



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS,
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. 413 OF 2016

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS
OF MANDAMUS BY PRISCILLAH WANJIKU KIHARA AGAINST KENYA NATIONAL
EXAMINATION COUNCIL**

**IN THE MATTER OF KENYA NATIONAL EXAMINATION COUNCIL (KNEC) ACT NO.
29 OF 2012**

IN THE MATTER OF BASIC EDUCATION ACT NO. 27 OF 2012

**IN THE MATTER OF ARTICLES 165 (6) & (7) AND ARTICLE 23(3)(f) AND ARTICLE 47
(1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTION 8 AND SECTION 9 OF THE LAW REFORM ACT (CAP 26)
LAWS OF KENYA**

PRISCILLAH WANJIKU KIHARA.....APPLICANT

-VERSUS-

KENYA NATIONAL EXAMINATION COUNCIL (KNEC).....RESPONDENT

JUDGMENT

Introduction

1. By her Notice of Motion dated 21st September, 20163, the *ex parte* applicant, **Priscillah Wanjiku Kihara**, seeks the following orders:

1. An ORDER of MANDAMUS to remove into the High Court and direct the Respondent, either directly or indirectly, through its agents or employees and/ or servants to forthwith verify and confirm the applicant's 2004 K.C.S.E results to the United States of America Embassy at Nairobi - Kenya as requested by the applicant on 19th June, 2015.
2. An ORDER of MANDAMUS to remove into the High Court and direct the Respondent,

either directly or indirectly, through its agents or employees and/ or servants to forthwith replace the applicant's 2004 K.C.S.E lost Certificate as requested by the applicant on 19th June, 2015.

3. That the Court be at liberty to make such further orders as it deems fit to meet the ends of justice.

4. That the cost of this application be provided for.

Applicant's Case

2. According to the applicant, she was schooling at Larmudiac High School and sat for her KCSE examination in the year 2004 vide index No. 511603060 and managed to obtain the following grades :-

(a) English	C+(plus)
(b) Kiswahili	C-(Minus)
(c) Mathematics	D (Plain)
(d) Biology	D+(Plus)
(e) Physics	D (Plus)
(f) Chemistry	D (Plain)
(g) Geography	D (Plain)
(h) Christian Religious Education	C+ (Plus)
(i) Commerce	D+ (plus)

Mean Grade C- (Minus)

3. She averred that on 16th October 2014, she applied for DV-2016 lottery commonly known as Green Card to United States Department of State, Kentucky Consular Center, 33 North Highway 25W, Wellington, KY 40769 USA and on or about 5th May 2015 the United States Department of State confirmed that she had won the said DV-2016 lottery (Green Card). Thereafter downloaded the requirements for obtaining a Visa from the United States Department of State website in regard to Visa application requirements and found that some of the requirements among many, was to confirm her 2004 K.C.S.E results and K.C.S.E original certificate.

4. According to the applicant, when she applied for the Green Card (DV-2016 Lottery), she did not have her 2004 K.C.S.E original certificate having lost the same during 2007/2008 post-election violence and reported the loss thereof to Nakuru Police Station and was issued with a police abstract.

5. It was averred that on 19th June 2015, the applicant made a formal application to the respondent for the confirmation and verification of her results (2004 KCSE) directly to the Embassy of United States of America Nairobi and also applied for a replacement of her lost certificate and made the requisite payments. To her said she attached an affidavit and a letter from the principal of Larmudiac High School Njoro dated 29th June 2015.

6. According to the applicant, on 17th November 2015, the United States of America Department of State issued an official notice to her in pursuance of DV-2016 Visa and scheduled her appointment at the Embassy of United States of America Nairobi on 20th January 2016 at 6:30 am. The applicant however

contended that since 19th June 2015, she has been following her application for verification, confirmation and replacement of her lost certificate with the respondents and though the respondents have all through been confirming that they would discharge their statutory duties in due course, all was a fallacy and a myth.

7. The applicant disclosed that on 20th January 2016, she appeared before the Embassy of United States of America for an interview as scheduled, was interviewed and she passed the same for confirmation of the results and production of the original certificate (KCSE 2004). It was averred that on the said 20th January 2016 and upon finalization of her interview, the American Embassy referred her to the respondents' offices to find out why they had not confirmed her results to the American Embassy nor replaced her lost certificate. Upon going to the respondents offices to confirm the reasons of the delay, she was arrested by the police guarding the respondents premises, taken to Akina Police post for interrogation and eventually was arraigned at Kibera Law courts in Criminal case No. 421 of 2016 and charged with the offence of altering a document contrary to Section 347 (b) as read with section 349 of the **Penal Code**. She was however acquitted under section 210 of the **Criminal Procedure Code** CAP 75 Laws of Kenya.

8. The applicant averred that since 29th July 2016, she has been visiting the respondents' offices, requesting the respondents to confirm her results to the Embassy of United States of America Nairobi and to replace her lost certificate but all in vain. As a result on 11th August 2016, she approached her advocates M/s Osoro Omwoyo & Co. Advocates who wrote a letter to the respondents informing them of her acquittal hence there was no reason for not confirming her result to the Embassy of United States of America Nairobi and replacing the lost certificate. It was however the applicant's position that the respondents have been sly to deal with the issue especially confirming her results to the Embassy of United States of America Nairobi and replacing her 2004 KCSE lost certificate on flimsy grounds e.g. that the legal officer is on leave, that her advocates letter dated 11th August 2016 has not been forwarded to the headquarters, wait for our reply etc. In her view, all these were delaying tactics to defeat her quest of obtaining a Visa to the American Embassy. She disclosed that on 29th August 2016, her said advocates wrote another letter addressed to the respondents' Chief Executive Officer but to date the same has not been acted upon by the respondents.

9. According to the applicant, on 5th of September, 2016, the Respondents wrote a letter to her through her said advocates stating that they had confirmed and verified the results to the Embassy and maintained that the certificate presented did not reflect the true and original grades as reflected in their system and in the original certificate. To the applicant the letter dated 15th July, 2016 which the respondents contended was a confirmation and verification was in fact not a confirmation of her results. She therefore contended that the Respondents without any colour of right continues to accuse her of forgery and altering her 2004 K.C.S.E results despite having been acquitted.

10. To the applicant, the respondents are under a statutory duty to confirm and authenticate her certificate issued by them upon request by any of the following:-the Government, public institutions, learning institution, employers and other interested parties. Further, the respondents are under statutory duty to issue replacement of her certificate upon acceptable proof of loss or damage of the original.

11. The applicant disclosed that her DV-2016 lottery commonly known as Greed Card shall expire on 30th September 2016 and unless the respondents are ordered to forthwith confirm her results (2004 KCSE) and replace her lost certificate, she and her immediate family are likely to lose the chance of being citizens of United States of America despite having finalized all the requirements of obtaining the Visa from the Embassy of United States of America Nairobi and what is remaining is the confirmation of my results and production of the replaced certificate to the American Embassy at Nairobi. In her view, it is unfair and unjust for the respondents to refuse, decline, reject and turn down her request for confirmation and replacement of her lost certificate as made on 19th June 2015. She contended that her rights to travel, obtain dual citizenship are about to be infringed, contravened, transgressed, curtailed, trumped upon and or truncated upon by the intentional refusal of the respondents to confirm and replace my certificate. It

was her position that the decision of the Kenya National Examination Council is inconsistent with Articles 47 (1) and (2) and 50(1) of the Constitution of Kenya 2010 and therefore null and void *ab initio*. She asserted that the respondents' failure to confirm and authenticate her results (2004 KCSE) is in contravention of the legal requirements enshrined in Section 10(1)(c) of the **Kenya National Examination Council Act** No. 29 of 2012 while its failure to replace her lost certificate (2004 KCSE) is in contravention of the legal requirements enshrined in Section 10(1)(d) of the same Act hence she is entitled to the remedy of mandamus *ex debito justitiae*. In her view, verifying, confirmation of result and replacing certificates is not a matter of discretions on the part of the respondents but statutory and mandatory and that the respondents have failed the duty to act in good faith and to discharge their mandate as per the law.

Respondent's Reaction

12. In their response the Respondent contended that the Application is incompetent, defective, vague and bad in law as it is based on duplex and independent statements and Verifying affidavits contrary to the law; there was no application or leave to amend the statement.

13. They averred that the applicant as deliberately misrepresented, distorted and or failed to disclose material facts in order to misled this Court to countenance illegality and that the Application is devoid of merit and seeks to compel the Respondent to commit illegalities, circumvent or breach the law and fails to satisfy the legal and evidential threshold for grant of reliefs sought as demonstrated hereafter.

14. According to the Respondents, on or about 19th June 2015, the Applicant lodged an Application with the Respondent for confirmation of results relating to her Kenya Certificate of Secondary Education to the Consulate Office of the United States of America Embassy at Gigiri –Nairobi (hereafter 1st Application) which application consisted of a duly filled prescribed form ref No. KNEC/GEN/ARC/FM/APF/044, a copy of a transaction receipt evidencing payment of the requisite fees for the service of Kshs. 2,320.00 to the Respondent's account and uncertified copy of the Kenya Secondary Education Certificate No. 2543552 with the Applicants name on it. According to the Respondents, on or about 1st July 2015, the Applicant also submitted an Application for replacement of her KCSE Certificate No. 2543552 and presented inter-alia a copy of KCSE Certificate similar to the one presented for the verification of results application above (hereafter 2nd Application).

15. However, during consideration of the Applications, the Respondents retrieved the record/data relating to the Applicants KCSE examination results and noted variance between the results shown on the uncertified copies of the KCSE Certificates provided in the Applications herein and the examination results in the Respondent's record/data at the latter's archives/records. According to them, the Respondents records confirmed the Applicant's candidature and results for the year 2004 KCSE examination under index number 511603060 save for examination grades or results for 3 subjects in the uncertified copies of the KCSE Certificates accompanying the 1st and 2nd Application as they did not tally with the Respondent's data for the Applicant's respective examination results at the Respondent's data/records. The variance in grades was in respect of the following subjects:

i) Kiswahili (Code 102): the Applicant's copy of the KCSE Certificate indicated grade C+ (Plus) while the Respondent's record indicated grade C-(Minus);

ii) Physics (code 232): the Applicant's copy of the KCSE Certificate indicated grade D+ (Plus) while the Respondent's record/data indicated grade D (Plain)

iii) Commerce (Code 562): the Applicant's copy of the KCSE Certificate indicated grade C-(Minus) while the Respondent's record indicated grade D+ (Plus)

16. The Respondents also averred that a counter-check with the Respondent's records of Applicant's results showed that the KCSE Certificate No. 2543552 issued to the Applicant indicated the Applicant results as (code 102) Kiswahili C- (Minus), (code 232) Physics D (Plain) and (code 562) Commerce D+

(Plus); the purported copy thereof produced in the 1st and 2nd Applications hereof indicated different results for the above stated subjects consequently raising suspicion of forgery or alteration of a public document. As a result, the Respondents immediately lodged a complaint with the National Police Service-Akila Police Station against the Applicant for reasonably being suspected of presenting an altered public document and or reasonable suspicion of alteration or forging of a public document which led to the Applicant's arrest and charge in *Kibera, Chief Magistrates Court Criminal Case No. 421/2016* by the relevant prosecutorial authorities in law.

17. It was averred that subsequent to the Applications, the Consulate Office, United States of America Embassy in Gigiri-Nairobi also scanned a copy of KCSE Certificate presented to it by the Applicant during Visa Applications which copy was similar to the copies presented in the 1st and 2nd Applications herein and requested for verification. By a letter dated 15th July 2015 to the Consulate Office, the Respondent rendered its decision to Consulate's request pursuant to the 1st Application in accordance with Part II of ***Kenya National Examinations Council (Confirmation of Examination Results and Issuance of Replacement Certificates) Rules 2011***; the said letter was hand delivered and receipt acknowledged thereof by the said consulate office on 18th August 2015. According to the Respondents, they confirmed the Applicants candidature for year 2004 KCSE as well verifiable results on the 1st Application and the Consulate's request but advised that the copy of Certificate presented for verification appears to have been obtained from a forged document; the Respondent also singled out particular results on the copy of the certificate which did not tally with the Respondents records.

18. It was contended that whereas verification of examination results is prompted by the Applicant, the response thereto is confidential and exclusively directed to the order of the Applicant's request without obligation to copy the Applicant; there is no obligation to copy the response to the Requestor/Applicant and the said limitation is permitted by the enabling the law and the Constitution.

19. To the Respondents, in respect to the 2nd Application, the same was considered and rejected for being defective and tainted with illegalities; the copy of the certificate presented had some results which did not correspond with the data or was obtained from a forged document which facts have at all material times been known to the Applicant.

20. The Respondents averred that on 19th July 2016, the Court in *Kibera, Chief Magistrates Court Criminal Case No. 421/2016* acquitted the Applicant of the charges against her on technicality and that the Court did not find that the impugned certificate is genuine or that the Applicant is holding a forged document as purported by the Applicant herein but only exonerated the Applicant from suspicion of having participated in the forgery.

21. It was contended that on 11th August 2016, the Applicant's advocates unprocedurally, irregularly and unduly demanded the Respondent to verify and confirm the 2004 KCSE examination results to the USA Embassy herein and replace the Applicants KCSE certificate based on the 1st and 2nd Application with the altered copy of a Certificate but on 29th August 2016, the Respondent formally advised the Applicants advocates that confirmation and verification of results was done and communicated to the Consulate office of the United States of America as indicated above and the purported request for verification and confirmation of results is irregular and without legal basis. It was also noted that the Applicant's advocate had attached uncertified copy of a KCSE Certificate Serial No. 2543552 that was different from the copy presented for verification and confirmation to the Respondent by the Applicant thereby casting more aspersions on the integrity and motive of the Applicant on the matter.

22. It was averred that the Respondents' advocates also clarified and advised the Applicant through her advocates on the Respondents decision on the 1st and 2nd Application by a letter dated 15th September 2016. To the Respondents, from the foregoing, it is clear that the Respondent has complied with section 10 of the ***Kenya National Examinations Council Act*** and Part II of ***Kenya National Examinations Council (Confirmation of Examination Results and Issuance of Replacement Certificates) Rules 2015*** and has not in any way absconded or failed to discharge any public duty to the Applicant as purported or

at all.

23. It was disclosed that the Court ruling and the different copies of Certificates presented by Applicant and her advocates prompted the Respondent to request the Consulate Office of the United States Embassy – Gigiri, Nairobi to provide a copy of Applicant’s certificate submitted to their office during the application for visa for comparison with the copy presented to the Respondent in the 1st and 2nd Application and that by a letter dated 13th September 2016 in response thereto, the said Consulate Office attached certified photocopy of the KCSE Certificate similar to the copy presented in the 1st and 2nd Application herein and confirmed that it was a true copy of the original certificate submitted to the Embassy by the Applicant personally on 20th January 2016.

24. According to the Respondents, it is trite from the letter by the Consulate Office of the USA Embassy’s above that the Applicant has an original certificate with altered examination results purporting to be issued by the Respondent which is contrary to the law hence the totality of matters herein, cast doubt on the Applicant’s credibility that the Applicant’s original KCSE Certificate was not lost as alleged or at all. Procedurally, there was no obligation for the Applicant to produce a copy of the KCSE Certificate if she did not have so long as she deposed that the original thereof is lost.

25. In reply allegation allegations that the Respondents failed to verify results to the Consulate of USA Embassy, the Respondents stated that it sought clarification about the Immigrant Visa section emails and the Consulate Office confirmed and acknowledged receipt of the requested verification vide Respondent’s letter dated 15th July 2015 hence the purported demand or Application for verification and replacement of Applicant’s KCSE results and Certificate thereof is vexatious, misconceived and devoid of any legal basis. To the Respondents there is no lawful pending Application for verification and or replacement of KCSE Certificate before the them and they cannot in the circumstances consider and grant the Applicant’s request for verification or confirmation of results as advanced in Court as the same is repugnant to public policy and the law. To the Respondents, the instant proceedings or reliefs sought clearly contravenes the relevant Statute and Part II and III of *Kenya National Examinations Council (Confirmation of Examination Results and Issuance of Replacement Certificates) Rules 2015* an afterthought, otherwise abuse of Court process and should be dismissed with costs.

Determination

26. I have considered the application, the Statement, the verifying affidavit and submissions filed on behalf of the applicant herein.

27. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring

him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

28. In Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240 it was held that:

“...On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.....when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance... From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and

investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene...The rule of law is the cog upon which all the provisions of the Constitution turn...I hold that the public bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case..... My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – see *Benett case (supra)*. Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law.”

15. In this case, the Respondent’s action being an administrative action would be subject to Article 47 of the Constitution which 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.

16. According to section 10(1)(c) and (d) of the Act some of the functions of the Respondents are to:

(c) confirm authenticity of certificates or diplomas issued by the Council upon request by the government, public institutions, learning institutions, employers and other interested parties;

(d) issue replacement certificates or diplomas to candidates or diplomas to candidates in such examinations upon acceptable proof of loss of the original.

17. It is therefore beyond doubt that the Respondents are empowered to confirm the authenticity of certificates issued by itself upon request by any interested parties and also to replace certificates upon acceptable proof of loss of the original. It is therefore clear that once the applicant shows by way of acceptable evidence that the original certificate is lost, the Respondent ought to replace the same.

18. In this case, the basis upon which the Respondent surmise that the applicant’s certificate may not have gotten lost is the discrepancies in the applicant’s presented copies of the certificates. In my view whereas the conduct of the applicant in her application for replacement of her certificate is not beyond reproach, the only consideration by the Respondent in deciding whether or not to replace the lost certificate is whether there exist reasonable basis for believing that the original certificate is lost. In this case, the

applicant has exhibited a copy of the police abstract report of the loss of her certificate. Apart from the production of a certificate whose contents differ from the one in the original application, one cannot state with certainty that the applicant in fact is in possession of the original certificate taking into account the report of loss of the same which is dated 7th October, 2008.

19. Without any reasonable basis for disbelieving the said report, the Respondent's decision based as it is on suspicion, must be found to be both unreasonable and anchored on irrelevant considerations. *Halsbury's Laws of England* Fourth Edition. Vol. 1(1) posits that:

“A discretionary power must be exercised for proper purposes which are consistent with the conferring statute. The exercise of such a power will be quashed where, on a proper construction of the relevant statute, the decision maker has failed to take account of relevant considerations or has taken account irrelevant considerations. In some statutes, some or all of the relevant considerations may be express; where the statute is silent or the express considerations are not exhaustive, the courts will determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion by reference to the implied objects of the statute.”

20. The position adopted by the Respondents seems to be that since the applicant was acquitted on technicality, she has not been exonerated from the suspicion of having committed forgery. The legal position is however that attempts to charge the applicant with a criminal offence seems to have hit the wall and the Respondents seem to have resigned to the position that there is nothing else they can do. In those circumstances it is clear that the Respondents have no justification for clinging to their suspicion in not processing the applicant's applications.

21. Section 6(4) of the *Fair Administrative Action Act*, 2015 provides that:

“if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.”

22. This was the position adopted by **Simpson, J** (as he then was) in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090** where he held that in the ordinary way and particularly in cases, which affect life, liberty or property, the concerned authority should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given is not one of the reasons on which the he is lawfully and justifiably entitled to rely, the Court is entitled to intervene since such action would then be based an irrelevant matter.

23. In the premises I hereby direct the Respondent to issue the applicant with a replacement of the certificate of her 2004 KCSE results as per the records and the data in the Respondent's System upon payment by the applicant of the requisite fees.

24. Upon the issuance of the said certificate, the Respondents are hereby directed to transmit a verified copy of the same certificate to the United States of America Embassy.

25. Taking into account the conduct of the applicant that gave rise to these proceedings each party will bear own costs hereof.

It is so ordered.

Dated and Delivered at Nairobi this 28th day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oguttu for Mr Osoro for the applicant

Mr Wageche for Mr Litoro for the Respondent

CA Mwangi/Gitonga