



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL PETITION NO. 1 OF 2018

IN THE MATTER OF: ARTICLE 21 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONTRAVENTION OF THE PETITIONER'S RIGHT TO INFORMATION HELD BY THE KENYA NATIONAL EXAMINATIONS COUNCIL AND / OR THE MINISTRY OF EDUCATION CONTRARY TO ARTICLE 35 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONTRAVENTION OF THE PETITIONER'S RIGHT TO EDUCATION CONTRARY TO ARTICLE 43(1) (f) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CONTRAVENTION OF THE PETITIONER'S RIGHT TO CONSUMER PROTECTION UNDER ARTICLE 46 (1)(b) & (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONTRAVENTION OF THE PETITIONER'S RIGHT TO EFFICIENT, LAWFUL, REASONABLE AND PROCEDURALLY FAIR ADMINISTRATIVE ACTION CONTRARY TO ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 53 OF THE CONSTITUTION PROVIDING FOR THE WELFARE OF A CHILD TO BE OF PARAMOUNT IMPORTANCE

BETWEEN

Y A (suing through A A M as the Guardian and Next Friend).....PETITIONER

AND

1. THE HON. THE ATTORNEY GENERAL.....1ST RESPONDENT

2. THE HEAD TEACHER, M SECONDARY SCHOOL.....2ND RESPONDENT

3. THE COUNTY DIRECTOR OF EDUCATION, MOMBASA COUNTY.....3RD RESPONDENT

4. THE KENYA NATIONAL EXAMINATIONS COUNCIL.....4TH RESPONDENT

5. THE CABINET SECRETARY FOR THE MINISTRY OF

EDUCATION SCIENCE & TECHNOLOGY.....5TH RESPONDENT

JUDGMENT

The Petition

1. The Petition before the court is dated and filed herein on 10th January, 2018. The Petitioner is a minor and filed the petition through the guardian and next friend A A M who also deponed to the Supporting Affidavit sworn on 8th January, 2018. The petition is also supported by a Supplementary Affidavit by the same deponent and filed on 15th March, 2018. The Respondents to the petition are as follows:

- (a) The 1st Respondent is the Honourable the Attorney General of the Republic of Kenya sued as the Chief Legal Advisor of the Government of Kenya on behalf of the Cabinet Secretary, Ministry of Education, Science and Technology.
- (b) The 2nd Respondent is the Head Teacher of M Secondary School in Kwale County where the Petitioner sat his Kenya Certificate of Secondary Education 2017 examinations.
- (c) The 3rd Respondent is the County Director of Education, Kwale County being the County where the Petitioner sat his Kenya Certificate of Secondary Education (KCSE) 2017 examinations
- (d) The 4th Respondent is the Kenya National Examinations Council which is a body corporate established by statute and mandated to oversee national examinations
- (e) The 5th Respondent is the Cabinet Secretary, Ministry of Education, Science and Technology

2. The Petitioner is a minor born on 30th May, 1999 and sat for his Kenya Certificate of Secondary Education (KCSE) exam which is the subject matter of this petition, for the year 2017 wherein he obtained a D+ grade. The results of the 2017 KCSE exams were released on 20th December, 2017 and this was the second time that the Petitioner was sitting the KCSE exam having sat for the same in the year 2016 when he obtained a C- grade and the purpose of re-sitting the exam was to better his grade so as to be able to join the university. Being dissatisfied with the way his papers were marked in the said 2016 exam the Petitioner wrote to the Kenya National Examinations Council, the 4th Respondent herein, requesting that his papers be remarked to no avail. The Petitioner alleges that he is a very bright student and indeed after repeating the 2016 examinations he has more than doubled his efforts and he was expecting not less than a B+ grade in his 2017 examination results. The Petitioner observes that Kenya National Examinations Council Act (2012) does not make a provision for a candidate to apply for re-marking of examination papers. Rather a reading of Sections 40H and 48J of the Act shows that the powers of the Council and the Appeals Tribunal contemplated therein are in respect of appealing only in instances of a decision of the Council to withhold, nullify or cancel the results of a candidate. However, the Petitioner avers that Article 13 of the Kenya National Examinations Council Service Charter provides for re-marking of examination papers. The Charter has no statutory backing but it gives a timeline of applying for re-marking within 30 days after the release of the examination results and re-marking within 90 days of such application. The Petitioner is apprehensive that without a court order the Kenya National Examinations Council, the 4th Respondent herein, shall not re-mark his 2017 examination papers within the timelines set out in the said 4th Respondent's Service Charter or at all thereby infringing on the Petitioner's constitutional right to education. The Petitioner avers that it is a matter of local notoriety that there was a mass failure in the KCSE, 2017 exams attributed to rushed marking and releasing of the results and the integrity of the marking process has been called to question. The Petitioner asks this court to take judicial notice of the uproar by the teachers, teacher's unions, students, the civil society group[s] and members of the general public after the exams results were announced regarding serious anomalies in the marking of the examinations which may have caused massive failure. Without a clear legal framework providing for re-marking the Petitioner is apprehensive that his constitutional rights stand to be infringed upon. The Petitioner avers that having been registered as a candidate in a national examination at a fee, the property in the candidate's examination answer papers finally vests in the candidate and the candidate ought to have a right to the marked examination papers either in their original state or certified true copies thereof upon request considering that the papers contain the candidate's index number and are identifiable with the candidate. The Petitioner seeks to be supplied with his marked 2017 KCSE examination papers.

3. The Petitioner alleges that the Respondents have infringed several constitutional rights of the Petitioner. These allegedly infringed rights are those conferred under Articles 21, 35, 43, 46, 47 and 53 of the constitution relating to the bill of rights, right of access to information, the right to education, right to consumer information, right to fair administrative action and the right of children. **The Petitioner prays for the following reliefs:**

- (i) A declaration that the Respondents have already violated and/or are likely to (further) violate the Petitioner's rights.**
- (ii) A declaration that the Petitioner is entitled to re-marking of his 2017 KCSE examination papers.**
- (iii) An order to be supplied with the Petitioner's marked 2017 KCSE examination papers.**
- (iv) General damages for mental agony, mental stress and torture occasioned by the violation and/or further intended violation of the Petitioner's rights.**
- (v) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.**

The Interested Party

4. On 17th January, 2018 Article 19 successfully applied to be joined as Interested Party in this petition. The Interested Party supports the petition and identifies international legal standards on the right of access to information, principally Article 19 of the Universal Declaration

on Human Rights; Article 19 of the International Convention of Civil and Political Rights, and regional standards, including Article 9 of the African Charter on Human and People's Rights and the Declaration of Principles on Freedom of Expression in Africa. The Interested Party relies upon and assumes as correct the entire factual background and procedural history so far on record. In addition the Interested Party appreciates that the petition raises weighty questions on the content, scope and limitation of the constitutional guarantee of access to information under Article 35 of the constitution.

The Response

5. All the Respondents oppose the petition. In this regard they filed Grounds of Opposition dated 9th February, 2018 and a Replying Affidavit sworn by **Mercy G. Karogo**, the acting Chief Executive Officer, Kenya National Examinations Council. In response to Petitioner's Supporting Affidavit Marcy G. Karogo states and confirms that the Petitioner sat the KCSE examination in 2016 as Index No. 02110204/xxx and obtained the following results/grade:

English	C-
Kiswahili	D+
Mathematics	D-
Biology	C-
Chemistry	D-
Geography	C-
CRE	B-
Computer Studies	B-
Mean Grade	C- (printout of results attached)

6. In 2017, the Petitioner sat again the KCSE examinations and obtained the following results/grades under Index No. 02110219xxx:

English	D
Kiswahili	C-
Mathematics	D-
Biology	D
Chemistry	D-
CRE	D
Computer Studies	B-
Mean Grade	D+ (printout of results attached)

7. The Respondents referred the court to the Rules and Regulations concerning the marking of exams as follows: Rule No. 27 (1) of the Regulations of the Kenya National Examinations Council of (marking of examination, release of results and certification) Rules of 2015 provide that:

“A candidate may apply to the Council for review of the decision in respect to the candidates’ examination results or data under the act, these rules or any other written law.”

That Rule No. 27(2) and (3) provides that:

“(2) Such a review shall be lodged to the Council by the candidate within thirty (30) days from release of the examination results.”

“(3) An application for review... shall be made to the Council in writing.”

That Rule 27(4), (5) and (6) provides that:

“(4) the Council shall upon receiving an application for review, consider the application and make a decision.”

(5) In determining the application for review, the Council may –

(a) Approve the request

(b) Approve part of the request; or

(c) Reject the request.

(6) A decision made in response to the review shall be in writing and shall be communicated to the applicant within ninety (90) days from the date of the receipt of the application.”

8. It is the Respondents’ case that the Petitioner has never requested for the remarking of his examinations and so this petition is either immature or incompetent.

The Submissions

9. Parties filed submissions which I have carefully considered. The Petitioner submitted that everyone has the right to access and update or otherwise correct their personal information under Article 35(2). The Petitioner further submitted that under the provisions of Article 21 of the Constitution of Kenya it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights, and all state organs and all public officers have the duty to address the needs of vulnerable groups within society, including children. By the failure of the state/and or state organs to provide a legal framework for re-marking of examination papers the Petitioner’s right to re-marking of his 2017 KCSE examination papers stands to be infringed. Under the provisions of Article 35 of the Constitution of Kenya every citizen has the right of access to information held by the state and information held by another person and required for the exercise or protection of any right of fundamental freedom and, that under Article 35(2) every person has the right to the correction or deletion of untrue or misleading information that affects the person. The Petitioner submitted that he has a right to know how the 4th Respondent decided to allocate him a D+ grade in his 2017 KCSE examinations. It was submitted for the Petitioner that the re-marking of his examination papers would lead to correction or deletion of untrue and misleading information about his performance in the 2017 KCSE exams thereby upholding his fundamental constitutional right to university education guaranteed under Article 43(1)(f) of the Constitution. By giving the Petitioner a lower grade than he deserves and in the event that his examination papers are not re-marked the Respondents will have denied the Petitioner his right to timely university education. The Petitioner submitted that he has the right to join the university at the same time as those with whom he sat for the 2017 KCSE exams without having to resort to going through very costly and time consuming diploma courses and/or without having to repeat Form 4 to sit for the examinations a third time. Referring to Article 46(1) (a)(b) of the Constitution, the Petitioner submitted that consumers have the right to goods and services of reasonable quality, and to the information necessary for them to gain full benefit from goods and services and, that under Article 46(3), this applies to goods and services offered by public entities. The Petitioner’s case is that the 4th Respondent is bestowed with the duty to offer services to students sitting for their national examinations. It was submitted that the 4th Respondent, on the prodding and directives of the 5th Respondent, offered the Petitioner substandard services in the form of a rushed marking of the Petitioner’s 2017 KCSE examination papers thereby allocating the Petitioner a lower grade than deserved. As such the 4th and 5th Respondents shall be infringing on the Petitioner’s fundamental rights under Article 46 unless the 4th Respondent is ordered to re-mark the Petitioner’s 2017 KCSE examination papers. The Petitioner submitted that under Article 47 of the Constitution, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. And the Petitioner’s case is that considering that the action of marking his examination papers and allocating him such low and undeserved results did not involve him, he has a right to re-marking of his examination papers and a right to the correction and/or deleting of the wrong marks allocated to him and if the Respondents are not willing to have the papers re-marked he should be given written reasons for the refusal to re-mark. Further, the Petitioner submitted that Article 53 of the Constitution of Kenya provides that the interests of a child shall be of paramount importance. So being a minor, the Petitioner’s fundamental freedoms ought to be given paramount importance. The Petitioner avers that as a result of the aforesaid violations, the Petitioner has gone through a lot of mental stress and torture. Consequently, the Petitioner prays for general damages for mental stress and torture.

10. The Interested Party submitted that the Petitioner did on the 13th day of January, 2017 send out an e-mail to the 4th Respondent requesting that his examinations administered by the 4th Respondent in 2017, be re-marked. This was in exercise of the Petitioner’s constitutional right as enshrined under Article 35 on the access to information. The Interested Party disputed the allegation by the 4th Respondent that the 4th Respondent did not receive a request for re-marking the said exams. The Interested Party referred to the Access to Information Act (ATI) Section 8 which does not make any provision to the mode of application that may be used by an applicant. The Interested Party submitted that in this digital era, the 4th Respondent had provided at its official website the e-mail address that is to be utilized by the public in case of any queries. No exceptions has been given. The 4th Respondent’s e-mail is a means of official communication, otherwise it beats logic on its availability within the 4th Respondent’s website. The Interested Party quoted the following sections of the ATI Act.

Section 8(1) of the ATI Act states:

“An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.”

ATI Act further espouses under Section 8(4) that a public body may prescribe a form for making an application to access information.

“(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only the applicant has not used the prescribed form.”

11. The Interested Party submitted that the 4th Respondent does not have any prescribed form of applying to access information and thus its claim that it did not receive the e-mail is a baseless claim which is unfounded and with no legal basis.

12. The Interested Party further submitted that public bodies are mandated to provide public information within 21 days upon request by a Kenyan citizen as provided under Section 9 of the Access to Information Act, and that the 4th Respondent failed and/or neglected to provide the information as requested to date. Without providing evidence, the Interested Party further submitted that the Petitioner, on several occasions wrote to the 2nd, 3rd and 4th Respondents in exercise of Section 4 and Article 35 of the Constitution and presented himself at the offices of the 2nd, 3rd and 4th Respondents, requesting to have his examination papers re-marked but to no avail. It was submitted that this act violated Article 35 of the Constitution, which is clear that every citizen has a right to information and the 3rd, 4th and 5th Respondents' are bound by that. Further, the Interested Party referred to Section 9 (3) of the ATI Act which provides that the maximum number of days within which a response must be given is 14 days from the date on which the request was given. Despite the statutory timeline having passed, it was submitted that the 2nd, 3rd and 4th Respondents have failed and/or ignored to provide the said information as requested by the Petitioner. It is the Interested Party's submission that the 2nd, 3rd, and 4th Respondent being public bodies failed in the discharge of their constitutional mandate as stipulated under Article 10, 33 and 35 of the Constitution. They also violated Article 10(1) (b) on the national values.

“10(1) the national values and principles of governance in this Article bind all state organs, state officers, public officers and all persons whenever any of them-

(b) human dignity, equity, social justice -inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.”

13. In replying submissions the Respondents denied ever receiving a request from the Petitioner for the remarking of the said exams. The Respondents further averred that there is no marked variance between the marks scored by the Petitioner in 2016 (C-) and in 2017 (D+) since both marks fall within the same range. The Respondent submitted that the petition does not raise the required constitutional threshold, is an abuse of the court process and should be dismissed.

Analysis and Determination

14. I have carefully considered the submissions of parties. In my view there are only two issues for determination. These are:

(a) Whether the Petitioner submitted any request for information to the 4th Respondent.

(b) Whether the Petitioner has the right to access the information requested for.

Whether the Petitioner submitted any request for information to the 4th Respondent

15. This issue is paramount in this Petitioner because we cannot go into whether the Petitioner has a right to access information before we answer the question as to whether a request was made for information in the first place.

16. The Petitioner alleges that he has attached to the affidavit of A A M an e-mail marked “AAM4” which is alleged to be a letter addressed to the 4th Respondent seeking a remark of the Petitioner's examinations. That letter is alleged to have been dated 13th January, 2017. However, that e-mail was not attached to the said affidavit, and the said annexure “AAM4” is not attached as alleged. What is attached to the said affidavit as “AAM5” is a letter dated 5th January, 2018 addressed to the 4th Respondent requesting for a remarking of the Petitioner's examinations. In this letter the Petitioner refers to the alleged e-mail which was allegedly sent earlier and had not been responded thereto. The letter dated 5th January, 2018 is also written to 1st, 2nd, 3rd and 5th Respondents. There is no evidence of any e-mail communication on record. This court is not able to know whether or not the missing “AAM4” was an unintended action. This court however notes that the 4th Respondent has denied receipt or existence of the said e-mail. It does not help that the record of the petition is also not paginated, so that the court is not able to know whether or not a page is missing. It has been stated over and over again that court documents must be properly paginated and bound together. This is the only way of keeping documents safe. It is the finding of this court that the alleged annexure “AAM4” which is alleged to be an e-mail dated 13th January, 2018 is not on record and cannot be referred to in this court. However, there is still something uncanny about that alleged e-mail dated 13th January, 2018. This is so because the letters for request for information referred to above are dated 5th January, 2018. Those letters refer to an earlier e-mail, which is not identified yet the e-mail alleged to have been sent is said to be dated 13th January, 2018. Logic demands that a letter dated 5th January, 2018 cannot make reference to another letter dated 13th January, 2018. In my view there appears to be a deliberate attempt to mislead this court as to whether there was a formal request made to the 4th Respondent.

17. That notwithstanding however, if we take what we have on record being the letter dated 5th January, 2018, those are ordinary letters whose proof of posting cannot be determined. It is the finding of this court that it is impossible to tell whether or not a request was made in writing to the 4th Respondent for the re-marking of the Petitioner's examination papers. Since the 4th Respondent has denied receipt of any

such request, this court has no option but to uphold the 4th Respondent's denial with respect thereto.

18. It is now trite law that he who alleges must prove.

Section 107:

“(1)Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

19. It is the finding of this court that the Petitioner has failed to tender evidence in support of his claim that he presented an application for review/remarking within 30 days of release of the examination results pursuant to rule 3 of Legal Notice No.131 of 2015, The Kenya National Examinations Council (Marking of Examinations, release of results and certification) Rules of 2015. It is the finding of this court that the Petition herein is premature, without basis and is an abuse of the process of this court.

Whether the Petitioner has the right to access the information requested for

20. Mr. Makuto counsel for the Respondents disparaged the petition and demeaned the prayers as nonstarters. Counsel referred to the said prayers as follows:

(a) A declaration that the Respondents have already violated and/or are likely to violate the petitioner's rights;

(b) A declaration that the petitioner is entitled to remarking of his 2017 KCSE Examination papers.

(c) An order to be supplied with the Petitioners marked 2017 KCSE Examination papers

(d) General damages for mental agony mental stress and torture occasioned by violation and or further violation of the petitioners rights.

21. Mr. Makuto rightfully submitted that prayer (a) is ambiguous. It is not couched with the precision expected of prayers in a petition seeking enforcement of a fundamental right and or freedom given that it does not state the right in question. It is now settled law that in drafting a petition one has to set out his pleadings with a reasonable degree of precision about that which he complains of, the provisions said to have been infringed and the manner in which they are alleged to have been infringed. The Petitioner herein however fails to state precisely which particular right he seeks declared as having been infringed to enable the Respondents properly defend themselves against the allegation. A blanket order cannot issue.

22. It was submitted by the Petitioner that the 4th Respondent Act (2012) does not make provisions for remarking papers. However, that is not correct. The KNEC Regulations Revised 2014 make provisions for remarking. They state:

“the Council will undertake to remark answer scripts duly after convincing reasons have been given by head of the candidate whose examination results have already been issued. (Copy of KNEC (KCSE) Regulations Revised 2014 are attached to the affidavit of Mercy Karogo)”

23. Under the Regulations on remarking however, KNEC reserves the right to reject any requests for remarking, if in its opinion, a strong case has not been established. Such a request attracts a fee for the service, which is to be paid by the Petitioner. There was no evidence that this was done. The question that arises therefore is; did the Petitioner make an application for remarking and supply reasons to the 4th respondent to warrant the remarking of his papers? In answer to this question the 4th Respondent is acting Chief Examinations officer stated at paragraph 14 of her replying affidavit that no request has been received. No indication has been made of which particular scripts the Petitioner wished to have remarked and no payment towards the cost of remarking has been made by the petitioner. Essentially the 4th respondent was not afforded an opportunity to make a choice on whether or not to allow the remarking of the Petitioner's examination scripts.

24. Prayer (c) of the petition seeks an order directed at the 4th Respondent to supply the Petitioners with marked 2017 KCSE examination papers. No reason has been given for such a request. It is important to note that Kenya National Examinations Council's (KNEC) is the institution mandated to conduct national public, academic, technical examinations within Kenya at basic and tertiary levels under Section 10 of the Kenya National Examinations Council Act No. 29 of 2012. Section 10(1)(a) of the Act provides that:

“(1) the functions of the Council shall be to –

Set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels.”

25. It is the view and finding of this court that the examination papers are therefore the property of the Kenya National Examinations Council and not the Petitioner's. While Article 35 of the Constitution provides for access to information, Article 24 of the Constitution provides that rights and freedoms can be limited in certain instances. Article 24 provides that:

“Article 24 “(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

Section 42 of the Kenya National Examination Council Act No. 29 of 2012 provides:

“(2) The Council, being a public entity shall be under no obligation contemplated under Article 35 of the Constitution to give such information as would, in the opinion of the Council-

(a) Compromise the integrity of any examination administered by the Council.

(b) Compromise the examination process; or

(c) Compromise the right to privacy of any individual.”

26. If the two provisions (Article 24 and Section 42) are read together it is clear that the right to access to information in this case is not absolute and may be limited in the circumstances provided under Section 42. The Petitioner is asking the Respondent to provide the marking sheets for the exam for all its children to be verified. While such a request can be justified if made upon any other institutions whether public or private, the Respondent herein is a statutory body mandated with setting and marking exams, whose integrity, credibility, confidentiality and reliability must be guaranteed and safeguarded at all times. The kind of request by the Petitioner, if allowed, will open the national exam body to ridicule, scandal and infamy, with every student feeling dissatisfied with their results applying for remarking. That would be the end of examinations and its integrity as hitherto known in Kenya. The temptation to open up the exam bank however inviting it may seem, must be resisted. This is not to say that where a constitutional right is threatened the Respondent will be shielded. No. What I am saying is that a violation of constitutional right which would demand the opening up of exam bank to verify results must in all circumstances be valid, clear and self-evident. It cannot be a subject of speculation, or a fishing expedition or an errand to find out any errors which are not self-evident.

27. In the current petition all the Petitioner is saying is that he is a bright student and he feels that he was given lower marks than what he thinks he deserves. No other reason has been provided. In my view, this is not sufficient reason to cause the re-opening of the “exam bank”.

28. From the foregoing this court finds that the petition before the court does not meet the threshold for constitutional petition, is an abuse of the process of the court and is dismissed with costs to the Respondents.

That is the Judgment of the court.

Dated, Signed and Delivered in Mombasa this 6th day of June, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mrs. Momanyi for Petitioner

Mr. Kiprono for Article 19

Mr. Kaunda Court Assistant