REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CONSTITUTION PETITION NO.1 OF 2018

IN THE MATTER OF ARTICL1,2,3,10,19,20,21,22,23,26,28,40,47,50,

159,165(3)(d),258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION

AND

IN THE MATTER OF THE VIOLATION OF THE RIGHT TO PROPERTY,

DIGNITY, EDUCATION, FAIR HEARING AND PROTECTION

OF FREEDOM AND SECURTIY OF PERSON

BETWEEN

BOARD OF MANAGEMENT,

CHALBI BOYS HIGH SCHOOL.....1ST PETITIONER

BUKE DIBA YATTANI.....2ND PETITIONER

GINDOLE KATELO BORU.....3RD PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF

EDUCATION SCIENCE & TECHNOLOGY.....1ST RESPONDENT

KENYA NATIONAL EXAMINANION COUNCIL.....2ND RESPONDENT

COUNTY DIRECTOR OF EDUCATION MARSABIT..3RD RESPONDENT

INSPECTOR GENERAL POLICE SERVICE.....4TH RESPONDENT

ATTORNEY GENERAL..... 5TH RESPONDENT

JUDGMENT

The petitioners in their petition dated 16th February, 2018 seek the following orders:-

(a) A declaration that the actions of the respondents contained in the letter dated 16.1.2018 and consequential actions are brazen, illegal egregious, ultra vires and discriminatory.

(b) A declaration that the actions of the 1st and 3rd respondents above have out rightly violated the rights of the petitioners, Chalbi Boys High School 2017 KSCE candidates and their parents, under Article 26, 47, 50 and 53 of the Constitution and the respondents be condemned to pay damages.

(c) An order of mandamus does issue to the 1st and 2nd respondents compelling them to forthwith release Chalbi Boys High School 2017 KCSE candidates results forthwith as contained in the website on the 20th December 2017.

(d) An order of certiorari to remove into this honourable court for the purpose of it being quashed the decision by the respondents in the letter dated 16.1.2018 and consequential actions and the same be and is hereby quashed.

(e) The petitioners be paid costs of this petition.

The petitioners also filed a notice of motion of the same date mainly seeking conservatory orders restraining the respondents from cancelling the Kenya Certificate of Secondary Education (KCSE) 2017 results for Chalbi Boys High School as stated in a letter dated 16.1.2018. The Petition is supported by affidavit of the 2nd and 3rd petitioners sworn on 16.2.2018 and their further affidavit sworn on 28.3.2018. The 1st ,3rd, 4th and 5th respondents filed their grounds of opposition dated 4.5.2018. The 2nd respondent filed a replying affidavit sworn by **Andrew Francis Otieno** on 2.3.2018. The 2nd respondent also raised a preliminary objection based on two issues mainly that the petition is incompetent because there is in existence alternative remedies which have not been exhausted and that the petition on its face has not met the threshold test of Constitutional Proof as per the principle in **ANARITA KARIMI NJERU V REPUBLIC (1976-1980)KLR 1272**. Parties Agreed to have the preliminary objection, the application and the petition heard at the same time.

The petitioner maintains that the petition is competent and is properly filed before this court. Rule 15 of the Legal Notice No.132 of 2015 - the *Kenya National Examinations Council (handling of examination irregularities*) rules allows a candidate whose examination results have been cancelled to apply to the council 30 days after the release of the results for a review of the council's decision. The results were released on 20.12.17 by the 2nd respondent and there was nothing unfavourable for the petitioners to warrant making an application for the review of the results. The petitioner had no reason to challenge the results. After the results were released the respondents started their own investigations without involving the petitioners. Rule 14 of Legal Notice No.132 of 2015 calls for investigations on any examination irregularity and preparation of a report. Under rule 14, if the report present satisfactory evidence over an examination irregularity then the affected candidate or candidates should be informed. The petitioners position is that they have never received any communication informing them the decision and the report of investigations cancelling the results. Therefore the petitioners could not have invoked the alternative dispute resolution mechanism as the conditions for such a procedure has not materialized. Mr. Langant, counsel for the petitioners relies on the case of **Republic V KNEC and Attorney General Ex-parte Echesa Abubakar Busalire, Chairman Parents Association of Chebuyusi High School (suing on behalf of parents of Chebuyusi High School) and S W K & 189 others(Suing on bhalf of parents of Lebuyusu High School:- consolidated) eKLR.** In that case Justice Odunga dismissed a similar preliminary objection.

Counsel further submit that a party alledging that his constitutional rights have been violated is required to describe the affected rights and how they were violated. Apart from that Article 22 (3) of the Constitution requires the Chief Justice to make rules providing for procedures relating to constitutional proceedings. Such rules are already in existence. Where it is established that a constitutional petition requires constitutional interpretation or application, then it should be heard and determined on its own merit. The petitioner herein contends that their right to be heard as provided under Article 38 of the constitutional was infringed. The petitioners were never granted an opportunity to be heard and to give their views before the decision to cancel the results was made. The petitioners rely on the case of **Mumo Matemo V Trusted Society of Human Rights Alliance & 5 others (2013)eKLR** where the court composed of a five judge bench stated as follows:-

"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims, However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alledged to have been violated."

It is submitted that the decision by the respondent to cancel the results affected 70 students of Chalbi Boys High school. When the results were released the students were able to access them online. The results were clean and unblemished. Thereafter the results were withheld for ulterior reasons. On the same date the results were released the school received a letter dated 20.12.12 suggesting that the schools' 2017 KCSE results had been withheld until the 18.1.2018 to allow for investigations on malpractices. The 70 students had the legitimate expectation that the released results were proper. The respondents should have not released the results if investigations were already ongoing. It was wrong, illegal, unconstitutional and immoral for the 1st and 2nd respondents to release the results and raise the hopes of the 70 students only to subsequently withhold the results and thereafter cancel them. Since the respondents were exercising a statutory duty they ought to have given the petitioners and the affected students the right to be heard before taking the drastic action of cancelling the results. It was purported that the results were cancelled because there was collusion in English and physics. Those allegations are not based on any evidence but on an alleged report by 3rd parties.

The petitioners further submit that section 7(2) of the Fair Administrative Action Act provides that a Court or a Tribunal may review an Administration Action or decision if the person who made the decision was not authorized to do so by the empowering legal provisions and acted in absence of jurisdiction or power. The decision by the respondents to cancel the results is against the provisions of Articles 47 and 50 of the constitution and also the Fair Administrative Action Act. No proper investigations were conducted. The 2nd respondent has not given any evidence on the alleged investigations. The results were appropriately and legitimately released on 20.12.2017 and the decision to cancel them was a simple board room decision. The act of cancelling the results was arbitrary, whimsical and cynical display of arrogance that must attract the sword of justice that only this Court possesses. The constitution and envisages a dignified future for all Kenyans. The 70 young

students would be affected for the rest of their lives. That is why the petitioners came to this court seeking a redress of the respondents' drastic action. The 1st respondent should have interrogated the students and other stakeholders. Mr. Langat maintains that he relies on the principle of legitimate expectation. The results were released and the candidates took action in line with the released results. Once the results were released then it ceases to be a KNEC process and it becomes a public process. KNEC becomes a player with invested interest and cannot be fair in the process. A legitimate expectation will arise where a decision maker has lead someone affected or likely to be affected by his decision to believe that he or she will maintain a benefit. The release, ranking allowing to access and the publication of the results created such an expectation not only in the students but in the stakeholders of the school. Any attempt to reverse the same would be expected to follow a certain legally recognized procedure which include stating the reasons and adducing evidence to the affected party. The letter dated 16.1.2018 is a manifest breach of the petitioners' legitimate expectation and ought to be quashed.

The right to a fair hearing is one of the fundamental rights and freedom that should not be limited in any instance. The petitioners have demonstrated that the impugned and unilateral decision to cancel the 2017 KSCE examination results without any hearing or known investigation prior to the decision is unlawful, unfair and unjust. The contentions by the 2nd respondents that investigations were carried out between the 8th and 11.1.2018 is merely intended to cover their trucks by the late investigations. Counsel relies on the decision of Justice G V Odunga in the **Echesa case (Supra**) where the Judge stated as follows:

> ***"It is therefore my view and I find that by cancelling the applicants' results after their release in these circumstances did not meet the basic tenets of fairness and that decision cannot stand. I associate myself with the position taken in the Indian Borough of Newham Vs Khatun-Zeb and Iqbal [2004] EWCA Civ. 55 were it was held that:***
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> ***"clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse…At all events it is plain those oppressive decisions may be held to be repugnant to compulsory public law standards."***

Counsel for the petitioner further maintain that conservatory orders ought to be granted as there has been contraventions of the constitution. The decision by the respondents to subsequently cancel the results after their release was unconstitutional.

Miss Faith Irari appeared for the 1st, 3rd 4th and 5th respondents. Mr. Obura appeared for the 2nd respondents. I have read the submissions of the respondents and they are more or less the same. The authorities relied upon are also the same. I will therefore deal with the two sets of submissions together. The respondents maintain that the petition is incompetent because of existence of alternative remedies, that the petition does not meet the threshold test of constitutional proof and the petitioners have not established a case to warrant the granting of the orders being sought.

It is submitted that rule 15(1)(2) and (3) of Legal Notice No.132 stipulate that the candidate whose results are cancelled are entitled to appeal within 30 of the cancellation for a review of the 2nd respondents decision by formerly writing to the 1st respondent. The 1st respondents has an obligation to respond within 30 days. Section 40B of the Act further established the National Examination Tribunal whose jurisdiction is provided at section 40(H). Counsels maintain that there is an available mechanism provided by the law to the petitioners before approaching the court. Section 9 of the Fair Administrative Action Act States that a party has to exhaust internal mechanism for appeal or review and all remedies available under any other written law before proceeding to court. The petition is incompetent because the petitioners did not exhaust the mechanism provided by the law. Counsel relies on the case of **CORTEK MINING KENYA LIMITED V THE CABINET SECRETARY MINISTRY OF MINING AND THE ATTORNEY GENERAL(2017)eKLR**. In that case the court of appeal held that:

> **Where Parliament had provided statutory procedure under Section 93 of the Mining Act for challenging revocation of a licence issued to a miner and a party brings a judicial review application challenging the revocation of the licence the party must disclose the alternative remedy available and explain why it was not efficacious thus resorting to judicial review. The Court observed that alternative appeal process provided in statute unlike judicial review would afford the parties an opportunity to explore the merits of the decision.**

The respondent maintain that the candidates including the petitioners were informed of the decision to cancel the result by the letter dated 16.1.2018 and that is why they would like to have that letter quashed. The petitioners were therefore expected to appeal against the decision to cancel the results through the provided mechanism instead of filing the petition. There were no exceptional circumstances which could have enabled the petitioners to come to the court before exhausting the other procedures.

Counsels maintain that the petition does not meet the constitutional threshold set in **ANARITA KARIMI NJERU CASE (Supra**). The petitioners' prayer to quash the letter dated 16.1.2018 is not based on an alleged constitutional misconduct against the respondents. The petitioners were required to set out with reasonable degree of precision their complaints and the provisions alledged to have been infringed and the way the infringement occurred. The petitioners could have been heard had they followed the correct procedures.

Counsels submit that under rule 8 of Legal Notice No.131 of 2015, chief examiner has a legal duty to report to the 1st respondent on all aspects of marking of exams. A report was made whereby the 2017 KSCE results for English paper two(2) was suspected to have had irregularities. Upon receipt of such a report, the 2nd respondent under rule 3(2) has powers to take appropriate action against any candidate, person or any examination centre that is involved in examination irregularity or malpractice. Therefore the 2nd respondent was within its legal mandate to constitute a team pursuant to rule 7 of legal notice No.132 and investigate the matter. There were alleged irregularities in 64 examinations centres that were identified. When the results were released on 20.12.2017 irregularities in 54 centres has been investigated leaving irregularities in 10 centres including Chalbi Boys High school to be investigated. On the same day the results were released, a letter was written to the head teacher of the school advising him that the results of the school had been withheld. Section 32 of the Act gives the 2nd respondent the general power to cancel a paper already taken. Rule 9(b)(c) allows the 2nd respondent to cancel the affected paper as well as the entire results. Investigations were conducted and subjects specialist discussed the results of the school and subsequently the results were cancelled. Counsels rely on the case of **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC, EXAPRTE KEMUNTO REGINA OURU [2009]eKLR**

It is submitted for the 2nd respondent that the legislation regulating the conduct of examinations does not require the 2nd respondent to give a hearing to the candidates before cancelling examinations. To do so will be against public policy. Article 24 of the constitutional allows the limitation of a right or a fundamental freedom where it is reasonable and justifiable. The 2nd respondent did not violate any constitutional right of the petitioners and therefore the orders being sought cannot be granted.

The 1st, 3rd and 4th respondent also maintain that they have been wrongly enjoined in the petition. The 1st respondent is only a policy maker. The 3rd respondent is a County Director of Education whose role include overseeing Government Education policy within a County. The 4th respondent is the Inspector General whose role is to investigate crimes. The current dispute did not involve investigations by the 4th respondent.

It is also submitted that Under sec. 10(2) of the Kenya National Examination Act No.29 of 2012, the Council has the responsibility to withhold or cancel the result of candidates who are involved in examination irregularities or malpractices. Section 32 of the Act deals with the issue of copying at examinations and when it is established then such a candidate can be disqualified from taking the entire examination and if the person has already taken a paper at an examination then the paper can be cancelled.

Parties are in agreement that the petition raises the following issues for determination:-

1. Whether the petition has not met the threshold test of constitutional proof as per the principle in Anarita Karimi Njeru case.

2. Whether the petition is incompetent because of existence of alternative remedies which have not been exhausted.

3. Whether the petitioners deserve being granted the orders being sought.

On the first issue, it is submitted that it is a requirement that where a petitioner alledges that there has been a violation of the constitution, then the person seeking the court's intervention should set out with reasonable degree of precision the alledged constitutional rights which have been violated, the manner in which the rights have been violated, the specific constitutional provisions which have been violated and the relief being sought from the High Court.

The Petition herein is brought under several constitutional provisions. The petition is brought under Articles 1, 2, 3, 10, 19, 20, 21, 22, 23, 26, 28, 40, 47, 50, 53, 159, 165(3) 258 and 259. At paragraph 29 of the petition, the particulars of violation by the respondents are stated as follows:-

a) The 1st and 3rd respondents are the complainant, investigator, witness, prosecutor and the judge.

b) The 1st respondent has acted ultra vires his powers.

c) The 2nd respondent has ceded its powers to the 1st respondent.

d) Condemning the students and the parents and the board without a hearing and or investigation.

e) Condemning innocent students without a hearing

f) Running amok and acting capriciously.

g) Using the petitioners, parents and students as an experiment on their imaginary powers.

h) Using their offices for selfish gains

i) Subjecting 70 students to uncertainty and vilification without investigations.

j) Besmirching the reputation of 70 students.

The body of the Petition also makes reverence to specific constitutional provisions. At paragraph 31, it is stated that Articles 47 and 48 of the constitution guarantees fair administrative action and the right to access justice.

Prayer (b) of the petition reiterate that the actions of the 1st, and 3rd respondents violated the rights of the petitioners, the Chalbi Boys High School candidates and parents under Articles 26, 4, 50 and 53. The petitioners are therefore seeking an order of certiorari to remove into this court for purposes of it begin quashed the respondents, decision to nullify the results as contained in the letter dated 16.1.2018 and all the consequential actions. In essence therefore the petitioners contend that their rights as enshrined in several constitutional provisions have been violated. They have come to court seeking redress.

The respondents' main convention is that the petition lacks precision. It does not set out the alledged constitutional provisions which have been violated and the manner in which the violation has occurred. There is no instrument which enables the court to determine the degree of precision. The term normally used is **"reasonable precision**." The main reason for that requirement is simple. The alledged violators of the constitution would like to know which Articles of the constitution they are alledged to have violated and how did they violate those constitutional provisions. An allegation that one has violated a constitutional provision is a serious indictment since the constitution is the

supreme law of the Republic and binds all Kenyans. This therefore calls for the need to categorically state which provision of the constitution have been violated or is being threatened with violation.

My view is that the principle requiring pleading with reasonable precision is a subjective one and entirely depends on the discretion of the Court. The principle should not be taken as the first gabion a petitioner should pass before the Court can determine the petition. Whoever comes to court with a petition alledging that there has been constitutional violations should be reading allowed to present his petition instead of being given some conditions before the court opens its doors to hear the protestations. Article 165(3) bestows upon the High Court the power to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Therefore, even the threat to a constitutional right has to be investigated by the court and determined. The High Court should therefore be eager to know what are the petitioners claims and have them determined on merit. It would be discouraging petitioners from approaching the court if the Court should place some form of a parametres in the form of precision table to be complied with before the merits of the petition is determined. The Court cannot require petitioners to have each constitutional provision alledged to have been breached stated and explained on the one hand and the petitioner proceed to explain each and every aspect of the violation on the other hand before the petition is allowed to proceed for hearing. The allegations of violations can be deduced from the context of the petition. A petition is normally brought under certain constitutional provisions. Some provisions such as Article 22 are simply enabling provisions and whether stated or not cannot affect a petition.

In the current case, the petitioner's main contention is that they were condemned unheard. The right to a fair hearing is provided under Article 50 of the constitution. Article 47 provides for Fair Administrative Action. The petitioners contend that this Article was also infringed. The Kenya Certificate of Secondary Examination 2017 results for Chalbi Boys High School were cancelled without giving the school's stakeholders a hearing. Whether the petitioners' allegations are true or not will be the issues to be determined by the court. The court should not insist on a precision format in a petition before hearing a constitutional petition.

The Anarita Karimi case was determined before the promulgation of the constitution. There are the constitution of Kenya (Protection of Rights and Fundamental Freedom) practices and procedure Rules, 2013. These rules provide guidelines and procedures for dealing with allegations of constitutional violations. Under rule 3 (scope and objectives), the Court has to pursue access to justice for all persons including the illiterate, uniformed and unrepresented. That being the case, it would be unfair for the court to dismiss petitions drawn by the illiterate and uninformed Kenyans simply because such petitions do not measure upto the required degree of reasonable precision. What such litigants seek from the Court is substantive justice which entails the substantive determination of their complaints.

The 1st, 3rd and 4th respondent contends that they have been wrongly enjoined in the petition. Section 5(b) of part II of the Constitution of Kenya Procedure Rules states as follows:-

> **A Petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.**

Given that the Petitioners contend that they were condemned unheard and that their right to a fair hearing was infringed among other allegations, I do find that the petition meets any form of standard required in form of pleading. It sufficiently states the alledged violations and the constitutional provisions that are alledge to have been violated.

The other issue being raised is that the petition is incompetent because of existence of other alternative remedies which have not been exhausted. It is submitted for the respondents that Rule 15 of the Legal Notice number 132 of 2015 requires the petitioners to apply to the council first before approaching the court. Rule 15 of legal notice No.132 of 2015 states as follows:-

> (1) ***A candidate whose examination results have been cancelled may apply to the Council within thirty days after release of the results for a review of the Council's decision.***
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> (2) ***An application for a review of cancelled results shall be made in writing and shall indicate clearly the ground for requesting the review.***
>
> (3) ***The Council shall upon receiving an application, consider the application and respond, in writing, to the applicant within thirty days.***
>
> (4) ***Where the Council declines an application for review, the Council shall specify the reasons for declining the application for review of cancelled results.***

It is further submitted that section 40B of the Kenya National Examination Council Act establishes a Tribunal which deals with appeals arising from decisions by the Ministry of Education to nullify or cancel examinations.

Section 9 of the Fair Administration Action Act states as hereunder:-

> (1) ***Subject to subsection (2), a person who is aggrieved by an administrate action may, without unreasonable delay, apply for judicial review of an administrative action to the High Court or to a subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.***
>
> (2) ***The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal review and all remedies available under any other written law are first exhausted.***

(3) ***The High court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section(1).***

(4) ***Notwithstanding subsection (9), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice.***

(5) ***A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High court may appeal to the Court of Appeal.***

The petitioners on their part maintain that when the results were released there was no reason for them to petition the relevant authorities as the school got the results. There was no reason to challenge the results. When the cancellation was done, they were not consulted and therefore had to come to court instead of applying to the council.

Section 40H of the Kenya National Examination Council Act No.29 of 2012 states that the Tribunal set up under section 40B shall consider all appeals made against a decision of the Council to withhold, nullify cancel examinations prepared and administered by the council. Section 40J of the Act states as follows:

(1) A ***person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.***

(2) An institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the tribunal in the prescribed form.

(3) Notwithstanding the provisions of subsection (1), a person aggrieved by a decision of the Council may appeal to the Tribunal through the County Director of Education in the County in which the applicant is resident.

(4) The County Director of education shall transmit to the Tribunal any applications received under subsection (3) within five days of receipt.

(5) Where the person aggrieved by the decision of the Council is a minor, the application under subsection 9 (1) shall be made by the parent or guardian of the minor.

Section 40(O) of the Act states as follows:-

A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may appeal to the High Court on any of the following grounds-

(a) The decision of the Tribunal was contrary to law or to some usage having the force of law

(b) The decision failed to determine some material issue of law or usage having the force of law; or

(c) A substantial error or defect in the procedure provided by or under this Act has produced an error or defect in the decision of the appeal.

The respondents position on the issue is based on two legislations. The first one is the Kenya National Examination Council Act which provides for appeals to the Tribunal. Similarly, rule 15 of legal notice No.137 of 2015 allows the petitioners to apply to the council. One can apply to the council first once the results are withheld or cancelled. Rule 15 mainly deals with cancelled results. In this case, the results were initially released and were available to the candidates. The petitioners saw no reason to apply to the council.

Section 40 J of the Act comes into play when the council withhold or cancel results. An aggrieved party can directly appeal to the Tribunal if the council opt to withhold or cancel results. Section 40(f) of the Act provide the procedure to be followed in determining such appeals.

The record shows that although the results were released, a letter was issued on the same date of the release, that is 20.12.2017 informing the head teacher of Chalbi Boys High School that the results had been withheld. The petitioners were therefore aware that even though they could access the results, the same had been withheld. The essence of the letter was to nutify the school that the results which the students could access were of no consequence and they had to wait for the investigations to be finalized first before making use of the results.

The operating words under both rule 15 and section 40(J) is "**MAY"** There is no mandatory obligation for the party who feels aggrieved by the council's decision to withhold or cancel the examination results to apply to the council or lodge an appeal in writing to the Appeals Tribunal. In my view, the application to the council or the lodging of an Appeal to the Appeals Tribunal is one of the avenues available to a party who is aggrieved by the examination council's decision to withhold or cancel results. Rule 15 and Section 40(J) does not outlaw the filing of petitions before the High Court.

Section 2 of the Fair Administrative Action Act No.4 of 2015 defines an Administrative Action to include:-

(i) The powers, functions and duties exercised by authorities or quasi Judicial tribunals or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

Section 3 of the Fair Administrative Action Act states as follows:-

The Act applies to all state and non-state application agencies, including any person

(a) Exercising administrative authority

(b) Performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) Whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

Section 9(2) of the fair Administrative Action Act states as follows:

"The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal review and all remedies available under any other written law are first exhausted". (*emphasis added)*

The issue is whether the respondents' action was an administrative one. The 2nd respondent is endowed with the responsibility of administering examinations in Kenya. This is a statutory obligation provided under Section10 of Act No.29 of 2012. Upon the conduct of the examination, the 2nd respondent ensures that the exams are marked and the results are released. Where the 2nd respondent is satisfied that a certain candidate or a specific examination centre has been involved in examination malpractice, the second respondent has the power to withhold the results and ultimately cancel them. The 1st respondent's responsibility for purposes of the exams is the announcement of the results. The Ministry of education also formulates the education policies for the entire country.

As far as the administration of exams and announcement of results is concerned, I do find that the 1st and 2nd respondents do exercise administrative functions. The administrative functions have to be backed by the law. Act No. 29 of 2012 does provide the legal framework through which the 1st and 2nd respondents exercised their administrative actions.

Section 9(2) of the Fair Administrative Action Act prohibits the Courts from reviewing an administrative action or decision made under that Act. Unless the mechanism for appeal or review and all remedies available to the petitioners under any other written law have been exhausted first. In essence therefore, whereas an application under rule 15 of legal notice no.132 of 2015 or appeal under Section 40 of the Act No.29 of 2012 is not mandatory under that Act. the Fair Administrative Action Act makes it mandatory for a party to follow that procedure by stating under section 9(2) that a party must first exhaust the mechanism or remedies provided under any written law. This requirement is mandatory and it is made in realization of the fact that there are so many bodies and institutions which carry out administrative actions under several statutory provisions. These bodies have the expertise to deal with the issues at first hand.

The petitioners have placed heavy reliance on the decision by Justice G.V. Odunga in the **Echesa case (supra**). Paragraph 129 of justice G.V. Odunga's judgment reads as follows:

128: In my view the facts of the case fall short of what is required for the dispute to be deemed to be a constitutional one meriting the by passing of the Tribunal. In my view despite the arguments hinged on the constitution nothing bars the Tribunal from dealing with the same.

However, Judge Odunga dismissed the preliminary objection on other reasons including a finding that rules 13 and 14 of legal notice No.132 were not complied with. The applicant and the principle of the school had not received the investigation report.

My view is that once a party applies to the council or appeals to the Tribunal the council's decision, then the council can be made to reveal all the allegations and findings against a specific examination center or candidate whose results have been withheld or cancelled. The school can as well write to the council requiring the release of the investigation report. If the request is not complied with then the applicant can move the High Court Under Article 35 of the constitution seeking the information contained in the report. It should not be lost that it is the 2nd respondent who has the mandate to determine whether irregularities and examination malpractices have been committed.

I do therefore find that the petitioners ought to have first exhausted the mechanism and all available remedies provided under Act number 29 of 2012 before moving the court. My view is that once such a finding is made, the court need not terminate the petition. It can refer the petition to the relevant Tribunal or institution for determination and leave the petition pending. Upon the determination of the dispute by the other institution/tribunal, the parties can approach the court for further directions. If the parties are satisfied with the determination, the petition can be deemed as settled, if not, it can be amended, withdrawn, dismissed or determined in its current form.

Since the Court allowed the parties to have the petition determined on its own merit, I will proceed and evaluate the petition on its merit.

The undisputed facts are that the 2017 Kenya Certificate of Secondary Examination results were announced on 20th December, 2017. The results for Chalbi Boys High School were also released on that day. While releasing the results, the 1st respondent announced that irregularities were noted in some examination centres and investigations were going on in some centres. Chalbi Boys High School was one of the centres where investigations were being undertaken. The replying affidavit by **Mr. Andrew Francis Otieno** states in some parts as

follows"-

28. That in the light of massive irregularities established with respect to the candidates of Chalbi Boys High School the English results of 70 candidates were cancelled and the Physics results for 14 candidates were also cancelled. I am informed by the advocate on Record which information I verily believe to be true that the cancellation was pursuant to the provisions of Section 28 and 32 of the act as read together with Rules 9 and 14 of Legal Notice No.132 of 2015.

30. That upon release of provisional examination results on 20th December 2017 and upon receipt of a letter dated the same date by the Head teacher of Chalbi High School as admitted by the applicants at paragraph 11 of the Affidavit in support of the Petition it was the duty of the Head Teacher to inform the parents and the students that the results were provisional and were withheld since they were the subject of investigations due to suspected irregularities committed by the candidates.

There were 10 examination centres whose results were withheld. Paragraph 17 of Mr. Otieno's affidavit states as follows:-

That the 10 examination centres where the results were withheld, the number of candidates involved, the subjects affected and the source of report on irregularities were as follows:

S/ NO.	Sub County Code & Name	School Code & Name	Number Sat	Subject Affected	Report Made by
17.1	15327 Tigania West Sub County	15327106 Kibuline Sec Schl	67	English P 2 (101 / 2)	Chief Examiner, English (101 /2)
17.2	**16320 Chalbi South Sub County**	**16320302 Chalbi Boys High**	**70**	**English P 2 (101 /2)**	**Chief Examiner, English (101 /2)**
17.3	18324 Nzaui Sub County	18324206 Barazani Girls	97	Chemistry P 3 (233 /3)	Chief Examiner, Chemistry (233/3)
17.4	24504 Kipkomo Sub County	24504101 St. Cecilia Girl's Sec- Chepararia	162	English Paper 2(101/2)	Chief Examiner, English (101/2)
17.5	24504 Kipkomo Sub County	24504201 Ortum Secondary School	320	English P 2 (101/ 2), Biology P 2 (231/2) & Physics P 1 (232/ 1)	Chief Examiners, English (101/2), Biology (231/2) & Physics (231/ 1)
17.6	27570 Gilgil Sub County	27570201 Koelel Secondary School	321	English Paper 2 (101/2), Biology P 2(231/2) & Physics P 1 (232/1)	CDE, Nakuru DCIO, Gilgil
17.7	33517 Baringo Central Sub County	33517101 Tenges Sec. Schl	149	History & Government P 2 (311/2)	Supervisor
17.8	37632 Navakholo Sub County	37632101 Chebuyusi Boys High School	190	Biology (231/1) and Chemistry (233/2)	Chief Examiners, Biology (231/1) & Chemistry (233/2)
17.9	40727 Kenyanya Sub County	40727105 Mokubo Sec. Schl	205	English Paper 2 (101/2) & Chemistry (233/3)	Chief Examiners, English P 2 (101/2) & Chemistry (233/3)
17.10	45815 Dadaab Sub County	45815103 Towfig Sec. Schl	146	Biology P 1 (231/1)	Chief Examiner, Biology P 1 (231/1)

Rules 13 and 14 of Legal Notice number 132 of 2015 states as follows:-

13(1) The ***Councils management shall, upon receiving report of examination irregularity in any examination, cause a report to be compiled and discussed by the management of the Council***.

(2) **the management of the Council shall submit the report on irregularity to the examination Management Committee**.

14 (1) ***When the examination Management Committee is satisfied that the report presents satisfactory evidence of an examination irregularity, the results for the affected candidate shall be canceled.***

(2) A candidate whose results have been cancelled shall be informed in writing indicating the examination irregularity.

The issue is whether the candidates were notified in writing that their results had been cancelled and whether examination irregularities were committed.

The letter dated 20th December, 2017 from the 2nd respondent to the head teacher of the school states as follows:-

> **RE: THE YEAR 2017 KCSE EXAMINATION RESULTS**
>
> **The KCSE Examination results for center number 16320302 have been withheld in the entire examination to enable KNEC to finalise investigations relating to the conduct of the examination in your center, the outcome of which you shall be informed by 18th January 2018.**
>
> **Please bring this to the attention of the affected candidates.**

On 16th January 2017, the 2nd respondent wrote a letter addressed to the schools head teacher. Part of the letter reads as follows:

> **RE: THE YEAR 2017 KCSE EXAMINATION RESULTS**
>
> **Reference is made to the letter from the Kenya National Examination Council (KNEC) referenced KNEC/CONF/REQA/SE/KCSE/IRR/2017/002 and dated 20th December 2017 in which KNEC informed you that results for Chalbi Boys High School (16320302) had been withheld in the entire examination to enable KNEC to finalise investigations relating to the conduct of the examination in your centre.**
>
> **Investigations conducted by KNEC have revealed that the candidates whose index numbers are listed in the table below were involved in the examination irregularity, which is contravention of the Kenya National Examination Council Act No.29 of 2012, Article 32. In view of this, the 2017 KCSE examination results for the candidates have been cancelled in the subjects indicated.**
>
> **Please bring this to the attention of the candidates affected and advise them that cancelled results are not available for remarking**

The respondent contend that there was collusion by all 70 students in English paper 2 (Code 101/2) and Physics paper 1(232/1) by the 14 candidates who took physics. The students were able to see all the results including the results for English and physics. I have seen the results as annexed by the petitioners. The students performed very well in some subjects whose results were not affected. For instance In Mathematics, (121) there were 9 students who got A- and above. Over 48 students got B- and above in Mathematics. The rest got C and C+. In History (Code 311) 34 students got A- and above. The rest got Bs. No one got grade C in History. In Chemistry (233) 37 students got between C- and C. Two students got B-. In English, the results show that 25 students got between C- and C+. No one got above C+. In Physics all the 14 candidates got between C and B. In Islamic Religion (Code 314) only one out of the 25 students who took the subject got a C+. The rest got B- to A. About 44 students sat for CRE (code 313). All the candidates got C- and above. 25 students got between B- and B+.

The above analysis gives a picture of the results of the school. The minutes of the Examination Management Committee of 12.1.2018 have been annexed. The investigation methodology has also been stated. The investigations involved 64 examination centres. It is indicated that investigations in 54 centres had been concluded by the time the results were announced. Investigations in 10 centres required more time.

The petitioners were not the only ones under investigations. Chalbi Boys High School is one of the centres where investigations were on – going. This fact was brought to the knowledge of the school. The letters written to the head teacher asked him to bring it to the attention of the affected candidates that their results had been cancelled. I do find that the letters do satisfy the requirement of regulations 13 and 14 of legal Notice No.132 of 2015. There is no requirement that the Council has to write individual letters to each affected candidate. A letter written to the head teacher indicating that the results of the school have been withheld or cancelled is sufficient. The letters asked the head teacher to bring it to the attention of the candidates. The reason for the cancellation is give as examination irregularities.

It is clear to me from the above evaluation of the results that the respondents did not cancel the results out of malice. There are subjects where the students performed very well such as Mathematics, History, IRE and CRE. The respondents did not interfere with those results. The respondents concern was that there was collusion in Physics and English paper 2. This court has no technical know how to arrive at a conclusion that indeed there was no collusion.

The petitioners contend that they were not accorded a hearing. In the case of **THE KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC, EXPARTE KEMUTO REGINA OURU (2010) eKLR**, the Court of Appeal stated as follows:

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

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

It is my view that it would not be prudent for the National Examination Council to summon all the affected candidates and give them a hearing. It is quite obvious that none of the candidates will admit that he/she was involved in examination irregularities. The school head teacher or any other teacher of the school will not admit such accusations. Giving personal hearing to the affected candidates is not necessary. Once satisfied that the candidates were involved in examination malpractices and the procedures relevant to arriving at such a conclusion are followed, then the council has the right and powers to cancel the results. Lack of a hearing accorded to any affected candidate cannot be a good reason to fault the council.

The title of the petition indicate that the respondents violated the petitioners right to property, dignity, education, fair hearing and protection of freedom and security of person. There was no violation of those constitutional rights. The results become the property of the candidate once they have been properly held to be free from any irregularities by the second respondent. Even after receiving the text message showing the results the candidate expect to be issued with an authentic result slip by the examination body. The candidate had not acquired any property known in law. There was no violation of their right to dignity. They were not the only ones who took the exams. Other candidates also had their results cancelled due to irregularities. The respondents allowed the candidates to register for the exams afresh and there was no violation of the right to education. One cannot insist on being given his or her results despite the fact that such a candidate has been involved in examination irregularities. There was no right to the security of the petitioners or the candidates.

Why did the council cancel the results for English and Physics and not mathematics, History, IRE and CRE. The answer to this is that the Council did not find any examinations irregularities in these subjects. It is also noted that the students had not registered very high marks in English and physics. No one got above C+ in English and the highest grade in Physics is a B. The integrity of the results has to be Zealously guarded. The results involve the accumulated outcome of all the subjects taken by candidate and not those obtained in a single subject or paper. The council has to be satisfied that the results given to the candidates is a true representation of their effort.

The petitioners contend that the candidates had legitimate expectation since they accessed the results and had no reason to complain. The record show that upon the release of the results, the head teacher was notified that the results were being withheld pending investigation. The candidates are supposed to be issued with documents by the school giving the interim results. The school would ordinarily stamp the document giving the results for each candidate. Once the results are being withheld, the school will not issue candidates with any document showing the results. The interim results retrieved from the council's portal by way of text messages cannot be held to be the real and true results of the candidate. Proper results should be followed by a confirmation results slip stamped by the school and a proper result slip issued by the Kenya National Examination Council. Legitimate expectation is derived from a lawful course. The candidates were aware that their results had been withheld due to election malpractices. They should not have expected that investigations would have automatically cleared them. Their expectation ought to have been either positive or negative. Since the outcome was negative, which ought to have been one of the expectations, the court cannot find that the negative finding by the council was out of malice. The council was able to flag down the candidate's examination malpractices and was right to cancel the results.

The exams are prepared, conducted, marked and ultimately released by experts who are experienced in their various respective fields of study. Out of thousands of examination centres, the council managed to flag out 64 centres. The report show that in some centres some candidates got their results despite the cancellation of the results for other candidates. For instance, at Koelel Boys High School, 11 out of the 321 candidates had their results cancelled. At Tenges Boys High School, 31 out of the 99 candidates had their results cancelled. At Barazani Girls school, only one out of 96 candidates got her results. The results for 95 candidates were cancelled. The same applied for Mokubo Secondary school where one out of the 204 candidates got his/her result. The essence of all this is that the results are not cancelled out of the council's ego, caprice or selfishness as alleged by the petitioners. A decision to cancel the results is arrived at after thorough investigations are carried out. The court should not trash such exercise by the council. The contentious by the petitioners that no investigations were carried out are misplaced. The council did not just pick on Chalbi Boys High School and decided to cancel the results.

From the record herein, I am satisfied that the respondents properly reached at the decision to cancel the results. The actions of the respondents are not ultra vires or discriminatory. All the candidates have to be treated equally and no candidate should gain any advantage through the use of examination malpractice. I do find that there was no violation of the petitioner's or the candidate's constitutional rights. The orders of mandamus and certiorari are not available to the petitioners. There was no requirement that the petitioners and the candidates were to be accorded a hearing before the results were cancelled.

I do find that the petitioners ought to have first pursued the mechanism under Rules 15 of legal notice No.132 of 2015 as well as the procedure under section 40(J) of the Act No.29 of 2012. The petitioners were aware right from 20.12.2017 that the school's results had been withheld. They had a reason to apply to the council or appeal to The Tribunal. Be that as it may. I do find that the application and the petition dated 16th February, 2018 lacks merit and are hereby dismissed. Parties shall meet their own respective costs reason being that the petitioners were pursuing a constitutional petition not for their personal benefit but for the benefit of the 70 affected candidates.

Dated, Signed and Delivered at Marsabit this 2nd July, 2018

S. CHITEMBWE

JUDGE