



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Misc Civil Appli 1 of 2009

REPUBLIC APPLICANT

VERSUS

THE KENYA NATIONAL EXAMINATION COUNCIL RESPONDENT

EX-PARTE:

KEMUNTO REGINA OURU (Suing through father and next friend JAMES OURU) AND 128 OTHERS

JUDGMENT

This is an application dated 25th March, 2009 by 129 Applicants against the Kenya National Examination Council under the provisions of Order 53, Rule 3 (1) of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, Chapter 26, Laws of Kenya for the following orders:-

1. AN ORDER OF CERTIORARI to remove into the High Court for the purpose of its being quashed forthwith the decision for Kenya National Examinations Council as contained in its letter to the Head Teacher and Secretary of the 129th Ex parte Applicant dated 03-03-2009 canceling the examination result in respect of 128 Kenya Certificate of Secondary Examination candidates for the year 2008 (the 1st to 128th Ex parte Applicants) on the ground of an alleged irregularity referred to as “collusion in the Chemistry (233) subject” without any evidence whatsoever to that effect and without giving the affected candidates and the school a hearing.
2. AN ORDER OF MANDAMUS directed at the Respondent to compel the Respondent to reverse its decision to cancel the Chemistry (233) examination results of the 128 Kenya Certificate of Secondary Examination candidates for the year 2008 within twenty one (21) days of the Order and to release the entire results to the aforesaid candidates.
3. IN THE ALTERNATIVE TO PRAYER 2, AN ORDER OF MANDAMUS directed at the Respondent to compel the Respondent to produce before the Honourable Court all the Chemistry (233) answer booklets for all the 128 affected candidates particularly Chemistry Paper 3 (233/3) for the Court’s inspection.
4. THE costs of this application be provided for.

The 1st to 128th Applicants were candidates for the Kenya Certificate of Secondary) Examinations

(hereinafter referred to as “KCSE”) for the year 2008 while the 129th Applicant is St. Mary’s Tachasis Girls Secondary School which is the school and examination centre for the said candidates. All the candidates are girls.

Before the substantive Notice of Motion dated 25th March, 2009 was filed the Applicants duly filed an Ex parte Chamber Summons dated 25th March, 2009, two Verifying Affidavits sworn on 20th March, 2009 by Fred Tororey the Head Teacher of the School and Nancy Chebet on 19th March, 2009 a student and candidate for the said examinations.

This Court granted leave for the filing of the substantive application.

The Respondent (hereinafter referred to as “KNEC” or the “Council”) opposed the application and filed a Replying Affidavit sworn by Mr. Paul Wasanga the Chief Executive Secretary of the Respondent on 22nd April, 2009 and a Supplementary affidavit sworn on 11th May, 2009.

The background to the case is that in the year 2008, St. Mary’s Tachasis Girls Secondary School presented 131 candidates for KCSE. The Examination was conducted between 21st October, 2008 and 17th November, 2008. Nothing seemed untoward until the National results were announced in March, 2009. The Applicants herein did not get their results. Instead the Council by a letter Ref. KNEC/CONF/RS/KCSE/IRR/2009/087 dated 3.3.2009 addressed to the Head Teacher, St. Mary’s Tachasis Girls Secondary School, informed the School that the results of 128 candidates had been cancelled allegedly because the affected candidates had been involved in “collusion” while sitting Chemistry Paper 233. Only three (3) candidates out of 131 at the School received their results.

The second letter read as follows:-

“REF KNEC/CONF/RS/KCS/IRR/2009/089

3RD MARCH 2009.

The Headmaster, St. Mary’s

Tachasis Girls Secondary School,

Thro; The District Education

Officer, Nandi East,

P.O. Box 13,

NANDI HILLS.

RE: THE 2008 KCSE EXAMINATION RESULTS

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. Please bring this to the attention of the candidates affected.

Index Number(s) Subject(s) Nature of

Irregularity

541304(47065)

Chemistry Collusion

011

.....

..... 131

PAUL M. WASANGA, MBS

COUNCIL SECRETARY/CHIEF EXECUTIVE

C.C. Provincial Director of

Education, Rift Valley.”

The Applicants stated that following the shocking news a number of members of Board of Governors, some parents along with the Principal of the School travelled to KNEC Headquarters on 10.3.09 and held a meeting with the Council. That at this meeting, they met the Deputy Secretary of the Council who said that suspected collusion affecting the 128 candidates was detected during the marking of the Chemistry Practical Paper (233/3) specifically in relation to question 1, Table 2, Procedure B thereof where the affected candidates had all allegedly recorded the same titre average of 20 cm³.

The Applicants added that nothing in writing was forthcoming in this regard from the said officer and even after a formal demand by the Advocate for the Applicants. They annexed a copy of a letter dated 10.03.09 from their Advocates marked FT.8.

The said letter addressed to the Council Secretary read as follows:-

“10.03.2009

THE COUNCIL SECRETARY/

CHIEF EXECUTIVE

.....

.....

RE: DEMAND FOR THE RELEASE OF KCSE RESULTS FOR 2008 FORM FOUR CANDIDATES FOR ST. MARY’S TACHASIS GIRLS SECONDARY SCHOOL

We have been retained by the Board of Governors of the above-mentioned school with instructions to write to you and address you as hereunder:-

THAT vide a letter dated 03/03/2009 addressed to the Head teacher and Secretary of the Board of Governors of the aforementioned school, you stated that the examination results for 128 candidates out of the total 131 candidates had been cancelled following an alleged examination irregularity which you referred to as “collusion in respect of the Chemistry (233) subject.” Our clients have been to your offices seeking clarification thereon and specifically the particulars of the alleged collusion but you have neglected, refused and/or declined to give any explanation to justify the taking of such a drastic action without giving the affected students a hearing. You are well aware of the fact that as a public body you are legally duty-bound to give all relevant parties a hearing before a decision of that nature can be arrived at. The unilateral action taken by your institution breached this fundamental requirement of natural justice. Full particulars of the aforesaid breach are well within your knowledge.

Our instructions are therefore to demand, which we hereby do, that you forthwith rescind your

aforesaid decision and release the examination results for all the 128 students without any delay.

TAKE NOTICE that unless you unequivocally rescind the decision within the next two (2) days from today's date we have firm and mandatory instructions to institute judicial review proceedings against you for orders of Certiorari, and mandamus to quash the aforesaid decision and compel you, to revoke the said cancellation and accordingly release the student's results. Needless to add that such action shall be at your own peril as to costs and incidental consequences.

Yours faithfully,

KIPKENDA LILAN & KOECH ADVOCATES,

PAUL LILAN

ADVOCATE

C.C. Client ”

A careful perusal of the Replying Affidavit and Supplementary Affidavit filed by the Respondent Council shows that it did not respond to the said demand letter. The Council also does not claim that it replied the said letter. This situation led to the Applicants coming to this Court for redress in terms of the Notice of Motion herein.

In their claim in the Statutory Statement the Applicants aver inter alia that:-

- The Respondent acted capriciously maliciously and in total disregard of its own rules by canceling the results of the candidates aforesaid without conducting any investigations. The decision was reckless, unreasonable, motivated by ulterior motives and amounts to an abuse of office in that:-

(i) The said letter does not state the rule under which the decision to cancel the Chemistry results for 128 candidates out of 131 candidates was made.

(ii) Whereas the Respondent's letter states that the 128 candidates engaged in an examination irregularity known as Collusion, it does not give the relevant details thereof particularly:-

(a) The particulars of the alleged collusion against each of the 128 students.

(b) The particulars of other person(s) involved in such collusion with the aforesaid students;

(c) Whether or not any of the invigilators or supervisors allowed, aided, abetted or failed to ensure there was collusion, if any;

(d) Where and in which specific examination rooms the said collusion took place;

(e) The modality of the collusion;

(f) The mechanism used by the Respondent to arrive at the conclusion that some of the candidates (3) did not collude while the rest (128) did; and

(g) The criteria used to determine that some collusion was obtaining in a situation like the one existing therein especially in a practical subject.

- The decision by the Respondent was in violation of the rules of Natural Justice as the affected students were not afforded the opportunity to be heard or to make representations regarding the allegations before making the aforesaid drastic decision which adversely affects them. The Respondent neglected, refused and/or otherwise failed to give the Applicants a notice to show cause why their examination results

should not be cancelled neither did it disclose the source of the information regarding the alleged collusion despite the fact that its own officers conducted the entire process and certified that all was well at the St. Mary's Tachasis Girls Secondary School Examination Centre.

- The Cancellation of the results was done in an arbitrarily and unfair manner hence amounting to an abuse and/or improper exercise of authority and clearly frustrates the Applicants' legitimate expectation of fair play and lawful conduct on the part of the Respondent.
- The Respondent breached a fundamental principle of law by making a decision with glaring errors of fact and arriving at a conclusion that was unsupported by evidence. The material error of fact makes the decision ultra vires hence making the Court's intervention necessary.
- The Respondent's decision to cancel the entire results of the 128 candidates out of a total of 131 on the sole basis of suspicion of some collusion arising out of a purported similarity of the answer given on one question in the Chemistry Practical Paper without any other evidence or corroboration is so outrageous in its defiance of logic and acceptable moral standards that it is obviously absurd.
- The Respondent misdirected itself by taking into account a wholly irrelevant and extraneous consideration thereby arriving at an unlawful and irrational decision.
- The Respondent breached the principle of proportionality by failing to maintain an appropriate balance between the adverse effects which its decision may have on the right and interests of candidates concerned and the purpose which the Respondent is seeking to pursue. The decision to cancel the entire KCSE results of the 128 candidates on the basis of an alleged irregularity relating to one question in a single subject is evidently way out of proportion with the intended purpose of trying to avoid cheating in examinations in the future. The decision is extremely harsh considering that:-
 - (i) The candidates have been completely locked out of future professional careers they would have wished to pursue upon completion of their 8.4.4 education as they shall not get any certificate and cannot therefore get a chance to further their studies.
 - (ii) The cancellation renders the entire studies from Kindergarten up to Form Four a waste both in terms of the resources expended and considering that the job market requires a basic minimum of a KCSE Certificate before one can be employed in any field.
 - (iii) The decision aforesaid is highly unfair to the affected students who diligently studied and worked hard in preparation for the examination only for it to be cancelled on the basis of unfounded suspicions.
- The Respondent acted with bias and treated the Applicant Candidates unfairly by failing to take into account favourable evidence including the absence of any adverse report from the supervisors and invigilators regarding the alleged irregularity and totally disregarding the Candidates' impressive performance in all the other subjects.

In response to the allegations of fact by the Applicants, the Respondent through its Replying Affidavit admitted the same but defended the claim and responded, inter alia, as follows:-

“

6. THAT pursuant to the statutory mandate conferred upon the Respondent, the Respondent offered the Kenya Certificate of Secondary Education to 305,015 Candidates spread out in 5,183 examination centres countrywide. The examination was conducted between 21st October, 2008 and 17th November, 2008.

7. THAT St. Mary's Tachasis Girls Secondary School hereinafter referred to as "the School" offered 131 Candidates to sit for the 2008 KCSE Chemistry Examination Paper.

- 8. THAT S. 10 of the Kenya National Examination Council empowers the Respondent to make Rules regulating the conduct of examinations and for all purposes incidental thereto.**
- 9. THAT the Respondent has pursuant to the said powers made the Kenya National Examination Council (Kenya Certificate of Secondary Examination) Rules, 1998 amongst which Rule 28 which lays down measures that may be taken by the Respondent against Candidates, Schools or centres caught in any examination misconduct or irregularity.**
- 10. THAT the Respondent does in the ordinary course of its business publish Examination Regulations and Syllabuses every two (2) years and under paragraph 23.0 of the 2008-2009 Examination Regulations and Syllabuses has set out what amounts to misconduct and the disciplinary measures to be taken in the event that anyone is caught having engaged in any type of misconduct as set out therein. I attach hereto a copy of the said Regulations and Syllabus and mark it "PMW 1".**
- 11. THAT the Respondent did also circulate to every candidate the 2008 Kenya Certificate of Secondary Education Examination Timetable which contained detailed instructions on how the Candidates should conduct themselves during examinations and warned of the grave consequences that would result to any candidate caught having engaged in examination irregularities. The Respondent did also take the trouble to warn candidates of the dire consequences of engaging in examination misconduct in the Dailies. I attach hereto a copy of the 2008 Kenya Certificate of Secondary Education Examination Timetable and the Respondent's advertisement in the Standard of 23.10.08 and mark them as PMW "2 A & B".**
- 12. THAT the Respondent also issued detailed instructions on the manner that the 2008 Kenya Certificate of Secondary Education Examination should be conducted so as to ensure the smooth flow of the examination process and an absence of opportunity for engaging in examination malpractice. I attach hereto and mark as "PMW 3" the said instructions dated 30th August, 2008.**
- 13. THAT marking of the 2008 Kenya Certificate of Secondary Education Examination began on 4th December, 2008 and ended on 27th December, 2008. That the marking was undertaken in line with the Marking Regulations Serial Number 0285 which I attach hereto and mark as "PMW 4".**
- 14. THAT cheating by various candidates in the form of collusion in the Chemistry Practical Paper 233/3 was detected during the marking exercise and reported by the Chief Examiner of the Chemistry Practical to the Respondent through his Report dated 19th December, 2008, a copy whereof I attach hereto and mark as "PMW 5".**
- 15. THAT between 12th January, 2008 and 27th February, 2008 the Research Division of the Respondent processed the 2008 Examinations Result by reading Supervisors, Chief Examiners, Head Teachers, Project Assessors and Field Reports. This included scrutinizing of scripts for similarity of responses in the various subjects among other activities and preparing its report with its recommendations for the Management Committee's consideration. I attach hereto and mark as "PMW 6" a copy of the said Timetable. I also attach Circular KNEC/W1/RS/003 and mark it as "PMW 7" setting out in condensed form the sequence of events by the Respondent's various organs in detecting, and verifying cheating in examinations and eventually effecting cancellation of results of candidates involved in the cheating.**
- 16. THAT some of the cases of cheating mentioned in the report of the Chief Examiner mentioned in paragraph 14 (above) were those of the 128 candidates of the school (the 1st to 128th Applicant) hence the candidates' Chemistry Paper 3 scripts were carefully scanned and scrutinized by the subject officer of Chemistry of the Respondent who observed a unique response pattern that showed collusion to have taken place. This was then vetted by the Research Team.**
- 17. THAT contrary to the assertions made by the Applicants that the decision to cancel the**

results of the 128 candidates was made based solely on suspicion arising out of similarity of the answer given on Question 1 Table 2; Procedure B; the truth is that all 128 candidates cheated in Questions 1 in the filling of values in both Table 1 and Table 2. However they all did not have similar values for the required workings but had various similar values in clusters of between 2 and 17 candidates. In Question 1 b (ii) 18 candidates used values different from those obtained from their experiments.

18. THAT owing to individual differences in the taking of measurements, taking of readings (i.e due to the angle/elevation at which readings are taken); accuracy in timing; it is not possible for individual candidates to obtain the same values. In fact provision is made in the experiment for repeat of the experiments and thereafter averaging of values and it has been confirmed that even values of the repeated experiments by one individual vary owing to operation of the same factors.

19. THAT collusion was also established in Question 2 where again candidates in clusters of 91, 77 and 44 respectively gave identical wrong observations in questions 2(b) and 29 (c) (ii) (this latter under observations and inferences); and particularly identical expressions and phraseology in spite of the fact that they were supposed to work independently and thus come up each with their own unique expression of the observations/inferences made.

20. THAT comparisons of answering patterns for candidates from non-cheating centres were made and these showed different features such as no identical values or identical phraseology among other trends.

21. THAT this method of detecting collusion has been successfully relied on by the Respondent in the past.

22. THAT these findings were presented to the Research Processing Team in a meeting held on 30th January, 2009 and after scrutiny of the scripts and upon being satisfied that collusion had been established as set out; the team recommended that the Chemistry results of all the 128 affected candidates be cancelled. I attach hereto and mark as "PMW 8".

23. THAT the Respondents Management Team met on the 17th and 18th February, 2009 and again discussed and verified all the examination irregularity cases and on being satisfied that cheating had been established in the cases presented (amongst these were the results of the 128 Applicants herein) recommended that their deliberations be tabled before the Respondent's Examinations Security Committee for their final decision. I attach hereto the said minutes and mark them as "PMW 9".

24. THAT the 184th Examinations Security Committee meeting was held on 24th February, 2009 where all cases of the 2008 Examination irregularities were tabled and discussed exhaustively and upon being satisfied that the alleged irregularities had been proved the recommendation to cancel the results of the candidates found to have cheated was approved. I attach hereto the minutes of the said meeting and mark them as "PMW 10".

25. THAT the Rules do allow the Respondent to cancel the results of candidates if satisfied that the candidates have been involved in examination irregularities or misconduct without having to conduct further investigations.

26. THAT it is not true that it is only through reports made by Supervisors that the Respondent may detect cheating in an examination.

27. THAT it is not uncommon to find that Supervisors, teachers, head teachers and other examination officials aid candidates to cheat in examinations.

28. THAT collusion by definition is a secret and/or clandestine activity which occurs when a candidate answers an examination question in conjunction with either another candidate or with

assistance of another person.

29. **THAT it is in the public interest that each candidate should have a grade that has been fairly obtained given that examination results are the major determinant of access into institutions of higher learning and the job market and that due to the stiff competition for places, it is imperative that objectivity and fairness be the overriding factor in the allocation of such places.**

30. **THAT there is evident need to ensure the integrity of national examinations. Cheating in examinations, if unpunished, threatens the very core function of the examination body. Cheating in examinations undermine one of the core factors of examinations namely, to rank a candidate in tandem with their ability and also to award candidates the mark or grade which they deserve.**

31. **THAT cheating in examinations if condoned endangers certification and education system of a country as is well explained in the Education Minister's speech on releasing the 2008 Kenya Certificate of Secondary Education Results on 3.03.09 a copy whereof I attach hereto and mark as "PMW 11".**

32. **THAT it is due to this perceived threat to the integrity of national examinations that the 149th Examinations Security Committee Meeting in 2002 harmonised the effect of irregularities on candidates entire results so that the threat of the harsher penalty of cancellation of the entire results of a candidate caught having engaged in cheating in any one subject would help deter cheating in examinations. This rule has been in force since then. I now attach hereto and mark as "PMW 12" the said minutes.**

33. **THAT without any doubt the Respondent acted fairly, carefully, lawfully and without malice in the cancellation of the results of not only the 128 candidates of the school but also of the other 1291 candidates whose results were cancelled.**

34. **THAT the marking and processing of examination papers is a confidential exercise and by the very nature of its functions; the Respondent carries out its duties in a climate of confidentiality in order to ensure that the examinations it offers are marked and graded fairly without undue influence or pressure from any quarter and that they are released on time."**

The Applicants were represented by Mr. Paul Lilan while the Respondent was represented by Mrs. Mary Kiarie. By consent they filed written submissions and subsequently appeared in Court before me on 12th May, 2009 when they highlighted the said written submission with succinct and articulate oral submissions. Each Counsel filed and supplied to the Court very useful authorities which immensely assisted this Court to deliberate upon the dispute and reach its findings and make its decision.

I have carefully considered the Substantive Notice of Motion, the Statutory Statement, and the Verifying Affidavit on the part of the Applicant. I have also carefully considered the Replying and Supplementary Affidavits filed by the Respondent. I have considered the written submissions and oral submissions made by Counsel and the authorities.

I wholly agree with both Counsel that at the end of the day the main questions for determination before this Court are two-fold; to wit:-

1. Whether the Respondent in canceling the 2008 Kenya Certificate of Secondary Education results of the 128 Ex parte Applicants did that which it had capacity to do.
2. Whether the Respondent in canceling the said results did so without following the right procedure and/or failed to observe the principles of natural justice.

The Applicant has also raised the issues of:-

- Irrationality/unreasonableness of the decision

- Proportionality

The Respondent referred to and relied at length upon a

decision of the Court of Appeal which dealt with some of the questions herein. In the light of the principles of **STARE DECICES AND PRECEDENT** I am bound to immediately consider the said decision in the case of **KENYA NATIONAL EXAMINATION COUNCIL –V- THE REPUBLIC EX P. GEOFFREY GATHENJI NJOROGE & 9 OTHERS C.A. NO. 266 OF 266**. When faced with a challenge by way of judicial review proceedings to the power or jurisdiction of the Council to cancel examination results, the Court of Appeal observed at P. 12:-

“When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the result of an examination. The question is how, not whether, that power is to be exercised.”

This Court as the High Court of Kenya is bound to apply and follow the said finding of law by the Court of Appeal. The Respondent under Section 10 (e) of the Kenya National Examinations Council Act, Chapter 225 (A) of the Laws of Kenya has power to make rules regulating the conduct of examinations and for all purposes incidental thereto. To this end the Respondent gazetted the (Kenya Certificate of Secondary Education Examination) Rules, 1998 whereof Rule 28 provides for a right to cancel examination results that may be vitiated by irregularity.

I therefore do hold and find that the Council had and does have the power, authority and/or jurisdiction of canceling examination results in and in particular in this case in respect of the 2008 Kenya Certificate of Secondary Education Examination Results.

With regard to the second question i.e. whether the Respondent in canceling the said results did so without following the right procedure and/or failed to observe the principles of natural justice, the same was not before the Court of Appeal in the **EX PARTE GEOFFREY GATHENJI NJOROGE** case. Faced with the spectre of deciding on such an issue the Court of Appeal had this to say at P. 21:-

“

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”

From the foregoing it is clear that the said question was not before the Court of Appeal for consideration and/or determination. In the absence of any other case or authority of the Court of Appeal or the High Court to which I was referred or came across during the deliberations herein, I think that this case could possibly be the occasion or opportunity that was been contemplated or waited for, for determination of the said question at the first instance.

The Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination Rules, 1998 in Rule 28 provides as follows:-

“28 Misconduct

(1) 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.

(2) If the Council is satisfied that candidates or schools have been involved in any irregularity or misconduct, the Council may cancel the results of such candidate or schools.

(3) The schools whose results are cancelled under this rule may be removed from the roll of

Council’s approved examination centres and depending on the degree of misconduct the candidates may be barred from entry to future Council examination.

(4)

(5)”

The Respondent Council submitted that neither the Act nor the rules stipulate any procedure for the conduct of investigations or trial. That the Rules allow the Respondent discretion in the manner it is to conduct an inquiry. I would agree with this argument. However, it is my interpretation and construction that the said Rules expressly stipulate and envisaged and contemplated that the Council had the power and jurisdiction to withhold the results of an examination for any candidate or group of candidates suspected of having been involved in examination irregularity or misconduct pending completion of investigations and the final disposal of any consequent disposal of any consequent disciplinary or other proceedings. (*emphasis mine*)

It is clear from the foregoing that there must be investigations, inquiries or trial before final completion of such investigations and the final disposal of any consequent disciplinary or other proceedings. In her written submissions, the Counsel for the Council agrees that neither the Act nor the rules stipulate any procedure for the conduct of investigations or trial. That the Rules allow the Respondent discretion in the manner it is to conduct the inquiry.

The question that begs to be answered is whether the absence of the procedure for the inquiry gives the Council the absolute power to oust the right of the candidates and the school to show cause why the results should not be cancelled? Does the absence of an express process or stipulation in respect of mode of inquiry negate the right to be heard in any manner, provided it leads to some fairness?

With respect I do not think that the Council had an arbitrary and/or absolute discretion in providing for the process of investigations and/or inquiry. It has to abide by the Cardinal Rules, of Natural Justice.

Rule 28 (2) provides that if the Council is “satisfied” that candidates or schools have been involved in any irregularity or misconduct, it may cancel the results of such candidate or schools. How in law or fact can the Council be “satisfied” in a fair and just and reasonable due process without at least giving the affected candidate or school opportunity to be heard if not the right to be heard?

Investigations would have entailed giving each of them notice to show cause why their results should not be cancelled. No such notice was issued to any of the Applicants before the obviously harsh, drastic and draconian decision of cancellation of the entire results was made.

The decision by the Respondent was made in violation of the rules of Natural Justice as the affected students were not afforded the opportunity to be heard or to make representations regarding the allegations before making the aforesaid decision which adversely affects them. The Respondent neglected, refused and/or otherwise failed to give the Applicants notices to show cause why their examination results should not be cancelled neither did it disclose the source of the information regarding the alleged collusion despite the fact that its own officers conducted the entire supervision and invigilation at the St. Mary’s Tachasis Girls Secondary School examination centre. There are no allegations that any of the students was caught red-handed committing the offence of “*collusion*” in the examinations.

There was an undated circular (Annexure FT 4) with the title “**Don’ts Regarding the conduct of 2008 Examinations**” which set out the various unauthorized acts in the examination room and their respective definitions and form of punishment. Collusion was defined in paragraph 3.0 as either:-

1. Passing notes for help, receiving or giving assistance or communicating in any manner with another person/persons,

2. Swapping scripts with another candidate for the purpose of assisting one another.
3. Exposing answers intentionally for others to copy.

At the bottom of it there is a statement to the effect that

“collusion can be detected in your script during marking.” No further details of how such a collusion could be reached during marking especially when the students are well invigilated was given. In the instant case there are no allegations or evidence that the invigilators and the supervisors were not satisfied with the conduct of the examination at the centre.

The Respondent submitted further that it is not in every situation that a person is entitled to an oral hearing in fulfillment of demand of the principles of Natural Justice. The Respondent cited the case of **CHARLES KANYINGI KARINA –V- THE TRANSPORT LICENSING BOARD MISC. APPL. NO. 1214 OF 2004**, in which the Honourable Judge stated as follows:-

“The two aspects of the rules of Natural Justice include:-

1. **The Nemo Judex rule – no man should be a Judge in his own case.**
2. **The Audi Alteram Partem rule – the right to a fair hearing.”**

I agree that this Court is concerned with the second aspect. In the case of **REPUBLIC –V- CRIMINAL INJURIES COMPENSATION BOARD EXP. DICKSON C.A. 1996** and as also expressed by Land Bridge in **LLOYD –V- MAHON H. 1987**

“What the requirements of fairness demand depends on the character of the decision-making body, the kind of decision it has to make and the statutory framework in which it operates.”

I was also referred to the case **IN THE MATTER OF AGA KHAN PRIMARY SCHOOL NAIROBI MISC. APPL. NO. 13 OF 2003** the Honourable Judge in considering the question whether rules of Natural Justice had been violated by failure of the Minister to consult the Parents Association stated at P. 6:-

“The Court holds the view that as regards the assignment of the teachers the Minister has unfettered discretion through Teachers Service Commission and the audi alteram partem rule (hear the other side) is excluded – See HALSBURY’S LAWS OF ENGLAND 4TH EDITION VOL. 1 PARAGRAPH 74 PAGES 20-21 – where the heard Authors state:-

‘The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice in a given context, the presumption in favour of importing the rule may be partly or wholly displaced where Parliament has evinced an intention to exclude the operation of the rule by conferring on the competent authority unfettered discretionary power.’

On the facts I find no such breach of the audi alteram partem rule. On the allegation that there was breach of the rules of Natural Justice, it is not in every situation that the other side must be heard. There are situations where hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations where the need for expedition in decision making far outweighs the need to hear the other side and in such a situation, the Court has to strike a balance.”

And in his book, **MICHAEL FORDHAM IN JUDICIAL REVIEW HANDBOOK; 4TH EDITION at P. 1007** comments as follows:

“Procedural fairness is a flexi-principle. Natural Justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case.”

I have considered the said authorities amongst many others supplied and relied upon by the Respondent. I substantially agree with the sound principles in the said cases. However each case must be decided on its own special facts and circumstances and merits thereof.

In the first place, Parliament has not evinced an intention to exclude the operation of the Audi alteram partem rule in Rule 28 of the 1998 Rules herein. Parliament has not conferred on the Council the unfettered discretionary power to cancel the examination results.

As indicated earlier, I find that Section 28 of the Rules envisage and contemplate a process of investigations before a final disposal of any consequent disciplinary or other proceedings. For there to be a disciplinary process which may lead to punishment, the suspect or perceived offender surely has a right to be heard or an opportunity to make representations? How can investigations be completed and a conviction made and sentence meted out before some form of hearing takes place during which the suspect is called upon to answer or respond to the charges? With respect it would be an absurdity in judicial interpretation of Rule 28 to hold that the Council has absolute, arbitrary, and unilateral power and discretion to find a suspect candidate guilty of an irregularity and cancel his/her examination without some modicum of due process. Such a situation would be abhorrent and negate all notions and principles of the Rule of Law.

The first context this Court must look at is the position of the candidate vis-à-vis, the application and operation of Rule 28.

After completing the examinations in November 2008, the next thing the candidates as well as the 129th Applicant the School heard was the cancellation of the results. There was no hearing and absolutely no opportunity was granted to the candidates and the school to make any representations before they were condemned. Natural Justice is about fair procedure and fairness generally.

An important limb of the duty to act fairly is the requirement to give a person to be adversely affected by the decision a reasonable opportunity to be heard, albeit on a limited basis. It does not have to be a fully fledged adversarial trial.

I agree that the cancellation of the entire examination results due to an irregularity in respect of one question in one part of a subject has led to very dire and serious ramifications for the candidates:-

- (i) The Candidates have been completely locked out of future professional careers they would have wished to pursue upon completion of their 8.4.4 education as they shall not get any Certificate and cannot therefore get a chance to further their studies.
- (ii) The cancellation renders their entire studies from kindergarten upto Form Four a waste both in terms of resources expended and considering that the job market requires a basic minimum of a KCSE Certificate before one can be employed in any meaningful field.
- (iii) The Candidates character, reputation and esteem in the eyes of their parents, the local community and society at large has been adversely and negatively impaired and dented.
- (iv) The Candidates and the school have been stigmatized and will certainly be ostracized. They will forever carry the tags of cheats and academic thieves.
- (v) Any ambition to continue with their education and careers has been nipped in the bud in shame and disgrace. They remain with no morale or dignity in all aspects.

(vi) The School being Church associated will be shunned and even the sponsors may withdraw support or call for expulsion of the Head Teacher, Teachers and Management.

(vii) The Candidates may be negatively affected in their churches and religious associations.

The Respondent has submitted that it looks at the Applicants as candidates and not young girls. That may be so, however, this Court looks at the Candidates as young girls many of them possibly minors. They are our children and are flesh and blood. They are our Kenyan youth and the future leaders of this Country. They have feelings, dignity, emotions and hearts that can be broken.

They have livelihoods, careers and the future which are at the verge of destruction. How can we look in their eyes and say that that they have no right to be heard in respect of the charges of collusion and misconduct in examinations of cheating and dishonesty in examinations. Collusion borders on fraud and even criminality in the mores of the society.

Should a Judicial Review Court allow the said to be countenanced or to happen again in the future? The “Wednesbury Principle” states that:-

“Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision”

See **ASSOCIATED PROVINCIAL PICTURE HOUSE –V- WEDNESBURY CORPORATION (1914) 1 KB 222 Per Lord Greene MB**

In this case, I hold that the Council did not properly direct itself on the relevant law and acted unreasonably.

The cancellation of the results was done in an arbitrary and unfair manner hence amounting to an abuse and/or improper exercise of authority and clearly frustrated the Applicants legitimate expectation of fair play and lawful conduct on the part of the Respondent; a statutory body.

I agree as stated in the **CHARLES KANYINGI CASE (P.7)** that:-

“An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the rights, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue.”

The Counsel 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, 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 upshot of the foregoing is that I do find in favour of the Applicants as against the Respondent. I do hereby grant prayers 1 and 2 of the Notice of Motion dated 25th March, 2009. The Respondent shall bear the costs of the application and the same be paid to the Applicants. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF MAY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:

Mrs. Masika holding brief for Mr. Lilan for the Applicant

Mrs. Kiarie for the Respondent