REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 8 OF 2016

IN THE MATTER OF LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA, THE CIVIL PROCEDURE ACT CHAPTER 21 OF THE LAWS OF KENYA AND ALL OTHER ENABLING PROVISIONS OF THE LAW

IN THE MATTER OF THE KENYA CERTIFICATE OF PRIMARY EDUCATION (KCPE) 2015, EXAMINATIONS IN KENYA

IN THE MATTER OF AN APPLICATION BY H N G SUING AS A FRIEND AND PARENT OF A H G FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE DECISION OF THE KENYA NATIONAL EXAMINATION COUNCIL OF 30TH OF DECEMBER 2015.

REPUBLIC …….....……..…..….APPLICANT

VERSUS

THE KENYA NATIONAL EXAMINATION COUNCIL....……RESPONDENT

EX PARTE:

H N G SUING AS A FRIEND AND PARENT OF A H N

JUDGEMENT

Introduction

1. On 6th January, 2016, this Court granted leave to the applicant herein, **H N G** who has instituted these proceedings in his capacity as a friend and parent of **A H N,** to commence judicial review proceedings as was sought in the Chamber Summons dated 13th January, 2016.

2. Subsequently, by a Notice of Motion dated 21st January, 2016, the said applicant sought seeks the following orders:

> **a. That the applicant be granted leave to apply for an order of certiorari to remove unto the high court and quash decision of the Kenya National Examination Council contained in a letter dated 30th December 2015 cancelling the entire results of A H G, Index Number [particulars withheld].**

b. That the applicant be granted leave to apply for an order of mandamus to compel the Kenya national examination council to release all the results of A H G.

c. Costs of this application be provided for.

d. Any other order the honourable court may deem fit and just to grant.

***Ex Parte* Applicants' Case**

3. According to the Applicant who averred that he was the father of **A N H G**, who was a candidate in the Kenya Certificate of Primary Education, 2005, through [particulars withheld] School, Nairobi (hereinafter referred to as "the Candidate"), the candidate enrolled for her Kenya Certificate of Primary Education Examinations 2015, which she undertook in the month of November 2015, using her name as **A H G**, and was subsequently issued with an index number [particulars withheld]. The name was pasted on her desk as is the custom during the Kenya Certificate of Primary Education Examination. The candidate accordingly sat for the examination papers to the exclusion of none and personally attended and sat for all the examinations so examined by the Respondent, and her attendance was verified by the invigilators who were invigilating the examinations and her school teachers.

4. It was averred that on the first day of the examination, the applicant wrote her name as the one she had registered with, which was similar to the one pasted on her desk, i.e. **G A H**. However on the 2nd and the 3rd days of the examination she included her surname and therefore wrote her name as **G A N H**. In so writing, instead of writing her name as A, she wrote her name as A, as school and classmates preferred to call her A instead of A. On being asked by the invigilators and supervisor why she had included her sir name in the subsequent days, the candidate explained that it was her sir name and anxiety had seized her as it was her first national examination she was undertaking. It was averred that the school – teachers were called to verify if she was who she claimed to be i.e **G A A H** and **G A A H N** was one and the same person.

5. It was deposed that upon the release of the Kenya Certificate of Primary Education, the Respondent in a letter dated 30th December, 2015, referenced as KNEC/CONF/R&Q/SE/KCPE/IRR/2015/030 and addressed to the head teacher [particulars withheld] School (hereinafter referred to as "the School"), informing the school of the cancellation of the candidate's results on the ground of collusion. Upon the applicant visiting the headquarters of the Kenya National Examination Centre in the company of the Principal of St. Christopher Preparatory School, he was informed verbally that the nature of collusion was to be effect that somebody else and not the candidate undertook the examination for the candidate.

6. It was averred by the Applicant that despite the ***Kenya National Examination Council Act*** No. 29 0f 2012, (hereinafter referred to as "the Act") defining the examination malpractices and irregularity between sections 27 through to section 33, the respondent adopted a method it describes as mechanisms of detecting collusion without relying on information received from the supervisors and invigilators. This method by the respondent, according to the Applicant, is not provided for by the Act. To the Applicant, whereas the candidate has a right to an administrative action from the Respondent that is expeditious, efficient, lawful, reasonable and procedurally fair, the Respondent's action by violated the principles of Natural justice, as the applicant was not afforded an opportunity of being heard or defending herself. The candidate has been condemned unheard.

7. It was the Applicant's case that the action of the Respondent to cancel the entire results of the applicant on the basis of suspicion of some collusion without any corroborating evidence was outrageous absurd and irrational. He further contended that the respondent's decision was harsh and unfair to the applicant who diligently studied and worked hard in preparation for the examination because it terminated the applicant's primary education without a certificate to show for it hence the applicant cannot progress to secondary school as no school will admit her without a certificate. In effect therefore, the respondent was for all purposes and intent forcing the applicant to repeat her examination against her will.

Respondent's Case

8. In response to the application, the Respondent averred that section 10(e) of the Act empowers the respondent to make rules regulating the conduct of examinations and for all purposes incidental thereto. Pursuant to the Act, the respondent promulgated ***Kenya National Examinations Council Regulations for the Kenya Certificate of Primary Education*** (hereinafter referred to as "the Regulations") regulating the conduct of Primary Education Examinations and for all purposes incidental thereto. The Respondent has also put in place an elaborate system of the registration of examinations as under the document titled ***"Instructions for Registration of candidates for the KCPE Examination"***. It was averred that the instructions for registration of candidates for the Kenya Certificate of Primary Education (KCPE) examination is usually scheduled to run from 1st January to 31st March yearly.

9. This period, it was averred, is usually preceded by a pre-registration period which runs from 1st November to 31st December of the previous year and that this pre-registration period is aimed at providing the schools with time to study the candidate's details and amend where necessary. During the same period, candidates are required to issue their names to the school vide a nominal roll and that the names used by the candidates are to be a replica of the official names as they appear in the Birth Certificate and it is these names used during registration for Kenya Certificate of Primary Education (KCPE) are to be used for registration during Kenya Certificate of Secondary Education (KCSE). Further, the head teacher of a school or institution has a responsibility to ensure that the names are correct and are spelt correctly so as to avoid giving incorrect names. This must be done in consultation with the parent or guardian of the candidate.

10. According to the Respondent, the candidate registered for the Kenya Certificate of Primary Education Examinations 2015 and undertook the examination using her name as **A H G** as shown in the 2015 online KCPE entries nominal rolls. The Respondent further stated that under the instructions for registration of candidates for the KCPE examination the council has set out clear guidelines stating that it is the responsibility of a candidate to ensure that his or her entries are in order and that his or her names are correctly reflected on the entry forms and that clause 10 of the instructions expressly provide that "The name of the candidates used for KCPE registration shall be a replica of the official names the candidate as it appears in the birth certificate…" It was averred that under part 8.1.6 of the instructions for the conduct of 2015 KCPE examinations, the supervisors were tasked to ensure each candidate has a desk to himself with a label showing his or her name and index number pasted to the desk as a constant reminder to the candidate on the names to write for the entire period of the examination. Part 8.1.7 of the Instructions for the conduct of 2015 KCPE examinations also require the supervisors to brief the candidates on how to conduct themselves during examination period.

11. In this case, the candidate admitted that she registered for the KCPE Examination 2015 and undertook the examination as **A H G** and the said name was pasted on her desk as it is the custom in the Kenya Certificate of Primary Education Examination. The respondent also issued Examination Ethics to guard against any candidates gaining undue advantage over others through cheating in examination and guidelines to the candidates through their head teachers warning against examination irregularities and the repercussions that followed if a candidate was found cheating.

12. It was contended that the KNEC Regulations for the Kenya Certificate of Primary Education provides a time frame for candidates to forward any queries regarding the examination results to be submitted within thirty (30) working days from date of the release of examination results which queries must be forwarded to the council by the head of primary schools for the candidate and through the County Director of Education for Private Candidates. The head teacher of the institution must request in writing explaining the reason for the query. To the Respondent, by providing for a window period to query for the candidates affected, the council ensures the right to fair administrative action of the affected candidates is not infringed. However, in this case, the candidate's guardians and teachers failed to raise any query regarding her results within the prescribed timeframe hence the respondent went ahead and wrote a letter to the Head Teacher [particulars withheld] School informing them of the cancellation of the said candidate's results due to collusion. This, according to the Respondent, this was because the candidate presented answer sheets that had different names and also there were significant variances in performance between the papers sat on the two days. In the Respondent's view, collusion by definition is a secret and/or clandestine activity which occurs when a candidate answers an examination question in

conjunction with either another candidate or with assistance of another person. The Respondent averred that it is not uncommon to find supervisors, teachers, head teachers and other persons aiding candidates to cheat in examinations.

13. The Respondent was therefore of h view that there was a high possibility in this case as from past experiences that another person writes some of the papers for a candidate and such a third party is likely to write other names as opposed to a *bona fide* candidate who ordinarily would not forget the names they have used over their schooling period.

14. It was contended that though the candidate was afforded a hearing by the respondent she could not satisfactorily explain how the answer sheets bore different names.

15. The Respondent's position was therefore that it is in the interest of the wider Kenyan Society that cases of cheating in examinations be dealt with firmly and that in the peculiar nature of the council's duties and functions it be held that the said results of the ex parte applicant were cancelled fairly and without bias.

Applicant's Rejoinder

16. In a rejoinder the Applicant averred that whereas it is true that KNEC Regulations for the Kenya Certificate of Primary Education provide for a time frame for candidates to forward any queries, the applicant herein did have a meeting with the head teacher of St. Hannah Preparatory School, where the candidate took her examination immediately the results were announced and raised queries about the cancellation of the candidate's results. The fact that the head teacher did not forward the query should not be visited upon the applicant for such omission by the head teacher. Further the 30 days period does not obviate the present court action and neither does it absolve the respondent.

17. The Applicant contended that the respondent failed to disclose to this Court if the performance of the applicant was better or worse where the candidate allegedly wrote her exam paper using her name **G A H** or **G A N H**. Further it is common knowledge that most students are not all round students and therefore performance is pegged on the subjects the student is strong at. To the Applicant, the issues raised are merely a hypothesis which are malicious and unfounded. The Applicant averred that it is common knowledge that during an examination of this magnitude, the students are obliged to provide passport photos, which are used to identify them, as they enter the examination hall. Therefore a red flag would have been raised by the invigilators if the passport photo provided by the candidate did not tally with the candidate.

18. The Applicant averred that he was never afforded a hearing and the paragraph purporting the applicant to have been accorded a hearing is a lie to this honourable court and thus the respondent in cancelling the results of the applicant acted unfairly and in a bias manner. It was the Applicant's view that in cases of collusion involving invigilators and teachers, the same is normally of a big magnitude, which involves the entire school and not just one candidate yet there was no report by any student, teacher or invigilator of such collusion. It was therefore averred that the averments by the respondent are mere wild allegations, and there is no direct or circumstantial evidence linking the candidate to the collusion narrative the respondent is trying to achieve.

19. The Applicant invited the Court to take judicial notice of the wide spread cheating perpetuated by the staff of the respondent, during the 2015, National Examinations, more so the Kenya Secondary Certificate of Education (KCSE) which resulted in the disbandment of the board of the respondent and the subsequent arrest and charging in court of the concerned party.

Determinations

20. I have considered the application, the affidavits both in support of and in opposition to and the submissions made on behalf of the parties hereto as well as the authorities relied upon.

21. In this case, the applicant seeks *inter alia* an order to quash the decision of the Council on the ground that the cancellation was done without the applicants being afforded an opportunity of being heard contrary to the provisions of Article 47 of the Constitution. That provision provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

22. The Respondent on the other hand contends that reasons were given for the cancellation of results. The Respondent explained that the action of the candidate in using different names for different examination papers other than the one with which she had registered constituted an irregularity. Regulation 18.1 of the Regulations provides as follows:

> ***If the Council is satisfied that a candidate has been involved in an irregularity, misconduct or dishonesty in connection with the whole examination r in any of the papers, the Council may at its sole discretion expel the candidate from the examination and refuse him/her further admission thereof, cancel any one or more of his/her entry as a candidate in subsequent examinations, in accordance with the KNEC Act 2012, section 27***

23. Although the said regulation seems to give the Respondent wide discretion to determine whether there is an irregularity and to determine the form of punishment to mete, that discretion ought not to be exercised arbitrarily or capriciously. It is now trite that even where the authority is clothed with prima facie wide and unfettered discretion, the Court can intervene in the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

24. However, as this Court held in **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR**:

> **"The cancelation of the candidates' results was obviously an administrative action which was required to be expeditious, efficient, lawful, reasonable and procedurally fair. The 1st respondent was or ought to have been aware that the cancellation of the candidates' results was likely to adversely affect the candidates' rights under Article 43(1)(f) of the Constitution hence the candidates were entitled to the reasons for the action...where the applicant seeks an order of certiorari to quash cancellation, the Council might well be required to justify to the Court the reason(s) why it thought the respondents had cheated. In this case therefore the 1st respondent was expected to justify to the Court why it thought there was collusion amongst the candidates. The 1st Respondent informed the Court the methods which it used to detect collusion. That method, it was averred, was used uniformly and not arbitrarily or selectively. The applicants have not shown that the method employed by the 1st Respondent was faulty. The Respondents however contended that the Council may not give clearer details of how the IDP Programme works as doing so may compromise the management and conduct of the examinations in future though the programme is tested, unbiased and a fool proof tool in the detection of the irregularity of collusion. In the said case the Court of Appeal appreciated that the marking of examinations must remain confidential as opposed to secretive and that no amount of liberalisation, transparency and accountability would ever convince the Courts that the marking of examinations should be conducted at the Moi International Sports Centre, Kasarani, so that the candidates and anybody else who feels inclined to do so can**

attend and see that the marking is fair and open. According to the court, in life, there are certain things which must be taken on trust and that when an examiner decides that a particular candidate has failed there cannot be any doubt but that the examiner is deciding on a matter touching on the very future of the candidate and yet, no one in his proper senses would contend that before such a candidate is declared to have failed, the examiner ought to give him a hearing. The Court however appreciated that when it comes to the question whether or not the Council is justified in cancelling particular results, different considerations may well apply."

25. In that case, the court appreciated that cancellation of results being an act which has nothing to do with the merits of the results and whereas the decision whether or not a candidate has failed may not call for reasons for the failure, where an allegation of impropriety or irregularity is made against a candidate, the candidate ought to be furnished with the reasons why such a decision was made and be afforded an opportunity of being heard on that cancellation. Where the Council does not furnish the applicant with the reasons for the decision, the Court may well be entitled to quash the decision.

26. Therefore as was held in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** where the Court expressed itself as follows:

"In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…….. An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law… It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him. .....It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

27. Similarly, whereas it is true that there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal and that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth, the position taken in **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** in my view holds supreme. In that case the Court of Appeal held:

"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."

28. It is therefore clear that whatever method adopted, the same must meet minimum degree of fairness.

29. However as held by the Supreme Court of India in **Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083** at pg 104:

> **"Viewed against this background, we do not find it possible to agree with the views expressed by the High Court that the denial of the right to demand a revaluation constitutes a denial of fairplay and is unreasonable. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against revaluation".**

30. At page 1105, the Court in ***Maharashtra Case*** stated:

> **"…… the test of reasonableness is not applied in a vacuum but in the context of life's realities;…….. If the principle laid down by the High Court is to be considered as correct, its applicability cannot be restricted to examinations conducted by the Schools Educational Boards alone but would extend even to all competitive examinations conducted by the Union and State Public Service Commissions. The inevitable consequence would be that there will be no certainty at all regarding the results of competitive examinations for an indefinite period of time until such requests have been complied with and the results of verification and revaluation have been brought into account. Far from advancing public interest and fair play to the other candidates, in general, such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice".**

31. Further in **R vs. Council of Legal Education [2007] eKLR** at pg. 9, it was held that

> **"The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature".**

32. However, even if the Court were to agree with the applicants that their right to fair administrative action was violated and were to proceed to quash the respondent's decision, it would not be for the Court to direct the Council as to the manner of proceeding. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court doubted whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law. Therefore where

the Court has quashed a decision, it not for the Court to direct the Respondent on how to proceed where the Respondent has a discretion to decide on the manner of proceeding. Therefore if the Court finds that the Respondents failed in their duty to afford the Applicant an opportunity of being heard before the impugned decision was made, the Court would only be entitled to quash the decision and leave it for the Respondent to take the next legal course available.

33. Where however the Respondent fail to release the results without any lawful or justifiable cause the Court would be perfectly entitled to compel them to do so after a demand is made by the applicant. As was held by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra):

> **"Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be. The same goes for awarding diplomas and certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b)."**

34. Section 45 of the Act itself provides as follows:

> ***(1) Where the Council is satisfied that there has been an irregularity in the course of any examination, the Council shall suspend or nullify such examination or any part thereof.***
>
> ***(2) Where the Council is satisfied that there is reasonable cause to believe that the examination results of any candidate have been obtained by irregular means, the Council shall nullify the examination results of such candidate.***
>
> ***(3) In the exercise of its powers under this section, the Council may conduct such investigations as it may deem necessary, and during such investigations, the Council shall withhold the examination results of any candidate pending conclusion of the investigations.***
>
> ***(4) In the course of investigations under this section, the Council may call for such information or the production of such documents as the Council may require, and within such period, in such place and from such person as the Council may determine, to assist in the investigations.***

35. In my view, before the Council resorts to the drastic action of cancelling results, it ought to be guided by the principle of proportionality. In **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** it was noted that:

> **"…a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards."**

36. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

37. The courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596) that it is "*a principle requiring the administrative*

authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues".

38. This position was recognised by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as follows:

> **55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
>
> **56. Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.**
>
> **57. In Mbogo & another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters**

which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah *(supra)* and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.

39. Accordingly since the Council is enjoined to carry out investigations in order to satisfy itself as to the irregularity or misconducted suspected to have been committed by the candidate, it is my view a lesser drastic option ought to be resorted to such as the withholding of the results pending the said investigations.

40. In my view, as part of the said investigations, the suspected candidate ought to be afforded an opportunity of being heard in the matter before any such adverse action is taken. This is clearly in line with Article 47 of the Constitution. In my view this is the only way in which Regulation 13.0 can be understood. The said Regulation provides as follows:

Queries regarding the examination results should be submitted to the Council within thirty (30) working days from the date of the release of examination results. The queries must be forwarded to the Council by heads of primary schools (for school candidates) and through the County Director of Education for private candidates.

Any queries received after 30 days from the date of the release of examination results will be processed at a fee to be determined by the Council from time to time.

41. It is however upon the candidate who is aggrieved by the Respondent's decision on his or her results to invoke the above regulation in order to have his or her grievances dealt with. A candidate who fails to do so cannot be heard to complain that he or she was never afforded an opportunity of being heard. This was the position adopted by the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** where it was held that:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

42. The applicant admitted that upon the release of the Kenya Certificate of Primary Education results, the Respondent in a letter dated 30th December, 2015, addressed to the head teacher St. Hannah's Preparatory School informed the school of the cancellation of the candidate's results on the ground of collusion. The Applicant disclosed that he visited the headquarters of the Kenya National Examination Council in the company of the Principal of St. Christopher Preparatory School, and was verbally informed of the nature of the collusion. The Respondent on the other hand contended that the information to the School was only transmitted after the Applicant failed to raise any queries within the stipulated period. To this the Applicant while conceding that the Regulations provide for a time frame for candidates to

forward any queries, averred that he had a meeting with the head teacher of [particulars withheld] School, where the candidate took her examination immediately the results were announced and raised queries about the cancellation of the candidate's results. Apart from that bare allegation there was no proof that he did raise the issue with the School or any other authority for that matter. Instead he seemed to have sought the company of the Principal of St. Christopher Preparatory School for reasons which are not disclosed. In the premises there is no evidence upon which this Court can find that the Applicant did comply with the Regulations as to the procedure for raising queries in such circumstances.

43. Section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

> ***(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***
>
> ***(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).***
>
> ***(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

44. It is however my view that the onus is upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. In this case the Applicant ought to have submitted his queries to the Council within 30 working days of the release of the examination results through the head of the School. Whereas it is contended that the said queries were submitted to the head of the School, it has not been explained why no such affidavit was availed therefrom and if the same was not forthcoming whether the same was sought for.

45. In ***Halsbury's Laws of England*** **4thEdn. Vol. 1(1) para 12 page 270** it is stated that:

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."**

46. In this case it is not disputed that the candidate did no adhere to the instructions and guidelines regarding the proper insertion of the registered names in the examination papers. She as clearly in default. Considering this conduct and the failure to comply with the Regulations, in the exercise of my discretion I am unable to exercise my discretion in favour of the applicant.

47. In the premises the Notice of Motion dated 21st January, 2016, which itself was expressed as seeking leave as opposed to the substantive orders must fail.

48. The same is dismissed but with no order as to costs.

49. Orders accordingly.

Dated at Nairobi this 17th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ayabei for Mr Olewe for the Applicant

Miss Kagiri for Mrs Kiarie for the Respondent

Cc Mwangi