and the Respondent sent a letter to the School confirming the updating of the results after addressing questions raised by the School (letter marked Exhibit “WKC 7”) and the final Result sheet after updating it (marked Exhibit “WKC 8).

37. In relation to allegations that the school had performed better in previous years, the Respondent replied that past performance cannot be a reason for doubting the veracity of exam results for 2016 because each cohort of candidates have different examination papers, and student’s competitiveness vary with each year and the strict regime under which exams were conducted in 2016 was bound to have an effect on the results and to add to that KCPE exams are set and marked externally and not by the School.

38. The Respondent further contended that the Optical Mark Reader (OMR) was not interfered with during the marking process, nor was the integrity of the exams tallying process compromised. To ensure integrity of the exam results, the Respondent alleges that after going through OMR, the answer sheets were handed over to a special team to identify any error and correct them and those that were completely rejected by the computer were given to a special team which had to identify the cause for rejection and where necessary mark them manually. Upon being marked manually, they had to be handed over to another team for keying into the Respondent’s server. The Respondent gave details on how the English Composition and Kiswahili Insha were marked at page 13 of his Replying Affidavit.

39. The Respondent states that all anomalies raised as queries were investigated and addressed appropriately as indicated in the School’s result print out. The Respondent further contends that to avail the examination scripts of children who sat KCPE 2016 at the School for purposes of checking the marked answer scripts of the Petitioners’ children; verification and adjudication of the Petitioners’ children’s captured marks, or for any other purpose as prayed for in the Petition, will compromise the integrity of the examination itself and the process of examining candidates and if the Petitioners’ prayers were to be granted it would amount to them being the examiners of their children’s performance in the KCPE examination thereby defeating the entire principle of having an independent examiner to assess candidates’ performance.

40. The Respondent further alleges that the Petitioners have no *locus standi* to raise alleged exam anomalies at [particulars withheld] Primary and [particulars withheld] Schools as the Petitioners are not Next Friends to the alleged candidates and if there were any candidate from those schools who felt aggrieved over the exam results and who contacted the Respondent their concerns were addressed as provided under the Regulations.

41. The Respondent’s case is that the Petitioners are on a fishing expedition based on a misguided

suspicion and there is nothing tangible to convince the court to accede to their request. The Respondent's case is that the relief of *mandamus* being sought by the Petitioners can only be granted to compel the Respondent to do what is within its legal duty to perform but since there is no legal duty imposed on the Respondent to avail exam scripts to parents for verification and evaluation as to whether the exam marking was properly done, the prayer for *mandamus* is misplaced.

42. With regard to the alleged breach of constitutional provisions, the Respondent denied that it has violated Article 10(2) (c) of the Constitution as it has observed good governance, integrity and transparency by allowing the School to raise concerns over specific exam results which were disputed and addressing them adequately. The Respondent states that it has not denied the Petitioners the right to information but has given the Petitioners all the information they need without compromising the Respondent's rights as provided under Article 24 of the Constitution read together with Section 42 of the Kenya National Examination Council Act No.29 of 2012.

43. The Respondent alleges that it has not taken any administrative action against the candidates listed at paragraph 2 of the Supporting Affidavit of **HUSSEIN SHARIFF** so as to be accused of having violated Article 47 of the Constitution. To the contrary, the Respondent alleges that it met the officials of the School and acted on the formal complaint as per the letter from the School dated 4th January 2017. The Respondent alleges that it gave the officials of the School a fair hearing when they visited it and after the hearing the necessary corrections were effectuated in the examination results sheet.

44. Further, the Respondent denies that it has violated the right of candidates under Article 53(1) (b) to free and compulsory basic education as that right does not insinuate that candidates must freely pass examinations. The Respondent further states that The Education Act No.14 of 2013 does not in any way entitle candidates to have access to their examination scripts once marked by the Respondent. The Respondent urged the Court to strike out this Petition for being fatally defective.

Preliminary Objection

45. Upon filing the Replying Affidavit to the Petition, the Respondent gave notice of the Preliminary Objection it intended to raise to the effect that the Petition was incompetent as it had been filed without the authority of the next friend.

Issues for Determination

Parties raised separate issues for determination but which I have reconciled as follows:

- i) Whether the Petition is incompetent for lack of authority of the next friend.
- ii) The nature of the Petitioner's complaints and whether the Respondent addressed the complaints raised by the Petitioners.
- iii) Whether the Petitioners' Constitutional rights were violated.
- iv) Whether the Respondent denied the Petitioners' information contrary to Article 35(1) of the Constitution.

Submissions

46. Parties filed detailed submissions which were orally highlighted in court.

i) Failure to file authority of next of friend (The Preliminary Objection)

47. The Respondent through its counsel, **Mr. Obura**, submitted on the Preliminary Objection and stated that the Petitioners have instituted the present suit allegedly on their behalf and on behalf of the candidates who sat 2016 KCPE at the School. Counsel submitted that the reliefs sought in the Petition are

specifically directed for the benefit of the candidates whom they claim are their children. In essence, the candidates are the complainants.

48. Mr. Obura submitted that the only evidence of parenthood is an affidavit sworn by **HUSSEIN SHARIFF** who deposed at paragraph 2 of the Supporting Affidavit that the Petitioners bring the Petition on their behalf and on behalf of their children and then proceeds to list the names of the parents against the names of the candidates. Mr. Obura submitted that there is no evidence of appointment of the deponent to swear an Affidavit on behalf of the rest of the Petitioners and even if there was to be evidence of such appointment the deponent cannot vouch on the parenthood of the rest of the Petitioners *vis a vis* their children without producing the children's birth certificates to support the fact they were sired by the rest of the Petitioners or in the alternative each individual parent swearing an affidavit to confirm parenthood. Because this has not been done, Mr. Obura submitted that the said Petitioners can then be said to be acting on behalf of those children not by directly interceding with the court and not by themselves informing the court that they have donated their authority to someone to act on their behalf but by the deponent himself claiming he has the authority to swear the affidavit. Mr. Obura submitted that this is an overstretched proof of *locus standi* of the Petitioners in the suit.

49. In opposing the Preliminary Objection, Mr. Jengo submitted that the requirement of the authority of the next of friend is provided for under the provisions of **Order 32 Rule 1 and 2 of the Civil Procedure Rules**. Counsel submitted that the said provision does not apply in case of constitutional petitions which are guided by the provisions of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedom) High Court Practice and Procedure Rules** which do not demand that the authority of next of friend be filed. Mr. Jengo submitted that the Constitution at Article 22(1) and (2) is explicit that any person can institute proceedings, claiming violation of fundamental rights and freedom even on behalf of another person. The Article reads thus;

“22(1) Every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under Clause (1) may be instituted by;-

(a) a person acting on behalf of another person who cannot act in their own name;

(b)

(c) A person acting in public interest in article 258 of the Constitution.”

50. Mr. Jengo also referred to Article 258 of the Constitution. Counsel submitted that the Children herein are minors who cannot institute legal proceedings in their own names and the parents have the necessary *locus standi* to file this petition on behalf of their children. Counsel referred to the decision in **Priscilla Nyokabi Kanyua vs. A.G & Another Constitutional Petition No. 1 of 2010** in which the court considered the applicability of Civil Procedure Rules in constitutional Petitions before the promulgation of the new Constitution. In refusing to strike out the petition, the court held:

“Should this court therefore strike out the petition for not complying with the Civil Procedure Rules and the (Practice and Procedure) rules of this court? We think not....Rule 10 of this courts (Practice and Procedure Rules) mandates the court to interpret the rules in a manner that promotes the principle of substantive justice without undue regard to technicalities.”

51. The Petitioners submit that even though the above decision was made before the promulgation of the new Constitution, the issue was later codified in the provisions of Articles 22, 258 and 159 of the Constitution of Kenya as set out in **Suleiman Said Shahbal vs. The Commissioner of Lands & 2 Others Constitutional Petition No. 8 of 2012** where the judge stated that Section 60 of the repealed

Constitution had been replaced by Article 159(d) which mandated the courts to uphold justice without regard to undue technicalities.

52. However, in response to this Mr. Obura urged the court to note the use of the word “may” in Article 22(2) (a) of the Constitution which states:

“In addition to a person acting in their own interest, court proceedings under Clause (1) may be instated by:

(a) A person acting on behalf of another person who cannot act in their own name.”

53. Mr. Obura submitted that by using the term “may” the Constitution did not confer absolute right to anybody who has shown an interest in acting on behalf of a minor. He contended that the society would not for example allow a paedophile or a lunatic to institute a suit on behalf of minors merely because Article 22(2) (a) allows “*a person acting on behalf of another person who cannot act in their own name to do so.*” The onus, Counsel submitted, still rests with the court to vet whoever purports to be acting on behalf of the minors. Counsel submitted that it is the duty of the court to ensure that interests of minors and their rights are not abused by persons who want to ride on a liberal constitutional dispensation allowing individuals to approach the court on constitutional issues. Thus while every person would have a right to act on behalf of a minor the court has to ascertain that the alleged right is genuine and propagated in good faith hence procedural guidelines which ought to be observed by a would be next friend.

54. Mr. Obura referred to the English judicial system where the High Court is bestowed with the duty of ascertaining locus. **HALSBURY’S LAW OF ENGLAND, Fourth Edition, Volume 24 at paragraph 895.4** counsel submitted:

“895.4 Appointment of next friend. Except where the court appoints a next friend for an infant, a person may not act as next friend until certain documents have been filed. Before the name of a person is used in a cause or matter in the High Court as next friend of an infant, he must give a written consent to be next friend to his solicitor (by whom he must act), and the consent must be filed in the Central Office of the Supreme Court or, if the cause or matter is proceeding in the Admiralty Registry or a district registry, in that registry. If a person is named as next friend without his consent, he may apply to have his name struck out.

The solicitor must similarly file a certificate certifying (1) that he knows or believes, as the case may be, that the person to whom the certificate relates is an infant and (2) except where the person named in the certificate as next friend is the Official Solicitor, that the person so named has no interest in the cause or matter in question adverse to that of the infant.”

55. Mr. Obura submitted that the procedure of appointing someone to act as a next friend to a minor has been incorporated in our legal system through **ORDER 32** Rules (1) and (2) of the Civil Procedure Rules. He submitted that the primary intention of these procedures as set out under English and our judicial systems as already pointed out, is to protect the minor and there is no better person to do so than the court itself.

56. The Respondent’s case is that the Petitioners have brushed aside the proper procedure of appointing someone to act as next of friend as mere “*procedural technicalities*” which ought to be dispensed with in a constitutional reference. The Respondent’s case is that before any procedures at common law or under any statute is dismissed as a “*mere technicality*” it is important to analyse the purpose of that procedure. Mr. Obura submitted that in the case of minors it is the duty of the court to determine whether whoever comes to court on behalf of a minor really has the minor’s interest at heart, otherwise, the minor could be subjected to abuse and exploitation. He further submitted that by requiring the next friend to give a written authority to the advocate who ought to file it in court that genuineness and good faith on behalf of the next friend and the advocate is enhanced in the eyes of the court and hence the law.

57. Mr. Obura disabused the contention that Civil Procedure Rules do not apply in Constitutional matters

and observed that even under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and particularly Rule 3(4) thereof there is a requirement that the court facilitates the just, expeditious, proportionate and affordable resolution of cases. Mr. Obura submitted that under Rule 3(8) it is provided as follows:

“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders that may be necessary for ends of justice or to prevent abuse of the process of the court.”

Counsel submitted that the court should guard against the process of the court being used to abuse the rights of children who are equally protected by Article 53 of the Constitution against any form of abuse.

58. On the contention that Article 159(2) (d) of the Constitution requires that justice should be administered without undue regard to procedural technicalities, the Mr. Obura reiterated that since the court is enjoined by Article 53(1) (d) to protect children against abuse, the court cannot ignore any procedure which enhances the protection of children. To this end, Mr. Obura cited the case of **KAKUTA MAIMAI HAMISI vs. PERIS PESI TOBIKO and OTHERS [2013] eKLR**, where the Court of Appeal following the decision in **MUMO MATEMU VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS Civil Appeal No. 290 of 2012** held as follows:

“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 that 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.”

59. It is the Respondent’s case that the Preliminary Objection should be upheld and the suit be dismissed.

60. On the same issue, Mr. Omtatah, the Interested Party, submitted that the preliminary objection does not have merit. Mr. Omtatah submitted that in common law, a **next friend** is a person who (in civil proceedings) represents another person who is under disability or otherwise unable to maintain a suit on his or her own behalf and who does not have a legal guardian and the doctrine is enshrined in **Order 32 Rule 1 and 2 of the Civil Procedure Rules**, which according to Mr. Omtatah, do not apply to constitutional proceedings, brought under Articles 22 and 258 of the Constitution. Mr. Omtatah submitted that constitutional proceedings under Article 22 are governed by *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, developed by the Chief Justice pursuant to Article 22(3) as read with Article 23 and Article 165 (3) (b) of the Constitution of Kenya. Even if **Order 32 Rule 1 and 2 of the Civil Procedure Rules** was to apply, Section 7(1) of the Sixth Schedule to the Constitution would require that the same **“be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”**

61. Mr. Omtatah submitted that Articles 22 and 258 of the Constitution are tailored for the community and they enact into the Constitution of Kenya the doctrine of public interest litigation. He submitted that these Articles vest every person with *locus standi* to institute proceedings for the protection of rights and fundamental freedoms under the Constitution. He referred the court to the case of **Kiluwa Limited & another v Commissioner of Lands & 3 others [2015] eKLR**, where the Court held, *inter alia*:

“23. Section 60 of the repealed Constitution of Kenya, has effectively been replaced by Article 159(d) of the Constitution of the Second Republic, which expressly mandates the court to do justice to all without regard to either status or procedural technicalities. In addition Articles 22 and 258 and no less Articles 3 and 48 of the Constitution, grant every person not only access to courts, but also the right to protect, defend and uphold the Constitution.”

62. Mr. Omtatah submitted that a court’s jurisdiction flows from the Constitution and or the law or both. He submitted that Article 159(2) of the Constitution of Kenya provides the guiding principles of the exercise of judicial authority and thus the court has no power to strike out petitions *in limine*. The

Interested Party submitted that it is instructive that under the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** there is no power to strike out petitions *in limine* and the court is therefore behoved to hear and determine the Petition in the merits. He referred the court to the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR** where it was held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

63. It is the Interested Party’s case that the Preliminary Objection is based on alleged but unfounded procedural technicalities and should be refused under the Constitution of Kenya which under Article 159(2)(d) and (e), requires that :

**“(d) justice shall be administered without undue regard to procedural technicalities; and
(e) the purpose and principles of this Constitution shall be protected and promoted.”**

64. Mr. Omtatah submitted that under **Article 165(3)(d)(ii) and 258** of the **Constitution** the High Court has jurisdiction to hear and determine the question whether anything done during the 2016 KCPE examinations contravened the Constitution or any written laws. He submitted that the Petitioners have shown that the anomalies were also reported in other schools, and the Respondent has admitted that the anomalies happened and they do happen, and that it has a provision in its regulations for addressing them, except that only certain persons may invoke it, making the determination of whether the Respondent’s impugned decision contravened the Constitution an exclusive province of the High Court.

65. I have carefully considered the submissions by Counsel and Mr. Omtatah. I must say that I am convinced both ways. I am impressed with the zeal which Mr. Omtatah and Mr. Jengo urged their case. I was also greatly impressed with the extent to which Mr. Obura was prepared to go to protect a possible abuse of children. The case law counsel cited from England were on point. However, while I accept the able submissions of Mr. Obura in support of the Preliminary Objection, I do believe that the new constitutional provisions, produced in Article 22, 159 and 258 of the constitution which have been cited above put it the paramount duty of this court to ensure that citizens access justice. When it comes to children, that duty assumes greater relevance. The English Law cited by Mr. Obura intends to assure that the court is specifically warned so that no imposter can purport to file a matter on behalf of a minor. Indeed, this court is specifically forewarned. However, in this matter, although the Petitioners are alleged to be parents, there is also the institution of the school – [particulars withheld] **Primary School** which is the primary initiator of this process. It is the children’s school, and is eloquently referred to in both the Petition and the response. This court is satisfied that there is proper safeguard, and that the Petitioners have properly brought the matter to court pursuant to provisions of Articles 22, 159 and 258. Therefore, the Preliminary Objection herein filed by the Respondent fails, despite appearing to have merit and good intention.

Submissions on the entire Petition

Whether Petitioner’s Constitutional rights have been violated

66. Mr. Jengo submitted that the Respondent had violated the Petitioners’ rights as follows:

(i) The right under Article 10 on to the principles of good governance, integrity, transparency and accountability in discharging public obligations.

(ii) The right of access to under Article 35.

(iii) The right to a fair administrative action that is expeditious, efficient, lawful and procedurally fair under Article 47(3) of the Constitution.

(iv) The right of the children to education provided for under Article 43 and 53(1)b of the constitution, and to act in the best interest of the children under Article 53(2) of the constitution. This can be read together with Article 55 of the Constitution on the rights of the youth.

67. Mr. Jengo submitted that the Respondent cannot hide behind the provisions of **Section 42 of the Kenya National Examination Council Act** and state that if it rectifies the glaring anomalies and irregularities it will compromise the examination process and the rights of privacy. Counsel submitted that it is not explained, nor is any evidence offered of how the doing of what is expected of the Respondent would compromise the examination and its processes. Counsel submitted that refusal to correct the alleged errors is a derogation from Article 10 of the Constitution which promotes transparency, good governance and accountability and demands that public actors observe national values. Mr. Jengo referred to the case of **Republic vs. Kenya National Examination Council Miscellaneous Civil Application No. 328 of 2015** where the court intervened stating that:

“That the court can interfere where there is improper exercise of discretion is now trite. As was held by Warsame J (as he then was) in Re: Kisumu Muslim Association Kisumu High Court Miscellaneous Application No. 280 of 2003 where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned judge further held that the high court has powers to keep administrative excesses in check and supervise public bodies through the control of abuse of powers...Unlawful behaviours might be constituted by (i) an outright refusal to consider the relevant matter (ii) a misdirection on a point of law (iii) taking into account some wholly irrelevant or extraneous consideration...”

The Judge in the above case cited **Pastoli vs. Kabale District Local Government Council and others 2008 2EA 300** where it was held that the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Counsel submitted that the Respondent has a duty to be transparent, accountable and to exercise principles of good governance in carrying out its duties in accordance with Article 10 of the Constitution.

68. Mr. Jengo submitted that due to anomalies in the examinations, the Petitioners’ right to education is severely compromised because without the retally and audit being done it will be difficult for the Petitioner’s children to transit to secondary schools of their choices hence their right under Article 43 and 53 of the Constitution will be curtailed.

69. Mr. Jengo admitted that the right under Article 35 of access to information is not absolute and submitted that it is upon the Respondent to demonstrate that it has reasonable grounds under Article 24 of the Constitution to derogate from the right. Other than citing the Provisions of Section 42 of the **Kenya National Examination Council Act**, the Respondent should show how the doing of what is requested by the Petitioners will fit into the limitations to access to information as provided by the Act establishing it. Mr. Jengo submitted that annexure **WKC-3** on the Respondent affidavit is an examination answer sheet and this shows that there will be no compromise of examination process and privacy if the Respondent was to relook at the Petitioner’s examination slips. Counsel referred court to the case of **Nairobi Law Monthly Co. Ltd vs. Kenya Electricity Generating Company & 2 Others (2013) EKLK** where the court held:

“...the right to information gives effect to the national values and principles of governance contained in Article 10 of the Constitution, and in particular, good governance, integrity,

transparency and accountability.”

70. Mr. Jengo submitted that the grant of the orders sought under Article 35 of the Constitution will promote the best interest of the children to education, will ensure transparency and accountability by the Respondent in its dealings and will ensure credibility in the National Examination’s Council.

71. Mr. Jengo further submitted that the action by the Respondent is also subject to **Article 47 of the constitution** which provides as follows:

“47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative actions, the person has a right to be given reasons for the action.”

72. Counsel submitted that the Petitioners have highlighted instances where there were errors in the marking of the exams, and to which the Respondent has acceded. The marks given determine whether a pupil can join a school of his or her choice while transiting to secondary school. Therefore, the failure to deal with the issues raised by the Petitioners herein and the continued opposition to the same is unreasonable hence breaches the Petitioners right to a fair, administrative action.

73. The Petitioners’ case is that the Respondent’s regulations already authorize what the Petitioners are demanding, only that the Respondent feels they can only undertake the same if the demands were made by the primary school head teacher or the County Director of Education. It was submitted by Mr. Jengo that this requirement limits the *locus standi* granted by the Constitution, violates the principles set out in Article 22,258 and Article 47 of the Constitution which allow anyone to raise up issues on human rights on behalf of people who cannot do it by themselves.

74. It is the Petitioners’ case that the children’s rights to education and training under Article 43, 53 and 55 of the Constitution as children and youth has been violated by the harp hazard manner in which their complaints have been addressed with the fact that they cannot access schools of their choice yet they are not sure about their grades. The Petitioners’ prayer is that in view of the anomalies noted in the tallying and computation of results, the Respondent do look at the scripts in the presence of examiners/teachers/representatives from the Petitioners children’s school teachers and principals who are also qualified examiners and confirm that the suspected errors of omission and commission are either there or not.

75. Counsel supported his submissions by citing **Republic vs. Commission for Higher Education Ex parte Peter Soita Shitanda** where the court recognized the fact that the right to proper examination and certificates affects a person’s right to education under Article 43. The court held:

“Article 43(1) (f) of the Constitution provides that every person has a right to education. The right to education would make no sense if a person academic qualification is not recognized by state on unreasonable grounds.”

76. It is the Petitioners’ case that their Petition be allowed as prayed.

77. On his part, Mr. Omtatah concurred with Mr. Jengo’s submissions and stated that the Respondent’s impugned conduct herein is unreasonable, illegal, unlawful and unconstitutional to the extent that it has denied Kenyans their rights.

78. Mr. Omtatah submitted that this Court should find for the Petitioners owing to the Respondent’s decision being unwarranted, unreasonable, discriminatory, unlawful, and illegal hence unconstitutional.

79. On his part, Mr. Obura for the Respondent submitted on the following issues:

i) What was the nature of complaint by the school (Petitioners) to the Respondent?

80. Mr. Obura submitted that from the two letters from the school, the following can be identified as the complaints;

(a) The School raised concern about the exam results of specific candidates whose names and index numbers were listed in the two letters.

(b) The School was concerned about the general performance of the candidates because of the drop in the mean score. They suspected that such poor performance could have been caused by optical machines being unable to capture marks of candidates either because they were faint or for whatever reason.

(c) They wanted the Respondents to intervene to have the scripts Cross checked in all subjects by the Kenya National Examination Council Officials.

ii) Did the Respondent address the complaints raised by the school (Petitioners)?

81. Mr. Obura referred to paragraphs 23 to 30 of the Replying Affidavit sworn by **WILSON K. CHELIMO** where the Respondent states the action it took with respect to the complaints raised by the school. Counsel submitted that the complaints were treated within the context of queries arising out of exam results and such concerns are envisaged after exam results have been released hence the manner of handling them is provided under Regulation 13 of **Exhibit “WKC 1”**. Counsel submitted that at paragraphs 28 (a) to (d) of the Replying Affidavit the Respondent states how each specific candidate’s case was dealt with by the Respondent. The Respondent established that other than two of the candidates whose names had been given as having anomalies in their exam results the rest of the candidates had genuine mark scores awarded to them and that finding was communicated to the School as per a letter dated 4th January 2017 produced as Exhibit “WKC 7” and in the final Result Script produced as Exhibit “WKC 8”. Counsel submitted citing paragraph 28 (d) of the Replying Affidavit, that the Respondent also addressed anomalies in the mark scores of two candidates – M I T and O G O – whose names had not been included in the letter of complaint dated 2nd December 2016 thereby confirming that the Respondent was not restricted to addressing concerns to do with only people whose names appeared in the latter.

82. Mr. Obura submitted that after instituting the corrections cited above, the Respondent has not received further queries from the school. He further submitted the KCPE answer sheets from the school were objectively and professionally marked and scores correctly awarded. Counsel submitted that the allegation by the Petitioners that the Respondent was evasive in addressing their concerns because of being instructed by the Cabinet Secretary not to do so, is without foundation because records show that issues which were raised by the School were addressed and the results script adjusted to incorporate any correction made.

83. Mr. Obura submitted that after the Respondents made the corrections in exhibit “WCK-7”, the school was informed of the same in respect of results of N D M and A A A. Counsel noted that the school has denied the receipt of this letter, but the school has not denied receipt of the Results Scripts with corrections done and this can be confirmed by checking on the results of the two candidates at Exhibit “WKC 8” where they respectively appear as Nos. xxx10 and xxx49. Counsel submitted that the Result Script shows that candidate N M was awarded 77 marks score in Kiswahili (Kis) and candidate A was awarded 62 marks score in the Science (SSR) paper following the corrections done, in addition, candidate M T (xxx8) was awarded Mark Score 81 in the Science (SSR) paper while candidate O G O (xxx29) was awarded mark score 61 in Kiswahili (Kis).

84. It is the Respondent’s case that the School raised specific issues with respect to specific students and the same was addressed. The School wanted the Respondent’s officers to have “*scripts checked*” in all subjects sat by the enlisted candidates (and not all the candidates) checked and the same was done.

Has the Respondent breached the Petitioners’ rights and fundamental freedoms under the bill of

rights and are the Petitioners entitled to the reliefs sought?

85. Mr. Obura submitted that Petitioners' prayers are coined in a contradictory manner which is not fathomable. He submitted that while the Petitioners want the Court to declare that certain constitutional rights have been breached, they are at the same time seeking an order of *mandamus* and or mandatory injunction to be directed at the Respondent to avail examination scripts of the children who sat for the 2016 KCPE at the School to enable them and the teachers to:

- (a) Establish validity, reliability and accuracy in the manner the marks were allocated.
- (b) Verify and adjudicate the examination scripts.
- (c) Ascertain whether wrong entries were done and establish whether there were proper conversions of marks into percentages.

86. Mr. Obura submitted that the Petitioners are not sure whether any breaches have been committed by the Respondents against the candidates as the prayers before the court are not similar to the demand made against the Respondent as per the School's letter produced as Exhibit "WKC 5" of the Respondent's Replying Affidavit and Exhibit HS 4 of the Petitioner's Supporting Affidavit. He submitted that whereas in those letters the School wanted the Respondent to correct certain anomalies with respect to certain specific candidates' results the Petitioners are now seeking the full audit of the entire results to be conducted not by the Respondent but by them, the Petitioners and the teachers. It is the Respondent's case that the examined will become the examiners, should this demand be allowed.

87. Mr. Obura submitted that the Petitioners are not sure whether or not there has been any breach of constitutional provisions, and that they are fishing for information. Counsel submitted that the Petitioners' are merely speculating and as such are not entitled to the said constitutional reliefs. He referred the court to the case of **DR. REV. TIMOTHY NJOYA AND THE HON. ATTORNEY GENERAL AND ANOTHER [2014] eKLR** where Justice Isaac Lenaola (as he then was) had the following to say with respect to parties who come to court while not sure of the breaches they are complaining about or the reliefs they are seeking:

"21. I must state at the outset that this Court deals with real and not hypothetical or perceived disputes. It is therefore a court of law mandated to deal with real disputes and a party must approach the court with hard facts which would reveal a violation of the Constitution and as a result, get a relief for that violation".

88. Mr. Obura submitted that in the this Petition, the Petitioners want the Respondent compelled to produce examinations scripts for their scrutiny an exercise which will not only violate the Kenya National Examination Council Act which gives the Respondent the absolute authority to administer and process examinations but also will be against the rules developed by the Respondent to address complaints arising out of release of examination results.

89. Mr. Obura challenged the Petitioners' reliance on **REPUBLIC VS. KENYA NATIONAL EXAMINATION COUNCIL Misc. Civil Application No.328 of 2015** as justification for the court issuing orders prayed for in the present case and submitted that it is distinguishable both in facts and prayers sought. In that case the Respondent withheld the applicants examination results because the applicants had not completed practical aspects of their training. The applicants being fearful that their exam results could be cancelled approached the court to have among other reliefs, a *mandamus* order directed at the Respondent to have the results released. The court issued a conditional order to the effect that the Respondent release the results "*after taking the necessary steps including facilitating Ministry of Education Science and Technology officials as external assessors to assess the Applicant.*" Mr. Obura submitted that that was the same condition which the Respondent wanted fulfilled before the results were released. He submitted that this case in no way compromises the several judgments of the High Court and the Court of Appeal to the effect that the Respondent should have the discretion of administering exams, awarding marks scores and keeping the process confidential and that overwhelming precedent established

by both courts has been recognized and codified through a legislative enactment in the form of Section 47 that limits application of Article 35 of the Constitution where it compromises the integrity of the examination administered, the examination process and the right to privacy of any individual.

90. Mr. Obura submitted further that there is no grain of evidence or legal justification which can be relied upon to hold the Respondent liable for a constitutional breach under Articles 10 (2) ©, 25, 35, 47 and 50 and summarily dismissed the allegations by the Petitioners that the Respondent had violated national values of good governance, integrity, transparency and accountability, or, that a right to access to information was violated, stating that the same was not absolute. Mr. Obura also submitted that the Petitioners were given audience pursuant to Article 47, while Article 50 was not entirely applicable as there was no formal proceedings between the parties to warrant a fair hearing. There was only an administrative issue which was considered when presented by the Petitioners.

Violation of Children's right to education - Article 53(1) (b).

91. On the allegation that the children's right to education under Article 53 (1) (b) were violated, Mr. Obura submitted that the Petitioners have not identified which of the candidates' problem remains unresolved, given that the complains raised were adequately addressed. As far, as the Respondent is concerned 2016 KCPE examinations were professionally marked and anomalies which were identified thereafter corrected and there is no other complaint pending to be addressed, and it is not stated how the children's right to education was violated.

92. Mr. Obura submitted that the Petitioners' case lacks merit and to grant the reliefs sought would be in violation of the law. He submitted that the entire Petition should be dismissed with costs to the Respondent.

Determination

93. I will address all the issues raised in the parties submissions together and not in any particular order because almost all the issues raise constitutional issues. In order to do this it is paramount to ask the questions as did Mr. Obura for the Respondents, and then answer the two questions. These questions are (1) what was the nature of complaint by the school or Petitioners to the Respondents; and secondly did the Respondent address the complaints?

What was the nature of complaint by the school (Petitioners) to the Respondent? Did the Respondent address the complaint?

94. This question is paramount and is at the center of the dispute herein. From the two letters from the school, the queries raised concern the exam results of specific candidates whose names and index numbers were listed in the two letters. The School was concerned about the general performance of the candidates because of the drop in the mean score. They suspected that such poor performance could have been caused by optical machines being unable to capture marks of candidates either because they were faint or for whatever reason. They wanted the Respondents to intervene to have the scripts Cross checked in all subjects by the Kenya National Examination Council Officials.

95. As to whether the complaint was addressed, it is evident paragraph 23 to 30 of the Replying Affidavit sworn by **WILSON K. CHELIMO** the complaints were treated within the context of queries arising out of exam results and such concerns were envisaged after exam results have been released hence the manner of handling them was provided under Regulation 13 of **Exhibit "WKC 1"**. The Respondent established that other than two of the candidates whose names had been given as having anomalies in their exams results the rest of the candidates had genuine mark scores awarded to them and that finding was communicated to the School as per a letter dated 4th January 2017 produced as Exhibit "WKC 7" and in the final Result Script produced as Exhibit "WKC 8". The Respondent also addressed anomalies in the mark scores of two candidates- M I T and O G O whose names had not been included in the letter of complaint dated 2nd December 2016. This confirmed that the Respondent was not restricted to addressing concerns to do with only people whose names appeared in the letter.

After instituting the said correction, the Respondent has not received further queries from the school.

96. The Respondent after effecting the necessary corrections submitted to the school Results Scripts with corrections done and this can be confirmed by checking on the results of the two candidates at Exhibit “WKC 8” where they respectively appear as Nos. xxx10 and xxx49. The Result Script shows that candidate N M was awarded 77 marks score in Kiswahili (Kis) and candidate A was awarded 62 marks score in the Science (SSR) paper following the corrections done. In addition, candidate M T (xxx8) was awarded Mark score 81 in the Science (SSR) paper while candidate O G O (xxx29) was awarded mark score 61 in Kiswahili (Kis).

97. It is the finding of this court that the School raised specific issues with respect to specific students and the same was addressed. I agree with submissions of Mr. Obura that the School wanted the Respondent’s officers to have “*scripts checked*” in all subjects sat by the enlisted candidates (and not all the candidates) checked and the same was done.

Has the Respondent breached the Petitioners’ rights and fundamental freedoms under the Bill of Rights and are the Petitioners entitled to the reliefs sought?

98. Having found that the Petitioners raised specific issues which the Respondent addressed, it is difficult to see how the Respondent could then be accused of violating any right due to the Petitioners under the Constitution. What I see is general reference to particular constitutional rights being violated, without giving details of such violation in relation to the issues raised. For a right to exist there must be a corresponding duty placed on the Respondent. That duty was placed upon the Respondent by the queries which were raised by the school. Those queries were addressed by the Respondent who thereby discharged the obligation. The Petitioners are now obligated to show what duty, giving right to the Petitioners, was not performed by the Respondent. This court also agrees with Mr. Obura that the Petitioners are not sure whether any breaches have been committed by the Respondents against the candidates as the prayers before the court are not similar to the demand made against the Respondent in their letters of complaint. Whereas in those letters the School wanted the Respondent to correct certain anomalies with respect to certain specific candidates’ results, the Petitioners are now seeking the full audit of the entire results to be conducted not by the Respondent but by them, the Petitioners and the teachers. Since the initial queries raised by the Petitioners were fully addressed by the Respondent, who never raised any further queries on the matter, it is clear to this court that as of now the Petitioners can only speculate that there could be anomalies but are not sure. Mr. Obura cited with the approval of this court, the case of **DR. REV. TIMOTHY NJOYA AND THE HON. ATTORNEY GENERAL AND ANOTHER [2014] eKLR** where Justice Isaac Lenaola had the following to say with respect to parties who come to court while not sure of the breaches they are complaining about or the reliefs they are seeking:

“21. I must state at the outset that this Court deals with real and not hypothetical or perceived disputes. It is therefore a court of law mandated to deal with real disputes and a party must approach the court with hard facts which would reveal a violation of the Constitution and as a result, get a relief for that violation”

Also in the case of **John Harun Mwau and Others vs. Attorney General and Others Petition No. 65 of 2011** it was stated that the court should not deal with hypothetical and academic issues. A similar issue was comprehensively determined in the case of **THE KENYA NATIONAL EXAMINATION COUNCIL AND THE REPUBLIC Ex-parte KEMUNTO REGINA OURU [2010] eKLR** where the Applicant sought *inter alia* a *mandamus* order directed to the Respondent to compel it to produce before the court all the Chemistry (233) answer booklets for all the 128 candidates who sat the Kenya Certificate of Secondary Examination for the court’s inspection. The Court of Appeal in its judgment made the following observations following the decision in the Indian case of **MAHARASHTRA STATE BOARD vs. KURMARSHEETH & OTHERS [1985] CLR 1083**.

“The Examiners are the first people to give a report of the examination. They are the people who detect suspected collusion or any irregularity after which they make their report. It is

their report which, according to the aforesaid rules and regulations which is considered by investigating groups against the laid down standards. To afford a hearing it will mean each candidate may need to be called upon to explain an alleged irregularity. For the candidate to respond to a particular allegation he or she will need to look at the examination script. That will, as stated by this Court in the *Kenya National Examinations Council vs. Republic* (supra) .place an unnecessary hearing burden on the Council; and in our view it is likely to have a ripple effect generally. If the Council can hear one candidate, what will stop other candidates agitating to be heard regarding their performance” It may be argued that the hearing should be confined to only those candidates respecting who the council evinces an intention of cancelling their results. However, by opening room for challenge of the intended decision to cancel an examination result, it will be difficult to deny other candidates like opportunity to question the decisions of the Council which they may be aggrieved about. Will it be in the public interest to allow individual candidates to make representation” We are not experts in that field. To come to a decision one way or the other evidence will need to be adduced, witnesses be examined and be cross-examined. The procedure of judicial review is not appropriate for that purpose. We agree with Mr. Oraro, upon reading the various authorities he cited, that the elaborate procedures and safeguards incorporated in rules and regulations made by the Council which create structures for addressing the various aspects raised by the Respondents are adequate. In our view this constitutes a fair procedure which guards against arbitrariness. The approach the Respondents seek was rejected in the Maharashtra State Board Case (supra) on the basis 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.”

Turning to whether the relief of mandamus was available the Court of Appeal observed:

“As regards the second prayer for an order of mandamus, Mr. Oraro for the appellant submitted that Ibrahim, J. erred in ordering the council to release the Respondent’s results. In his view mandamus may only issue to compel an authority to perform a statutory duty but not to determine the decision in any given matter. Prof. Muma on the other hand submitted that all Respondents were asking for is that their examination results be released. Mr. Oraro’s response was short. He wondered what results are to be released. This issue, although argued at length, we think that it is merely academic.”

The court concluded:

“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 Pro. 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.”

99. The Petitioners relied on the case of **REPUBLIC VS. KENYA NATIONAL EXAMINATION COUNCIL Misc. Civil Application No.328 of 2015** as justification for the court issuing orders prayed for in the present case. However, as correctly observed by Mr. Obura, that case is distinguishable both in facts and prayers sought. In that case the Respondent withheld the applicants examination results because the applicants had not completed practical aspects of their training. The applicants being fearful that their

exam results could be cancelled approached the court to have among other reliefs, a *mandamus* order directed at the Respondent to have the results released. The court issued a conditional order to the effect that the Respondent release the results “*after taking the necessary steps including facilitating Ministry of Education Science and Technology officials as external assessors to assess the Applicant.*” That was the same condition which the Respondent herein wanted fulfilled before the results were released.

100. In my view, the Respondent should have the discretion of administering exams, awarding marks scores and keeping the process confidential. This position can only change pursuant to a cogent, clear and obvious deviation which is unequivocal in all circumstances. Otherwise there will be a very obvious risk that will compromise the integrity of the examination administered, the examination process and the right to privacy of any individual.

101. The Petitioners also alleged violations of various constitutional rights among them Article 10 (2) (c) on the principles of good governance, integrity, transparency and accountability. However, the Petitioners have not identified acts committed by the Respondent which violate those national values and principles. If the argument is that the Respondent has not been transparent by producing the examination scripts to them to audit then that is taking their expectations too far as the statute establishing the Respondent read together with the Constitution does not envisage such a right to be accorded to the Petitioners.

102. In answer to alleged violation of the Right of access to information under Article 35, Section 42 of the Kenya National Examination Council Act read together with Articles 35(1) and 24 confirms that this right is not absolute and the Petitioners cannot demand to be availed examination scripts of 2016 KCPE. In the same vain I have not found any violation of Article 47 on right to fair administrative action, Article 50 on right to fair hearing or Article 53 (1) (b) of children’s right to education. It seems that the Petitioners are now on a fishing expedition, an errand to establish further or more errors. This is not acceptable. An error establishing a violation of a constitutional right must be self-evident. In the matter before the court, the matters complained of by the Petitioners were also complained of by some other 84 candidates in the country. The main cause was that these candidates had declared themselves “absent” by shedding the wrong eclipse. Others wrote the wrong index number. All those errors were corrected. This is a matter which did not merit a constitutional petition especially from the moment the Respondent addressed the issues which were raised in the initial complaint.

103. 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:

Art 24 “(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then 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 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.”

104. On the other hand, Section 42 of the Kenya National Examination Council Act No. 29 of 2012 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.”**

105. If the two provisions (Article 24 and Section 42) are read together this would mean that the right to access to information in this case is not absolute and may be limited in the circumstances provided under Section 42. The Petitioners are asking the Respondent to provide the marking sheets for the exam for all its children to be verified. While such a request can be justified if made upon any other institutions whether public or private, the Respondent herein is a statutory body mandated with setting and marking exams, whose integrity, credibility, confidentiality and reliability must be guaranteed and safeguarded at all times. The kind of request by the Petitioners, if allowed will open the National exam body to ridicule, scandal and infamy, with every student feeling dissatisfied applying for remarking. That would be the end of examinations and its integrity as hitherto known in Kenya. The temptation to open up the exam bank however inviting it may seem, must be resisted. This is not to say that where a constitutional right is threatened the Respondent will be shielded. No. What I am saying is that a violation of constitutional right which would demand the opening up of exam bank to verify results must in all circumstances be valid, clear and self-evident. It cannot be a subject of speculation, or a fishing expedition or an errand to find out any errors which are not self-evident.

Conclusion

106. The final orders of this judgment notwithstanding, this court acknowledges that the Petitioners and the School acted within their mandate and with patriotic zeal, to bring to the attention of the Respondent all the said anomalies. This action on their part is commendable as it is the only way the Respondent can know the existence of such anomalies and put in place measures to address the same. It is also noteworthy that the Respondent is coming up with newer and better ways of setting and marking exams, as well as effective ways of eliminating cheating in examinations. This means that the schools as stakeholders would be constantly required to be vigilant and to give feedback to the Kenya National Examinations Council in all matters concerning exams including the proper workings of such equipment as the Optical Mark Reader machines (OMR). Indeed it is to be hoped that the issues raised in this Petition will provide a solution to any problems which would be expected in future.

107. In the same way the court appreciates the participation of Mr. Okiya Omtatah, the Interested Party herein. His participation provided the national outreach in this matter so that the other 84 pupils nationally who were also affected by the same problem would feel vindicated that they were heard. It is for the above reasons that I will not award costs in this petition.

108. In the upshot it is the finding of this court that the allegations contained in the Petition were not proved. The Petition is dismissed. Parties shall bear town coats.

109. That is the Judgment of the court.

Dated, Signed and Delivered at Mombasa this 22nd day of June 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Obura for Respondent

Mr. Jengo for Petitioners

Mr. Kaunda Court Assistant