REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J)

MISC. CIVIL CAUSE NO. JR. 44 OF 2010

REPUBLIC…….....……....…….APPLICANT

VERSUS

THE KENYA NATIONAL EXAMINATIONS COUNCIL….....RESPONDENT

ex parte

1. **AFRAH FARID MAREE**
2. **KHAMBARI SWAFIYA FEISAL**
3. **RAMADHAN MOHAMED ALI**
4. **AWADH SAMIHA SWALEH**
5. **ASMA AL-MIN AHMED *suing through her father & next friend* AL AMIN ABDALLA**
6. **MUNAA BWANA**
7. **ABDUIRAHMAN H. IBRAHIM**
8. **ABDALLA M. YUSRA**
9. **BASHIR ISSA SHEIKH**
10. **SAMIRA ABDI HERSI**
11. **FATMA SIYAD KUNO**
12. **ABDILLE AMINA HASSAN**
13. **KHALID JAMA ABDI**
14. **SALIM AWADH SALIM**
15. **ABDULRAZAK ABDULLAHI JAMA**
16. **OCHIENG PATIENCE AKINYI**
17. **ABDULATIF HAMID MOHAMMED**
18. **HAMDI ISSA ALI**
19. **AHMED WANDE SHABAN**
20. **FATMA MOHAMED AWADH**
21. **AHMED AHMED SWALEH**
22. **ABDI FATMA MOHAMED**
23. **ABDULLAHI HASSAN MURASAL**
24. **NUMIN ABDISALAM**
25. **SWABRINA ABDULBARI**
26. **ADAN ABDI HAMID**
27. **OMAR AHMED SALIM**
28. **ADEB ALI SALAT**
29. **ABEID RAYA KHAMIS**

30. MARJAN ABDULRAHMAN R.S.
31. ABDULLAHI AHMED OSMAN
32. HASSAN HINDU ISMAIL
33. MOHD N. AHMED
34. ABDULRAHMAN RUKIA ABDALLA
35. KHALID ABDALLA
36. MUHAMAD YAHAT HUSSEIN
37. USAMA MOHAMED ABDALLA
38. FATMA MOHD AHMED
39. KHADIJA ABDULWAHAB ISHAQ
40. SHAM SHEKUWE ATHMAN
41. MOHAMMED BANAFUNZI ABDALLA
42. MOHAMED MINAD OMAR
43. IPTISAM AWADH SWALEH
44. ABDALLA QUALTHUM YUSSUF
45. ISMAIL FATUMA ADAN
46. HUSSEIN MAIMUNA HASSAN
47 ALI S. MWANAHAWA
48 KAKA BIABU ABDALLA.....APPLICANTS
49 ISMAIL SULUB YUSSUF ***suing as officials of*** **ABUHUREIRA EDUCATION BOARD**
MOHAMED OSMAN HAJI
HAMED MAALIM HUSSEIN

JUDGMENT

Pursuant to leave granted by this Court on **22nd March, 2010** the applicants, by their Notice of Motion dated **24th March, 2010** and brought under Order LIII (Rule 3 (1)) of the Civil Procedure Rules and s. 9 of the Law Reform Act (Cap. 26, Laws of Kenya), moved the Court to grant judicial review orders as follows:

(i) an order of certiorari to remove into the High Court and quash the decision of the respondent as contained in its letter to the Head Teacher/Manager of the 49th ***ex parte*** *applicant dated* ***25th February, 2010*** *cancelling the examination results in respect of 48 Kenya Certificate of Secondary Education candidates for 2009 (1st – 48th* ***ex parte*** *applicants) on the ground of an alleged irregularity referred to as "collusion in the Mathematics (121) and Business Studies (565) subjects", without providing any evidence whatsoever to that effect and without giving the affected candidates and the school a hearing;*

(ii) an order of certiorari to remove into the High Court and quash the decision of the respondent as contained in its letter to the Head Teacher/Manager of the 49th ***ex parte*** *applicant dated* ***25th February, 2010*** *barring the affected 48 Kenya Certificate of Secondary Education candidates for 2009 (1st – 48th* ***ex parte*** *applicants) from sitting for any KNEC examinations for the next two years;*

(iii) an order of mandamus directed to the respondent, compelling the respondent to release the Mathematics (121) and Business Studies (565) examination results it purportedly cancelled, in respect of 2009 for 1st to 48th ***ex parte*** *applicants;*

(iv) in the alternative to the third prayer, an order of mandamus directed at the respondent to compel the respondent to produce before the Court all the Mathematics (121) and Business Studies (565) answer booklets for all the 48 affected candidates respectively, for the Court's inspection and determination.

The application is supported by the statutory statement, and the verifying affidavits of **Omar Ahmed Salim** and **Mohamed Ismail Mursal** — allthese documents dated **18th March, 2010.**

The factual basis of the cause is that, on or about **3rd March, 2010** the head of the 49th applicant received a letter, Ref. No. KNEC/CONF/RS/SE/KCSE/IRR/2010/005 dated **25th February, 2010** by the respondent's Council Secretary/Chief Executive, notifying the applicants of the cancellation of the KCSE results for 48 out of a total of 57 candidates, and barring them from sitting any KNEC examination for the next two years, following an alleged examination irregularity referred to as collusion by 41 candidates in the Mathematics (121) paper and 14 candidates in the Business Studies (565) paper (of whom 7 candidates have both the Business Studies and the Mathematics paper cancelled). The applicants state that the respondent in its said letter, gave no explanation of the basis for arriving at the decision so communicated.

The application alleges illegality, in the respondent's decision-making which is the subject of complaint. By virtue of s. 10 (e) of the Kenya National Examinations Council Act (Cap. 225A, Laws of Kenya), the respondent under Legal Notice No. 18 of 1998, published the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 1998; but these Rules were later repealed by Legal Notice No. 14 of 2010, after being substituted with a different set of Rules, the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, Legal Notice No. 176 of **4th December, 2009.**

The applicants state that the respondent acted *ultra vires* by applying the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009 which were gazetted on **4th December, 2009** retrospectively, and thereby purportedly barring 1st – 48th *ex parte* applicants for two years from sitting any KNEC examinations, when the said rules were gazetted only **after** the conduct of the 2009 examinations for the academic subjects in question; those particular examinations fell on the following dates: Mathematics 121/1 – Thursday **22nd October, 2009**; Mathematics 121/2 – Monday **26th October, 2009**; Business Studies 565/1 – Monday **9th November, 2009**; and Business Studies 565/2 – Tuesday **10th November, 2009.**

It was the applicants' contention that the conduct of examination for the papers in question, should have been governed by the 1998 rules, as regards the management of matters of discipline; and so the respondent lacks the powers it purported to exercise to bar the applicants from sitting any KNEC examinations for two years.

It was contended that the 1998 rules aforesaid did not justify the action taken by the respondent in this instance; for Rule 28 thereof (on withholding of results) thus provided:

"The Council reserves the right to withhold the results of the examination for any candidate or group of candidates or examination centre suspected of having been involved in examination irregularity or misconduct pending completion of investigations and the final disposal of any consequent disciplinary or other proceedings."

The applicants stated that, by the 1998 Rules, the respondent could only withhold examination results, but not cancel them in the first instance; that the respondent cannot be deemed to have conducted investigations *"unless the candidates, the supervisors, invigilators and all other persons involved in the conduct of the examinations … are given an opportunity to respond to the allegations of misconduct"*; that the Rule imposes upon the respondent the duty to act in a judicious and reasonable manner, in good faith; that the 1998 rules do not provide for the barring of candidates from re-taking examinations if the same are cancelled.

The applicants stated that, in view of the respondent's operational circular Ref. No. KNEC/GEN/EA/EM/KCSE/COND.EX/2009 of September, 2009 entitled *"Instructions for the Conduct of the 2009 KCSE Examination"* availed to officers having the conduct of the examinations, *"no case of an examination irregularity can be said to have arisen without a report to that effect from the supervisor*

who should receive such a report from the invigilator."

The applicants contend that the respondent had acted capriciously and in disregard of its own rules, by cancelling the examination results of the applicants, and by barring them from sitting any KNEC examinations for the next two years. It was stated that the respondent's decision had been made without complying with rules of natural justice.

In a replying affidavit of **3rd May, 2010**, **Paul M. Wasanga**, the respondent's Chief Executive/Secretary, deponed that: the Kenya National Examinations Council Act (Cap. 225A, Laws of Kenya), s. 10 (e) empowers the respondent to make Rules regulating the conduct of examinations; the respondent has, by virtue of those powers, made the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 1998 (now repealed by the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009; the provision in the repealed Rules (Rule 28) has been carried over into the 2009 Rules, No. 26, 27 and 28, which relate to measures that the respondent may take against candidates, schools or centres found to have been involved in any examination misconduct or irregularity; in respect of the 2009 KCSE examinations, the respondent had published circulars and advertisements in the media cautioning candidates against participating in examination misconduct, and warning of consequences to ensue for candidates found to have been involved in misconduct; the respondent prints posters which are posted on every school notice-board and examination room highlighting forms of examination misconduct, and warning of penalties for those who may be found to have been involved in such misconduct.

The deponent concedes to the factual statement of the applicants, that *"it is true no report was received from the supervisor or from other sources indicating that examination irregularities had taken place at the Academy [49th applicant] during the conduct of the [2009] examinations";* but he goes on to depone that *"the respondent does not only rely on supervisors or head-teachers to report cases of irregularity or misconduct in examinations but also receives and sifts through reports by Kenyans of goodwill ranging from the media to security organs and individuals."*

The deponent avers that cheating in examinations *"is also detected during [the] marking of examinations and during the processing of examinations by the respondent's Research Team after completion of marking"*; that the marking of the 2009 KCSE examination was done between **4th** and **27th December, 2009** at various centres, and it was during this marking process that *"cheating by some students of the Academy was detected in Mathematics Paper 2 and Business Studies Paper 2"*; that *"once the marking of the scripts was completed the respondent's Research Team, [which is] the Department charged with analysis, scrutiny and verification of examinations, took up the scrutiny and verification exercise [for] all cases of suspected cheating [and] candidates' scripts were carefully scanned and scrutinized by results-processing officers"*; that it was during this exercise, that the results-processing officers detected cheating in Mathematics Paper 1 and Business Studies Paper 2; that the Research Team established cheating by 48 out of 57 candidates at the Academy in Mathematics Paper 1 and Paper 2 and Business Studies Paper 2; that at the Research Team meeting of **19th** and **25th January, 2010** a unique response pattern was confirmed and verified in both subjects, pointing to the involvement of the affected candidates in collusion, hence the recommendation made to cancel the results of the said candidates; that the respondent's Management Team duly deliberated on the cases of irregularity referred to it on **10th February, 2010** and approved the recommendations to cancel the affected results; that the respondent's Security Committee met on **23rd February, 2010** and discussed exhaustively all the 2009 KCSE examination irregularities, on a case-by-case basis, and, upon establishing that examination misconduct had taken place, approved the decision to cancel the results for a total of 1,171 candidates found to have cheated, and 48 of these were the first 48 applicants herein.

The deponent deposed that the confidential nature of examination assessment rendered it inappropriate to exhibit the names of the candidates whose scripts were affected by the finding of irregularity, and equally inappropriate to produce all the scripts affects, *"as this may compromise the integrity and security of the conduct of examinations."*

The deponent avers that even though a decision had been made to bar the affected candidates from repeat-sitting of the respondent's examinations for the next two years, this particular decision has since been rescinded, opening the way for the applicants to resit the 2010 KCSE examinations.
The deponent deposes that *"the marking of examination papers is a confidential exercise and it is inconceivable that candidates would be accorded an opportunity to agree to the decision taken by the examining body"*; that the respondent, which deals with two major national examinations as well as business, technical and teacher-training examinations for candidates of tertiary institutions and other examinations offered in collaboration with external bodies, *"has over the years developed expertise in [the] conduct, assessment and testing of examinations and has not had any reason to show … bias towards any candidate"*; and that the respondent has been guided by *"the need to ensure that examinations are marked and graded fairly without undue influence or pressure from any quarter …"*

The deponent avers that, *"without any doubt"*, the respondent acted *"fairly, carefully, and without malice, in the cancellation of the results of not only the 48 students of the Academy but also of the other 1123 candidates whose results were cancelled."*

Learned counsel, **Mr. Adan** made submissions based on the several documents of pleading and evidence filed in Court. Counsel urged that both during and after the conduct of the material examinations, the setting, supervision and sitting of which was managed by the respondent or the respondent's agents, no adverse report had been made about the conduct of the *ex parte* applicants: and that it was only later, when most schools received their results, that the applicants learned theirs had been withheld by the respondent. The respondent's decision was communicated to the 49th applicant through a letter dated **25th February, 2010** which stated:

"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. The candidates are also barred from sitting any KNEC examination for the next two (2) years. Please bring this to the attention of the candidates affected."

Counsel urged that the said decision had no basis in law: it did not flow from any statute, and it did not state its source of empowerment; it was a case of *"taking a major decision without founding it on law"*. Counsel submitted that whereas the letter in question was written on **25th February, 2010** the latest Rules of the respondent had been published in Legal Notice No. 176 of **4th December, 2009**, while the examinations in question had been conducted in **September** and **October, 2009**, at a time when the respondent's operative Rules were those contained in **Legal Notice No. 18 of 1998.** Counsel submitted that the 1998 rules had provided for examinations misconduct, and empowered the respondent to withhold results, on the basis of investigations. The new Rules of 2009 carried a new element, providing for cancellation of examination results, and for the barring of offending candidates from taking repeat-examinations. As the examination papers in question were sat **before** the publication of **Legal Notice No. 176 of 2009**, counsel urged that the actions taken to cancel results and to bar the applicants from repeat-examinations, could not be taken retrospectively when the Rules in force at the material time were those of 1998. **Mr. Adan** submitted that the 2009 Rules had not stated in terms that they were to apply retroactively, and that, given their punitive nature, they ought not to apply retroactively. On that basis, counsel urged that the respondent's letter of **25th February, 2010** was *"capricious, illegal, ultra vires and in bad faith."* So, counsel asked that the said exercise of power by the respondent be quashed, for illegality.

Counsel submitted that the respondent's decision was in violation of the terms of the Interpretation and General Provisions Act (Cap.2, Laws of Kenya), s. 28 which provided that no one was to be held liable under subsidiary legislation, in respect of the period prior to the publication in the **Gazette** of that subsidiary legislation.

Mr. Adan contested the respondent's decision on the basis that if it was based on the 2009 subsidiary legislation, no evidence had been tendered that such subsidiary legislation had been duly validated, after being laid before the National Assembly.

Counsel submitted that the respondent's decision was *ultra vires* for not according the affected parties a hearing; and that a hearing was mandatory so long as the respondent was exercising a statutory power. In aid of this argument, counsel invoked the Court of Appeal's decision in **The Commissioner of Lands v. Kunste Hotel Limited,** Civ. App. No. 234 of 1995 [1997]e KLR; the relevant passage thus reads:

"The appellant was exercising his statutory powers under the Government Lands Act [Cap 280, Laws of Kenya], when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Limited. The exercise of that power was therefore judicial in nature and he was … obliged to hear all those who were likely to be affected by his decision … It is … our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party."

Learned counsel also relied on the decision of this Court (**Ibrahim, J.)** in **Republic v. The Kenya National Examinations Council, ex parte Kemunto Regina Ouru**, Eldoret Misc. Civ. Application No. 1 of 2009 [2009]eKLR, citing the following paragraph in particular:

"The [respondent] may well have made its decision in pursuance of its mandate to conduct examinations in the public interest. Be that as it may, it would amount to a total miscarriage of justice, [a] gross violation of the cardinal principles of natural justice and a mockery of the rule of law in a country that prides itself to be a democratic society with a Constitution that protects the individual rights and freedoms of its citizenry and others, to allow the sacrifice of the applicants' fundamental rights at the altar of institutional convenience, expediency or unproven public interest as in this case."

The **Kemunto Regina Ouru** case, just like the instant case, involved the cancellation of examination results by the respondent. An appeal was lodged in that case, along with an application for stay of execution of the High Court decree; the stay is still operative, and a final decision has not yet been made.

Presenting the respondnet's case, learned counsel, **Mrs. Kiarie** confirmed that the respondent had cancelled the examination results for 48 candidates who have come before the Court as applicants; and that the respondent had gazetted new examination Rules on **4th December, 2009.** The respondent had subsequently rescinded the two-year ban which had been imposed on candidates found to have been involved in an examination impropriety.

Counsel submitted that the Kenya National Examinations Council (Kenya Certificate of Secndary Education Examinations) Rules, 1998 had, by **February, 2010** been replaced by the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules, 2009 — and hence the guiding rules for withholding and cancellation of examinations were, by **February, 2010**, to be found in Rules 26, 27 and 28 of the 2009 Rules.

Counsel submitted that there is nothing in Rule 26 of the 2009 Rules [and previously in Rule 28 of the 1998 Rules] making it imperative for the respondent to conduct a **hearing,** before effecting a cancellation of examination results, once it is established that an examination misconduct has taken place. **Mrs. Kiarie** contested the submission made for the applicants, that Rule 26 (1) in the 2009 Rules, under which the respondent had acted, required the respondent to conduct its investigations in some **particular** manner, before taking the decision to cancel the examination results. For this argument, counsel relied on the Judicial Committee of the Privy Council decision in **University of Ceylon v. Fernando** [1960] 1 All E.R. 631 — a case in which the appellant had suspended the respondent from all University examinations for an examination impropriety; and the applicable rule gave the Vice-Chancellor powers to suspend such a candidate where the Vice-Chancellor was satisfied such a misconduct had occurred. The relevant passage (**Lord Jenkins**, at p. 638 G-H):

"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 …, subject to the obvious implication that

some form of inquiry must be made, such as will enable him fairly to determine whether he should hold himself satisfied that the charge in question has been made out."

The respondent's obligation was further defined in the foregoing passage, by referring to the following passage [p.638] [of **Lord Shaw of Dunfermline**in **Local Government Board v. Arlidge** [1915] A.C. at p. 138]:

"[The authority concerned] … must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means."

Mrs. Kiarie submitted that neither Rule 26 (1) of 2009 nor the repealed Rule, prescribed a particular mode of conducting examination-misconduct investigations, before the respondent comes by the strength-of-satisfaction justifying cancellation of results.

Counsel contested the applicants' position, that purely by dint of the fact that the respondent assigned various actors duties and responsibilities in the conduct of examinations, no irregularity can ever properly come to the notice of the respondent except **via** those operational arrangements ― that valid report of irregularity must come from a **supervisor, invigilator** or **other officer** assigned a particular task.

Drawing from the fact-statements in the depositions, counsel submitted that the basis of the cancellation of results in this instance, was the **reports of the examiners** who detected cheating in Mathematics Paper 1 and Business Studies Paper 2. The respondent, being aware that collusion in examinations is a clandestine activity intended to defeat transparency, had sufficiently advertised warnings, and had warned that cheating could be detected during the marking of scripts.

Learned counsel submitted that the respondent had taken all due care, in conducting the investigations leading to the cancellation of the examination results in question:

"The respondent has … explained at paragraphs 21 to 26 of the replying affidavit that once the examiners detect collusion during marking, their findings are referred to the respondent who, through a three-tier process, scrutinizes and scans the suspect scripts, and, once cheating is confirmed and verified, then results are cancelled."

Counsel submitted that the evidence, in the form of depositions and annexures, shows that *"the examination process is impersonal and of high calibre, and undertaken by professionals qualified in the [relevant] fields …."*

Counsel submitted that distinguished case-authorities have held over the years, that a **hearing** does not always have to be conducted by an administrative or quasi-judicial body, as a precondition to the inference that **natural justice** has been realized. Apart from **University of Ceylon v. Fernando,** counsel, for that submission, called in aid **Pearlberg v. Varty (Inspector of Taxes)** [1972] 1 WLR 534, at p. 547 (*per* **Lord Pearson**):

"A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'parliament is not to be resumed to act unfairly', the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply."

Mrs. Kiarie urged that, in the circumstances of the instant case, *"it was not necessary nor was it a requirement that the respondent call the applicants and conduct a hearing before their results could be cancelled."* Counsel submitted that owing to the circumstances of this case, the applicants had no

legitimate expectation that they would be accorded a hearing.

A relevant High Court decision (**Wendoh, J.**) in this regard is **Republic v. The Kenya National Examinations Council & Another, ex parte Busara Forest View Academy Limited & 94 Others**, Nairobi High Court Misc. Judicial review Case No. 4 of 2009, in which it was held that legitimate expectation, in a case such as this, will certainly arise where **a promise has been made** that some form of consultation between the parties will take place, before a decision is arrived at.

Counsel submitted that the respondent had not, contrary to the applicants' claim, acted capriciously, arbitrarily, unfairly or maliciously; the respondent *"had a process [to] which all candidates' results were [subjected] fairly."*

Counsel called in aid, on the subject of school examinations and the demand for a hearing, the Court of Appeal's decision in **Kenya National Examinations Council v. Republic,** Civil Appeal No. 266 of 1996, in the following passage:

"The question … whether the Council is in law bound to hear a candidate before it cancels the results 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."

To the contention made for the applicants, that the respondent was in breach of the principle of **proportionality** by failing to maintain a balance between the goal sought, and the interests of the applicants, **Mrs. Kiarie** urged that cheating in examinations was a singularly harmful misconduct that, in the public interest, must be discouraged; it emerged from the evidence on record that examination results *"are the major determinant of access to institutions of higher learning and the job market and, due to the stiff competition for places, objectivity must be the overriding factor in allocation of places"*; the respondent conducts examinations in the public interest and, as regards the 2009 KCSE examinations, a total of **337,404** candidates had participated, and out of that number, **1,171** were found to have been involved in misconduct.

Counsel also contested the applicants' prayer that an order of mandamus should issue against the respondent: for the task of examination involves **discretion**, and so it is not possible to set out any specific task which the respondent is to be required to perform. By contrast, it was **Mr. Adan's** submission that the respondent's act being *ultra vires,* should be quashed, and thereafter, an order of mandamus becomes appropriate.

From the complexity of evidence, law and submissions involved in this matter, it is clear there was a *prima facie* basis for the leave granted, for the judicial review motion. But upon reviewing the merits of the case on each side, certain scenarios have emerged which point towards a clear finding in a particular direction.

Should an order of certiorari issue to quash the decisions of the respondent? Should an order of mandamus issue, compelling the respondent to release examination results which it has already **cancelled?** If those results have been cancelled, is the respondent in a position to re-create them and then release them as valid examination results? Is it for this Court to deal with the **academic merits** of an examination, and issue a conscientious order regarding the released results?

In the alternative prayer for an order of mandamus, the applicants ask that the respondent be compelled to produce before the Court *"all the Mathematics (121) and Business Studies (565) answer booklets for all the 48 affected candidates"*; were the Court to grant this prayer, and then the said documents were duly laid before the Court, will the Court fully appreciate the merits of these documents, and on that basis make conscientious judicial orders about them, for the benefit of the applicants?

One of the prayers for an order of certiorari, judging from the evidence and the submissions, is spent, and

is otiose: to quash the respondent's decision to bar the applicants from taking repeat-examinations over the next two years. That particular decision has been rescinded.

At the root of the complaint which occasions all of the applicants' prayers, is the contention that the respondent cancelled their examination results **without a legal basis, arbitrarily, unjustly**, and **without according them a hearing**; that the respondent failed to observe **rules of natural justice.**

The main body of relevant case law is not in favour of the contention that the applicants were entitled to a hearing, before the respondent could cancel their examination results: **Republic v. The Kenya National Examinations Council & Another, *ex parte* Busara Forest View Academy Limited & 94 others** (2009); **Kenya National Examinations Council v. Republic** (1996). These cases build upon time-honoured legal principle established in English law, the essence of which is that natural justice, in the sense of *"hearing the other side" (audi alteram partem), is not an inveterate rule applying strictly and in all cases in which a public body is taking decisions: it all depends on the nature of the public body, the law and rules governing it, the amount of discretion it is allowed, the subject-matter entrusted to it* — **University of Ceylon v. Fernando** (1960); **Local Government Board v. Arlidge** (1915); **Pearlberg v. Varty** (1972). This, however, is subject to the principle that the relevant public body is to go as far as possible in ensuring **fairness**, and in arriving at a just and conscientious decision.

The rider of ensuring **fairness**, in Kenya, judicial notice is to be taken, has assumed special status, with the promulgation of the **Constitution of Kenya, 2010.** Apart from this Constitution's declaration of *"national values and principles of governance"* (Article 10), which include rule of law, equity, good governance, transparency and accountability, Article 47 makes specific provisions on *"fair administrative action"*, as follows:

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

Such progressive principles of the general law and of the Constitution are expressed in **broad terms**; but it is for this Court to interpret them (Constitution of Kenya, 2010, Article 165 (3) (d)), and to apply them judiciously to the **facts and circumstances of the particular case.**

While the case now before the Court is a sensitive one in the manner in which it touches on the rights, interests and expectations of parties such as the applicants, a balance must be struck between such attributes, on the one hand, and the public interest in the proper management of examinations by the respondent, on the other. Uncontested evidence on record shows that the academic integrity of Secondary School examinations is crucial, as a basis for access to the entire learning process in the tertiary institutions, as well as to the finite job opportunities which facilitate the running of the society's private and public governance institutions. It follows that the tested rules and procedures of examination-management should be upheld, so long as better systems have not been conceived; and so the respondent, which holds itself out as the custodian of the best professional practices for examination-management, should be allowed a certain measure of discretion in the discharge of its functions. The respondent has shown that its remit in the management of examinations is not defined in detail by legislation, or by any published rules, and that it has well-established **practices** which guide it, in maintaining the standards, in the public interest. While the applicant insists that any finding of irregularity on the part of examination-candidates must flow in a structured manner from invigilators and examination officers, the respondent maintains that such irregularity often has complex permutations, which defy structured modes of identification: and an effective method of identifying examination fraud is the scrutiny of answer booklets by the examiners; it is by means of this method that misconduct was identified, in the instant case.

In my judgment, the case made by the respondent in this respect, clearly shows that a margin of discretion must be entrusted to the respondent, and the exercise thereof is not to be regarded as arbitrary, or *ultra vires* any law.

Running in parallel with that perception is the conclusion to be drawn, that this will not be a case for any particular mode of hearing to be accorded those found to have committed an examination irregularity. In

view of the task resting with the respondent, of organizing and managing examinations for thousands of candidates all over the country, it will not be a legitimate expectation on the part of the applicants herein, that the respondent should first accord them some particular mode of a hearing, before acting accordingly on perceived examination irregularities.

I have not found the respondent to have been in breach of any law regarding the management of examinations; I have not found the respondent to have acted *ultra vires* in any respect; and I have not found the respondent to have acted in breach of the principles of natural justice.

Accordingly, I decline to grant the prayers made by the applicants for orders of certiorari and mandamus.

The applicants shall bear the respondent's costs.

DATED and **DELIVERED** at **MOMBASA** this **8th** day of **April, 2011**.

J. B. OJWANG
JUDGE

Coram: Ojwang, J.

Court Clerk: Ibrahim

For the Applicants: Mr. Adan

For the Respondent: Mrs. Kiarie