



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 278 OF 2014**

**REPUBLIC .....APPLICANT**

**VERSUS**

**KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT**

**Ex-parte**

**PRINCIPAL ST PIUS X SEMINARY SCHOOL AND THE PARENTS AND GUARDIANS  
NAMESLY FR. BERNABUS MUNENE, ANN ANYAWIRA, JULIUS MBAYA M'IRIANDIKI,  
GEORGE KIRIAMANA, ALISON RIUNGU, ROSA TABICHA, ISAACK TUNE BORU, IRENE  
WAMGOMBE, SISTINA KAILU THILANG, JOHNEY MURITHI, JULIET MURITHI, JERUSA  
KAILIKA, MONICA MWAURA, MOSES MUGAMBI, RUTH NJERI, JOHN NYAGA, IKUNGU  
MURIUKI, WANGOME THUO, TUMME GOLICHA, MARGARET KATHURE, LUCYLINE  
KARURU, HARRIET MABAY, JANE MUTHONI, JOHN MBURIA, CLEMENT GICHUHI,  
ANNA WANJIRU, KIARIE KAROMO, CHRISTOPHER KIMATHI, PAUL GITONGA, JULIUS  
KARUKA, ZACHARY KATHUNKUMI, MARGARET ALUMA, MARRIETA MUTIUNGA,  
JANNET MAKENA, HELLEN NDIGWA, MERCY NKIROTE & PAUL MANINA**

**JUDGMENT**

The Principal of St. Pius X Seminary School together with the parents and guardians of some of the examinees who sat the Kenya Certificate of Secondary Education (KCSE) examinations in 2013 are the applicants in this cause. The Kenya National Examination Council (KNEC/Council) is the Respondent. The Respondent is a body corporate with perpetual succession created by the Kenya National Examination Council Act, 2012 (the Act) to, among other things, manage various examinations in the country.

The genesis of these proceedings can be traced to the letter dated 3<sup>rd</sup> March, 2014 addressed to the headteacher of St Pius Seminary Secondary School (the school) by Mr. Paul Wasanga, the Chief Executive officer of the Respondent. The letter states:

**“RE THE YEAR 2013 KSCE EXAMINATION RESULTS**

**This is to inform you that the KCSE examination results for the candidates whose index numbers**

are shown below have been *cancelled* in the subject(s) indicated because they were involved in an examination irregularity which is in contravention of the Kenya National Examinations Council Act, 2012, Section 32.

<u>Index Number(s)</u>	<u>Subject(s)</u>	<u>Nature of Irregularity</u>
15319102 (50294439)		
003 006 010 012 026 028 030		
031 032 033 034 035 036 037		
038 039 040 041 042 044 045		
048 050 051 052 053 054 057	Chemistry	Collusion
058 060 062 065 067 069 071	(233)	
073 074		

**Please bring this to the attention of the candidate(s) affected and advise the candidate(s) that cancelled results are not available for re-marking. Remarking is only undertaken when candidates are not satisfied with their performance but not when the results have been cancelled due to an examination irregularity.”**

The school responded to the said letter on 13<sup>th</sup> March, 2014 appealing or seeking a review of the said decision. The letter gave various reasons why the appeal should be allowed. By a letter dated 25<sup>th</sup> March, 2014, the Respondent gave a detailed response to school and concluded that the decision to cancel the results stood.

The parents of the affected candidates were not satisfied with the response and on 18<sup>th</sup> June, 2014 their advocate wrote a letter to the Respondent demanding the release of the cancelled results within 14 days. The Respondent replied through its letter dated 26<sup>th</sup> June, 2014 and observed, *inter alia*:

**“2.0 The cancellation of the Chemistry Practical Paper results for the candidates has been reassessed by KNEC and we have established beyond reasonable doubt that the said students were involved in collusion.”**

The applicants did not give up and on 18<sup>th</sup> July, 2014 they approached this Court and obtained leave to apply for orders of *certiorari* and *mandamus*.

Through the notice of motion application dated 24<sup>th</sup> July, 2014 they therefore seek an order of *certiorari* to remove into this Court and quash the Respondent’s decision contained in the letter dated 3<sup>rd</sup> March, 2014 cancelling the named students’ Chemistry results. They also seek an order of *mandamus* to compel the Respondent to reverse the decision to cancel the Chemistry results within 21 days from the date of the order and to release the entire results of the candidates in question. In addition to those prayers, the applicants pray for the costs of the application.

The facts of this matter are not disputed. The candidates in question sat the KCSE examinations in 2013. They were later informed by the Respondent through the letter dated 3<sup>rd</sup> March, 2014 about the cancellation of their Chemistry results on the ground of examination irregularity. Further inquiry revealed that results for the 36 candidates **“were cancelled in Chemistry (233) because they were**

**involved in collusion during the Chemistry Practical (233/3) examination.”**

From the papers filed in Court, the applicants' case is that in the letter dated 3<sup>rd</sup> March, 2014 the Respondent alleged that the results for Chemistry Practical were cancelled under **Section 32 the Act** due to an examination irregularity. They argue that the offence disclosed by **Section 32** is one of copying and that particular offence is specifically defined. They aver that the Respondent through the letter dated 25<sup>th</sup> March, 2014 changed gears and claimed that the results had been cancelled due to collusion. It is their case that neither the particulars of copying or collusion have been proved by the Respondent.

The applicants contend that the examinations were supervised by the Council's officials who at no time ever drew the attention of the school management to any irregularity during the examinations. They submit that although members of the school management and parents met the Respondent's Principal Research Officer on 6<sup>th</sup> March, 2014 no evidence of collusion was availed to them.

They argue that collusion was not possible as not more than three candidates used one table at a time. According to them, no student was caught copying or in possession of prohibited material in the examination room. Further, that no student was found copying from other students and neither was any other person found in the examination rooms.

The applicants argue that at no time has the Respondent given them particulars of the alleged collusion like the particulars against each of the 37 candidates; particulars of any other person involved in the collusion; whether the invigilators, supervisors and/or teachers were involved; if there was any complaint by K.N.E.C's agents i.e. the invigilators or supervisors; specific examination rooms in which collusion occurred; the method of collusion; the mechanism used by the Respondent to separate the candidates who colluded from those who did not collude; and the criteria used to arrive at the conclusion that there was collusion in the Chemistry Practical paper.

The applicants assert that although **sections 27 to 33 of the Act** define what amounts to examination malpractices and irregularities, the Respondent has instead adopted a method described as **'mechanisms of detecting collusion without relying on information received from supervisors and Invigilators.'** It is their case that this method is alien to the Act.

The applicants contend that the Respondent's conduct is irrational and discriminatory in that by the letter dated 3<sup>rd</sup> March, 2014 it had indicated that candidate Index 057 was one of the students whose results had been cancelled. Further, that this particular candidate's results slip which was sent to school had "Y" but the examination declaration printout released by the Council indicated that the candidate had an "A" grade. They submit that no explanation has been given for the change of fortunes in respect of this particular candidate and that the Respondent's letter of 25<sup>th</sup> March, 2014 simply talked of cancellation of results for 36 candidates. They assert that the release of the results of this particular candidate without any explanation is unfair and offends the principles of natural justice and the principle of fair and equal treatment. The applicants contend that in light of the treatment of candidate 057, the only conclusion is that the Respondent's decision was arbitrary, unfair, an abuse of power, improper use of authority and a frustration of the applicants' legitimate expectation of fair play on the part of the Respondent.

The applicants assert that the Respondent's decision was outrageous, absurd and irrational as it only acted on the basis of suspicion of collusion in the Chemistry Practical paper.

They assert that the decision was unfair in that the affected candidates who had diligently studied and worked hard in preparation for the examinations were locked out of future professional careers. They contend that in view of the decision of the Respondent their four years in secondary school will turn out to be a waste of resources in terms of time and money.

The applicants asserted that the Council was biased as it failed to take into account favourable factors including the absence of any negative report from the invigilators and supervisors regarding the alleged irregularity; the candidates' good performance in other subjects and their conduct from form one until the

time of the examinations.

The Respondent's opposition to the application was by way of a replying affidavit sworn on 20<sup>th</sup> August, 2014 by its Senior Legal Officer Andrew M Nyachio. He averred that **Section 10(e) of the Act** empowers the Council to make rules regulating the conduct of examinations and for all purposes incidental thereto. Pursuant to the said powers, the Respondent made the **Kenya National Examinations Council (Kenya Certificate of Secondary Examinations) Rules, 1998** which have been superseded by the **Kenya National Examination Council (Kenya Certificate of Secondary Education Examinations) Rules, 2009 (the Rules)**.

He contended that it has become a habit for a few candidates to engage in cheating during examinations and in a bid to contain and discourage cheating, it had always issued circulars and made advertisements in the media warning candidates against the vice and the consequences attached to such indiscretion. He averred that the candidates were warned of the consequences of cheating prior to the 2013 examinations.

It is the Respondent's case that since the year 2008 it had, in conjunction with the police, formed a team for monitoring and investigation of reported cases of illegalities in the national examinations. It was this team which uncovered massive cheating at the school/examination centre that occurred during the Chemistry Practical and this is what led to the cancellation of the results.

The Respondent's Senior Legal Officer averred that the scripts of the candidates were also scanned and scrutinized during the processing of the examination by the Council's research team and a unique response process depicting collusion was established.

Further, that the Respondent's Security Committee met and discussed the examination irregularities on a case by case basis and concluded that 3,353 out of the 446,696 candidates were involved in cheating. The Committee approved the cancellation of the results of these candidates who included the applicants.

He deposed that the affected students of the school were notified through the District Education Office. Upon enquires from the school's principal the Respondent reassessed its decision and affirmed that the affected students were indeed involved in collusion and the decision to cancel their results was left standing.

The Respondent's case is that in view of the warnings given to the candidates prior to the examinations, the intricate process of scrutinizing of scripts and the findings of its research team it cannot be said that it acted capriciously or arbitrarily or in breach of the rules of natural justice. According to the Council the rules allowed it to cancel results, without necessarily conducting further investigations, if it was satisfied that the candidates were involved in irregularities.

The Respondent's Senior Legal Officer averred that an essential factor in the conduct of examinations is that of certifying candidates based on their ability and of awarding marks or grades based on a candidate's own intellectual ability. This will be lost if candidates who cheat in examinations are awarded marks for those particular subjects. He contended that such an outcome may lead to loss of public confidence in the examining body and the education system at large. Further, that morale and values of honest candidates will be undermined. He submitted that if the issue of cheating is left unchecked, it will lead to doubts about the Council's certificates by institutions of higher learning and prospective employers.

It is the Respondent's case that it carries out its functions and duties in a climate of confidentiality so as to ensure that examinations are marked and graded fairly without undue influence from any quarter. The Respondent asserts that an order for the production of the candidates' scripts and reports on the process of verification will undermine the confidential nature of its functions.

The Respondent wraps up its case by urging this Court to find that it is in the interest of the wider Kenyan society for cases of cheating in examinations to be firmly dealt with. The Respondent submits that since it released the results of the other subjects unaffected by the irregularities it cannot be said to have interfered with the candidates' right to education.

The advocates for the parties in this matter filed submissions and I have had occasion to look at them. After considering the pleadings and submissions I form the opinion that one of the issues for the determination of this Court is whether the Respondent acted irrationally or unreasonably. Was it biased? The second issue is whether the rules of natural justice were applicable in this matter and if so were they complied with? Thirdly, the Court has to decide whether the orders sought are available to the applicants. The issue of costs will also have to be addressed.

The applicants contend that the decision was arrived at by use of a method called **‘mechanisms of detecting collusion without relying on information received from Supervisors and Invigilators’**. It is important to consider the context under which this statement was made by the Council. This statement is contained in the Respondent’s letter dated 25<sup>th</sup> March, 2014 which was written in response to the school’s letter of 13<sup>th</sup> March, 2014. In its letter the school principal had emphasized on the fact that there was no negative report by the invigilators and supervisors concerning the particular subject. In response, the Council in its letter stated, *inter alia*:

**“2.0 We wish to inform you that collusion occurs when candidates respond to questions in conjunction with other candidate(s) or with assistance of a third party such as a teacher, supervisor or an invigilator. It is also important for you to note that KNEC has mechanisms of detecting collusion without relying on information received from Supervisors and Invigilators.”**

Does the Act provide a process for arriving at a decision that a candidate has cheated? The applicants appear to suggest so but their suggestion is not supported by the Act. **Sections 28 to 32 of the Act** which were cited by the applicants only provide examination offences and not the process of confirming whether cheating has occurred. Such a scenario would then be governed by the holding in **Ceylon University v Fernando [1960] 1 W.L.R. 223** where the Court opined:

**“The clause is silent as to the procedure to be followed by the Vice-Chancellor in satisfying himself of the truth or falsity of a given allegation. If the clause contained any special directions in regard to the steps to be taken by the Vice-Chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed it is for him to determine the procedure to be followed as he thinks best.”**

The Respondent is indeed authorized by **Section 45(3) of the Act** to conduct such investigations as it may deem necessary into any alleged examination irregularities.

Were the applicants entitled to a hearing? That brings to the concept of natural justice. The question as to what natural justice entails has no concise answer. What is clear is that natural justice encompasses procedural fairness. That includes the duty to follow the procedure that has been laid down by the law or regulations.

Whether a person has received a fair hearing or not can only be deduced by considering the circumstances of each case. This principle was well stated in **R v GAMING BOARD FOR GREAT BRITAIN, EX P. BENAİM [1970] APP.L.R. 03/23** thus: **“it is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter.”**

The Court of Appeal in **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS**, Nairobi Civil Appeal No. 266 of 1996 addressed the issue as to whether an oral hearing should be provided before examinations are cancelled and observed:

**“The question of whether the Council is in law bound to hear a candidate before it cancels the result must remain for consideration on another occasion, though if we were forced to decide it in this matter we would ourselves be inclined to take the view that it**

**might place an unnecessarily heavy burden on the shoulders of the Council to insist on a hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to the marking of examinations.”**

However, the Court of Appeal, whose decision I beg to quote at length, gave an unequivocal answer to the question in **KENYA NATIONAL EXAMINATIONS COUNCIL v REPUBLIC EX-PARTE KEMUNTO REGINA OURU [2010] eKLR** when it stated that:

**“We earlier set out the various stages investigation of suspected irregularity goes through. The respondents, complain that they were not given a hearing in any of those stages or at all. Prof Muma, as earlier on stated, wondered why the respondents were not contacted to state how the sitting arrangement was in the examination rooms, or why even the invigilators or examiners were not asked to make a report of the examinations on the basis of their observations. On this aspect of the matter, we think, the learned counsel, missed the point.**

**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 v 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.....**

**Considering the foregoing we come to the conclusion that balancing one thing against the other the balance tilts in favour of subordinating the right to be heard directly, in favour of the public interest of ensuring that national examinations results enjoy public confidence and integrity by letting the experts handle them as they deem best provided what they do is applied equally to all candidates with similar complaints against them. In view of the conclusion we have come to, it is our judgment that Ibrahim, J. was in error to issue an order of certiorari, more so because, other than the alleged denial of a hearing as we strictly know it, there was no proper basis for him to interfere.”**

It is important to note that the decision in the above cited case arose from circumstances similar to those

of the case before this Court. In that case the Council had been accused of cancelling results of the respondent in the absence of a report from the school, the invigilator or the supervisor. The Court of Appeal answered that argument as follows:

**“We also are of the view that the Council by cancelling the results of the respondents, it was exercising discretionary power. Professor Muma submitted before us that such exercise would entail consideration of evidential material which according to him is lacking in this case. With due respect to learned counsel what better evidence needed to be considered other than the examination scripts , and the reports of the markers and examiners? It would be naïve to expect that the headmaster of a school, or the candidates themselves will provide such evidence as would objectively show how the examination in issue was conducted if it was not given in the course of the examination. It should also be recalled that the examiners are the first ones to raise the red flag. If an invigilator has not raised the issue in his report about the examination it is highly unlikely that he will give any useful evidence later on. In cases of this nature, the Court can only interfere where it is satisfied, either that the procedure adopted was unfair to an applicant or that the decision under challenge is unreasonable. We are not satisfied that the procedure was unfair to the respondents nor was the decision unreasonable.”**

I entirely agree with the reasoning of the Court of Appeal. Where the school or the supervisors or the invigilators are involved in the collusion, there is no way that any one of them can write a negative report about the examination centre.

From the decision in **ex-parte Kemunto Regina Ouru** (supra), it is clear that the Council is not under a duty to call a candidate for a hearing before cancelling examination results. The Council must however act fairly and above board. The Court is not powerless in the face of blatant unfairness or irrationality. The Court of Appeal did indeed observe that the **“Court can only interfere where it is satisfied, either that the procedure adopted was unfair to an applicant or that the decision under challenge is unreasonable.”** Looking at the material placed before this Court, I do not find any evidence to show that the affected candidates were treated differently from the other 3,317 candidates whose results were cancelled.

It must be admitted that the applicants pointed out some things which make them feel that they were unfairly treated. They gave an example of candidates 001, 002 and 003 who sat on the same table but only the results of Index 003 were cancelled. The applicants asked who then did this candidate collude with? This may appear a genuine question but a reading of **Section 32 of the Act** shows that collusion does not have to be between candidates alone. It can happen between a candidate and a teacher. It can also happen between a candidate and an outsider.

It is also clear that although the said Section talks of copying, the truth of the matter is that it deals with collusion. Collusion occurs when a candidate gets assistance from another candidate or any other person. It is therefore not correct for the applicants to allege that collusion is not an examination irregularity. For record purposes it is important to reproduce Section 32 which states:

**“32. Copying at an examination**

**A candidate who, during an examination—**

**(a) copies from the script of another candidate;**

**(b) communicates with another candidate with intent to assist that candidate answer an examination question;**

**(c) communicates with another candidate with intent to seek the assistance of that candidate in answering an examination question;**

**(d) is in possession of a textbook, electronic device or material in the examination room without lawful authority;**

**(e) copies from notes, electronic device or a textbook without lawful authority;  
or**

**(f) receives external assistance without lawful authority,**

**shall be disqualified from taking the entire examination and if the person has already taken a paper at the examination, the paper shall be cancelled by the Council and may be prohibited from taking an examination for a period not exceeding three years immediately after the commission of the offence.”**

I therefore agree with the Respondent that the applicants’ results were cancelled after confirmation that an examination irregularity had been committed.

There is the thorny question of candidate 057. Although the school principal wrote to the Respondent to ask under what circumstances Chemistry marks for this candidate were restored, he did not get any reply. Even though the applicants also directly raised this issue in the papers filed in Court, the Respondent never offered any explanation. This Court cannot speculate on what happened. The silence of the Respondent on this particular question is very disturbing. The Respondent must always remember that giving reasons is a sign of good governance by a public organization. Failure by the Respondent to give an account of what made it restore the marks of one candidate out of 37 whose results had been cancelled can easily be interpreted to mean that it made an irrational and discriminative decision in respect of the other candidates.

However, the fact that the results of candidate 057 were restored does not in any way mean that the process leading to the cancellation of the results of the other 36 candidates was unfair or unreasonable. It may simply mean that the Respondent is somewhat disorganized. It must be noted that **Rule 11(3) of the Regulations** gives the Council power to correct results prior to the issuance of a certificate.

Assuming that the applicants had established irrationality and unfairness in the decision of the Council, would orders have issued as prayed? An order of certiorari may have issued but an order of mandamus compelling the Respondent to release results would not have been an appropriate order. The appropriate order would have been to direct the Respondent to scrutinize the applicants’ examinations scripts afresh.

Cancellation of examination results is a bitter pill for the candidates, parents and sponsors. On the other hand, it is imperative that an aura of integrity be maintained when it comes to examinations. Candidates who are found to have committed examination irregularities ought to be punished. It is indeed in the public interest that cheating in examinations be discouraged. The Respondent must also be fair and objective when deciding to cancel results. The Council must project an image of fairness and reasonableness.

As already explained, this application cannot succeed. The same is dismissed with no order as to costs.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of December , 2014**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**