



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JR. CIVIL APPLICATION NO. 6 OF 2014

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION**

AND

**IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF
KENYA**

AND

IN THE MATTER OF A DECISION BY KENYA NATIONAL EXAMINATION COUNCIL

AND

**IN THE MATTER OF SECTION 32 OF KENYA NATIONAL EXAMINATION COUNCIL ACT,
2012**

AND

**IN THE MATTER OF ARTICLE 10, 22, 23, 43(1) (f), 47 AND 48 OF THE CONSTITUTION OF
KENYA**

BETWEEN

REPUBLICAPPLICANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF EDUCATION.....2ND RESPONDENT

EX-PARTE

MARTIN PHIRI AND NANCY PHIRI trading as HARVEST VIEW ACADEMY

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 16th January, 2014, the *ex parte* applicants herein, **Martin Phiri** and **Nancy Phiri trading as Harvest View Academy** seek the following orders:
 - a. An order of *certiorari* be granted by this Honourable Court to bring into this Court and quash the 1st Respondents' decision of cancellation of English Subject Results of sixteen candidates (001 to 0016), issued on 31st December, 2013 in the recent KCPE 2013 results, pending the hearing and determination of this application.
 - b. An order of prohibition be granted by this Honourable Court to prohibit 2nd Respondent from commencing or continuing with the selection process of candidates joining Secondary schools scheduled to begin on 16th January, 2014 pending the hearing and determination of this Application.
 - c. An order of *mandamus* be issued by this Honourable Court to compel 1st Respondent to revoke its decision of cancelling the results of the sixteen candidates, produce the entire English subject- results or in the alternative produce a detailed, comprehensive and adequate proof or report of how the decision to cancel the results of the sixteen candidates was reached.
 - d. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

EX PARTE APPLICANTS' CASE

2. The application was based on the following grounds:
 1. The Applicant herein is a registered school duly licensed by Nairobi City Council as a private business subsequently registered under the guidelines of the Ministry of Education established by the Education Act cap 211 Laws of Kenya tasked with the mandate of offering education, cultural, social and imparting knowledge to Early Childhood and Primary School Children.
 2. That on 31st December, 2013, 1st Respondent being the lead examining body, made a decision to cancel the results in the English subject of all the sixteen candidates (001 TO 0016) who sat for the Kenya Certificate of Primary Education (KCPE), in the year ending 2013 in the Applicant's School, the decision was unfair and unfounded since the 1st Respondent ostensibly failed to give satisfactory reasons supported by evidence, and/or explanations of how the English results were cancelled.
 3. That on 1st January, 2014 the 1st Respondents' officials through the media Daily Newspaper in the Standard at Page 10, caused to be published in the print media the names of the schools who were involved in the alleged irregularities, the Applicant being among the schools that are alleged to have colluded thus grossly affected by the said irregularities.
 4. The Applicant being concerned, on 6th January, 2014 lodged an Appeal at the 1st Respondent's Council through the advocates on record, with utter dissatisfaction of the decision given on 31st December, 2013; the Applicant has lodged an Appeal against the entire decision before the bodies' council management committee which is yet to sit and hear review applications presented by schools affected and Candidates involved *vis-a-viz* the imminent or upcoming or ongoing countrywide Form One Selection slated to start on 16th January, 2013 to February, 2014 or thereabouts, set to be conducted by the 2nd Respondent.
 5. That Applicant is apprehensive and concerned that if the cancellation of the results of the (English Subject) is not revoked by this Court the entire sixteen (16) candidates (001 TO 0016) will lose the very fundamental right to education enshrined in Article 43 and more so in Article 43(1) (f), since the countrywide selection process is imminent or about to commence, from 16th January, 2014 thereby locking out the sixteen candidates from admission to Secondary Schools.
 6. The 1st Respondent acted unreasonably thus failed to adhere to Article 43(1) (f) which

- concerns itself with the reasons as to why a candidate whose results are withheld or cancelled, must be informed fully or satisfactorily with sufficient reasons and evidence why the results were not released or were cancelled, which to the contrary the Applicant was never informed.
7. The orders sought are purely for the public interest.
 8. The Applicant is apprehensive that unless this Honourable Court issues a Certiorari Order quashing the decision of 1st Respondent and a mandamus Order compelling the body to release the results to the affected sixteen (16) candidates a miscarriage of justice will be occasioned.
 9. THAT the 1st Respondent did not demonstrate adequately and fairly the process or how the decision was reached which led to the cancellation of the results of English Subject of the entire school, rather it issued a confidential letter and cited the nature of the irregularity as collusion.
 10. The Applicant is concerned and has immediately written through the counsels on record to the Chairman of the body (KNEC)- 1st Respondent, with utter dissatisfaction of the decision given on 31st December, 2013; the Applicant with full understanding of the internal dispute resolution has preferred an appeal against the entire decision before the bodies' council management committee which is yet to sit and hear review applications presented by schools affected and Candidates involved *vis – a -viz* the upcoming countrywide Form One Selection on 16th January, 2013 to be conducted by the 2nd Respondent.
 11. The issuance of the KCPE Results 2013 without the English Marks reflecting, has contravened the legitimate expectation of the Candidates who expected to graduate to O-Levels with all their results released, therefore occasioning mental anguish, trauma, depression, dismay and astonishment, leading to anxiety of the parents and teachers of the candidates and their children, hence this Application
 12. Legitimate expectation arises where the sixteen candidates who are members of the public as a result of a promise or other conduct, expect that they will be treated in one way and the public body wishes to treat them in a different way.
 13. The lead examining body sued as 1st Respondent, is accredited public institution with a mandate to act reasonably, fairly or rationally to restore public confidence, on the contrary, it has ostensibly failed to produce a fair and detailed report or satisfactory or sufficient evidence to the Applicant, to show how they reached the decision to cancel the results of the whole school hence this application seeking an Order of Certiorari to quash the decision and review or revocation of the decision to cancel.
 14. That Applicant is apprehensive and concerned that if the cancellation of the results of the English Subject is not fairly reviewed, the entire sixteen candidates will lose the very fundamental right to education and their right being violated as envisaged by Article 43(1) (f), which concerns itself with the reasons as to why a candidate who sits for an exam must be informed fully with sufficient reasons and evidence why the results were not released or were cancelled, which to the contrary the Applicant was never informed.
 15. That there is need to quash the decision to ensure fair administrative action, rationality and objectivity in all public authorities and/or bodies including the 1st Respondent herein. Public authorities, including the 1st Respondent, must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised.
 16. The fundamental Right to education is being, or is likely to be denied, violated, infringed and/ or threatened to the detriment of the future of the sixteen (16) candidates who have been and will be traumatized or affected drastically by the missing English Subject results being a fundamental unit in the life of a Kenyan Child.
 17. That it is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question.
 18. The Respondents are subject to the supervisory jurisdiction of this Honourable Court, and

are by virtue of the law, creatures of statute, the Applicants are apprehensive that if the decision reached by 1st Respondent is not reviewed or revoked entirely, the administrative action will have been authorized to act arbitrarily or unfairly.

3. In support of the application, the applicants filed a supporting affidavit sworn by **Bishop Martin Phiri**, a Director and co-proprietor of the Applicant herein, a duly registered school.
4. According to the deponent, these proceedings intent to challenge the decision by the Kenya National Examination Council (KNEC) which was issued on 31st December, 2013 cancelling the results of all the sixteen (16) candidates (001 to 0016) (hereinafter referred to as the Candidates) who were examined in the English Subject- being a fundamental unit in the primary level, consequently not giving any reasons or evidence to support the allegation of collusion, thus contravening the remedy of fair decision making process which guide this Honourable Court. It was further deposed that the 1st Respondent did not demonstrate adequately and fairly the process of reaching the decision, whose effect was the cancellation of the results of English Subject of the entire school by putting the abbreviation '00' against each candidates' name and to utter dismay the 1st Respondent approved their decision and issued a mere confidential letter citing the school as having been involved in the irregularities in the nature of collusion.
5. According to the deponent, the applicants are apprehensive that the cancellation of the English Results of the sixteen (16) Candidates who sat for the KCPE and subsequently publication of the Applicant's name in the print media as among the schools who were involved in the irregularities, has tarnished the reputation of the school and threatened the right to education of the career and aspirations as well as the future of the said candidates. To the deponent, the issuance the KCPE Results 2013 without the English Marks, has contravened the legitimate expectation of the Candidates who expected to graduate to **O- Levels** with all their results intact, therefore occasioning mental anguish, trauma, depression, dismay and astonishment, leading to anxiety of the parents of the candidates and their children, hence this Application. It was therefore averred that the arbitrary cancellation of the results of English Subject, appears as ambiguous, null and obscure in the sense that the letter dated 31st December, 2013 above, was unconstitutional in the sense that it violated Article 43(1)(f) did not detail the evidence, reports, and/or statements from Supervisor, manager, policemen or drivers who were in the precincts of the school to lead 1st Respondent to reach a decision of cancellation of the English Subject results. To the applicant, the 1st Respondent being the lead examination body, has ostensibly failed produce a fair, and detailed report or satisfactory evidence to show how they reached the decision to cancel the results hence the application to quash the decision and review the results by issuing the *bona fide* results to each candidate. Since the decision by KNEC to cancel the English results of the Candidates was not informed by facts supported in evidence but by irrational, arbitral complexities which warrant the decision to be reviewed, the immediate form one selection to be undertaken by the 2nd Respondent will commence without properly solving the matter at hand and analyzing the likely rights being contravened. To the applicant, as the Applicant has been performing exemplarily particularly in English, throughout the previous years and has never been cited for any irregularities, the decision to cancel their results was received with utter shock and dismay. The applicant's case is that the decision making process of cancellation of the English Results of the Candidates (and the immediate intake of form one and selection of candidates are two scenarios which should be looked at keenly before quashing the said decision, by 1st Respondent.
6. In this case, the Applicant received a letter dated 13th January, 2013 from the Senior Legal Officer of 1st Respondent alleging that they have re-assessed the Applicant's application for review and declined to review their decision, the letter read in part as follows;... ***we have re-assessed the cancellation of the affected candidates' results and have established beyond reasonable doubt that the sixteen(16) candidates were involved in collusion;*** ...no evidence of collusion was tendered, neither was there any facts and reports indicating how the decision was reached. To this, the Applicant's advocates on record responded to the letter on 15th January, 2013 arguing that the rules of natural justice have been contravened and that the right of a fair hearing be duly incorporated, hence requested for a date for hearing before the Council Management Committee to present its case.

7. It is therefore the applicant's case that the interests of justice would be better served by prohibiting the immediate implementation of the form one selection of candidates, programme and/or policy pending hearing and determination the Application seeking review of the cancellation of the English Subject results and that the orders sought are purely for public interest and for the future of the sixteen candidates whose English subject results were cancelled. However, the Applicant is apprehensive that unless this Honourable Court issues a prohibitory order restraining the 2nd Respondent from running the form one selection exercise, until the issues arising from this application, are dealt with adequately, there is imminent danger or threat that the right to education of the sixteen candidates as enshrined in the Constitution will be compromised.

RESPONDENT'S CASE

8. On the part of the Respondent, the application was opposed by way of replying affidavit sworn by **Joyce Ndege**, the acting Deputy Secretary, Research and Quality Assurance Division of the 1st Respondent (hereinafter referred to as the Council).
9. According to the deponent, prayer (a) and (b) of the Notice of Motion cannot be granted as they are of an interim nature while prayers in applications for judicial review should rightly be of a final nature and that the grounds set out in the Notice of Motion and the Supporting Affidavit are misplaced as these are not a feature of judicial review applications and as such should be expunged from the court records.
10. While admitting that the Council cancelled the results of the English paper for all the Candidates who registered to sit for the Kenya Certificate of Primary Education (KCPE) 2013 at Harvest View Academy Centre Number 20408058, the deponent averred that the Council gave the reason for cancellation of the English paper results of the Candidates as collusion; a term that is used to describe a situation when a candidate answers his examination questions in conjunction with either another candidate or with the assistance of a third party such as the subject teacher, headteacher supervisor or invigilator. According to her, the KCPE examination was administered on the 12th to 14th November 2013 to 839,759 candidates in 23,362 examination centres (including 2 examination centres in Sudan) and the Council established examination irregularities and cancelled the results of the subject paper where irregularity was established in the results of 1576 candidates from 732 centres. Out of several forms of irregularities like impersonation, possession of prohibited materials in the examination room, among other forms of cheating, collusion was the most common form of examination irregularity that affected 98.9% of the total number of candidates found to have cheated and mostly so in Kiswahili and English paper subjects.
11. She deposed that after the conduct of the examinations all candidates' scripts were collected and forwarded to Council officials who arranged for their marking and the English paper which has a composition and grammar component is marked for the composition by examiners and for grammar through the scanning of candidates' answer sheets by optical mark readers. In her view, detection of collusion in multiple choice questions (the English Grammar paper is a multiple choice question paper) is done by examining the response patterns of the candidates or by use of a computer programme known as the Item Difficulty Profile (IDP). The performance profile of a school using the IDP programme shows deviations positive or negative. An exceptional report is produced if 10% or more of the questions in a paper are flagged i.e. if they deviate significantly from the normal expected performance behaviour. A negative flag is registered if 80% or more of the candidates give one wrong response out of three wrong responses given in a typical multiple choice question which has one correct response and three wrong responses. Candidates in a centre are said to have been involved in collusion in a subject paper if 80% or more of the candidates choose the identical wrong responses in at least 10% of the questions in a paper. For example in an English paper which has 50 questions, if 80% of the candidates in a centre have 5 negative flags then the candidates are considered to have colluded.
12. In the case of Harvest View Academy, it was deposed the IDP programme negatively flagged 12 questions (24%) for all 16 candidates (100%), a performance behaviour that is abnormal. According to her, this form of detection has been in use for as long as before 1985 when the Kenya Certificate of Primary Education was introduced and has been used over the years to detect collusion in open response questions through examination of response patterns of candidates by examiners and in her view, the programme is itself objective and is applied to data uniformly and

- is thus blind to the centre or candidates identity.
13. Once the Harvest View Academy English paper marks were flagged by the IDP programme, the Research and Quality Assurance division, a division charged with the responsibility of statistical analysis of performance patterns for all examination results vetted the irregularity cases and presented their findings to the management meeting of the Council on 18th December 2013 which Management Team approved the recommendation by the Research Team to cancel the results of 1,576 candidates out of 839,759 candidates who the Research Division found to have been involved in examination irregularities. Out of the said 1,576, 16 were the candidates who had sat for KCPE examination at Harvest View Academy.
 14. On 20th December 2013 the Examinations' Security Committee meeting comprising of education stakeholders was convened and matters relating to the conduct of examinations was discussed amongst which was the issue of examination irregularities in the year 2013 and having been satisfied with the evidence tendered pertaining to involvement by the 1,576 candidates in examination irregularities the Security Committee approved cancellation of the candidates results for the subject papers for which the candidates were shown to have cheated in and as a consequence the Council issued letters cancelling results of all the affected candidates and thus the letter of 31st December 2013 addressed to the Head Teacher, Harvest View Academy. It was deposed that the Council always sends out circulars to schools and cautions candidates against cheating in examinations in each candidate's copy of examination time table and in the print media prior to each examination season and warns them that if caught in examination irregularities results will be cancelled.
 15. While stating that the Council may not give clearer details of how the IDP programme works as doing so may compromise the management and conduct of examinations in future, the deponent asserted that the programme is tested, unbiased and a fool proof tool in the detection of the irregularity of collusion and hence the cancellation of the candidates English paper results is not ambiguous or arbitrary as is alleged by the deponent. It was averred that the IDP programme has no application to the past results of a centre and is used or flags results of centres on real time basis.
 16. Section 10(2)(a) empowers the Council to withhold or cancel the results of candidates involved in examination irregularities or malpractices and that an essential factor of conducting examinations, that of certifying candidates based on their ability and of awarding marks or grades based on a candidates own intellectual ability and performance will be lost if candidates who cheat receive marks for subjects they cheated in and this may result in erosion of public confidence in the examining body and by extension the entire education system of the country once objective assessment and certification in education is in doubt. Morale and values of honest candidates will be undermined and left unchecked these factors will lead to lack of consideration by local and global institutions of higher learning of certificates issued by the Council and by prospective employers both local and international. The deponent contended that the Council, by the very nature of its functions 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 and pressure from any quarter and it is the Council's position that an order for production of the candidates' script and a report on the process of verification would undermine the confidential nature of the Council's functions/duties. To her, it is in the interest of the wider Kenyan Society that cases of cheating in examinations be dealt with firmly and that in the peculiar nature of the Council's duties and functions it be held that the said results of the 16 candidates of Harvest View Academy in the English paper were cancelled fairly and without bias. She therefore was of the view that the Council has not in any way interfered with the right to education of the candidates as it released their results in relation to the other 4 subjects unaffected by irregularity and on the basis of the said results the candidates can be admitted to such secondary schools as their marks invite.

APPLICANT'S SUBMISSIONS

17. On behalf of the applicant, it was submitted by **Mr Lagat**, learned counsel that the decision to cancel the results was unfair, irrational and unreasonable in the sense that the applicant was never given a chance to vindicate the sixteen candidates in a proper forum where they would avail witnesses and statements and a fair decision would be made. Further as no sufficient reasons were

- given to support the allegations, the decision was irrational and unreasonable and the decision of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** was relied upon.
18. It was submitted that the process was not fair yet it touches on the life of the sixteen candidates based on no fair reasons and justification. Without any evidence of collusion, it was submitted the decision was not supported by evidence since the same has not been disclosed contrary to Article 47 of the Constitution and that to deprive the candidate to the right conferred under Article 43(1) (f) of the Constitution, the authority is under a Constitutional duty to furnish the person with the reasons for the decision.
 19. Whereas the respondent is empowered to withhold or cancel the results of candidates involved in examination irregularities or malpractices, to justify the withholding of the same, the section referred to does not define the nature of irregularity called collusion hence the Respondent was under a duty to clarify to the candidates in which subjects was there collusion. Without such clarity, it was submitted the decision was unreasonable.
 20. It was submitted that in the instant case the 1st Respondent has cancelled the results of the sixteen candidates without an option of remarking contrary to the decision in **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR**.
 21. It was submitted that the candidates' legitimate expectation under Article 43 of the Constitution to pass their examinations and enrol to O-Levels has been contravened or negatively affected and reference was made to **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** and **J P Bansal vs. State of Rajasthan & Another, Appeal (Civil) 5952 of 2001; HWR Wade and C F Forsyth in Administrative Law, 10th Edition (2009) page 449; and Republic vs. Attorney General & Another ex parte Waswa & 2 Others [200] 1 KLR 280**.
 22. It was submitted that under Article 47 of the Constitution, the 1st Respondent was under an obligation to invite the Applicant to appear before the Council regarding the issue of application for review before declining to review the decision and reliance was placed on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223; Republic vs. Kenya Power and Lighting and Another [2013] eKLR**.
 23. By failing to observe the rules of natural justice, it was submitted that the 1st Respondent is guilty of procedural impropriety due to the failure to invite the applicant to vindicate itself before the Council.
 24. According to the applicant the issues raised in the replying affidavit are issues which require expert opinion hence the conclusions in paragraphs 14 and 16 thereof are irrational as they are not supported by documents. The Court was therefore urged to quash the 1st Respondent's decision and compel the said Respondent to release the results to the candidates.

RESPONDENT'S SUBMISSIONS

25. On behalf of the respondent, it was submitted by **Miss Njenga** that the application has procedural lapses since prayers (a) and (b) of the Motion are interim in nature while judicial review orders should be final. It was further submitted that the grounds are misplaced.
26. With respect to the issues raised, it was submitted that the ground relied upon was collusion which was detected by computer programme and as explained in the replying affidavit which flagged out the irregularities in English paper and this was verified by the management and security Committee. With respect to legitimate expectation it was submitted that the issue was dealt with in **Republic vs. The Kenya National Examinations Council & Another ex parte Busara Forest View Academy Ltd JR No. 44 of 2009** in which similar issues were raised.
27. It was submitted that there was no expectation that a hearing would be conducted before the results were cancelled and that the Council has the mandate to carry out examinations and cancel results under Regulation 15. Accordingly the Court was urged to abide by the decision of the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**, and consider the public interest on cheating and the need to uphold the dignity of the results which overrides private rights. It was submitted that the natural justice rights cannot be achieved in the circumstances of this case.
28. It was submitted that the orders of mandamus not issue to compel a public body to perform its

- duty in a particular manner and that there are no results to be released.
29. In his rejoinder **Mr Lagat** submitted that the procedural issues raised were technicalities of the law which the Court ought to disregard. To him the Court has a duty to compel the 1st Respondent to remark the results hence the decision ought to be quashed.

DETERMINATIONS

30. I have considered the foregoing. The first issue for determination is whether prayers (a) and (b) as sought are capable of being granted. I agree that the way the said prayers are couched one gets the impression that the applicant seeks judicial review orders in the interim. I agree with the Respondents that judicial review orders cannot be granted in the interim and therefore the said prayers as presented are incompetent.
31. However, it is clear that the Respondent was aware of and knew the exact orders which the applicant is seeking. Therefore to dismiss the application on that misnomer would amount to elevating procedural requirements to a fetish. It has been held time and again that rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it and where it is evident that a party has attempted to comply with the rules, but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the court should rise to its calling to do justice by saving the proceedings in issue. **See Microsoft Corporation vs. Mitsumi Garage Ltd & Another Nairobi HCCC No. 810 of 2001; [2001] 2 EA 460.**
32. I am therefore disinclined to disallow the application merely on that ground more so in light of the provisions of Article 159(2)(d) of the Constitution.
33. The first issue for determination is whether the Court can compel the Council to release results which had been cancelled. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) the Court while relying on *The Concise Oxford Dictionary of Current English, 7th Edition* found that the word “cancel” means “obliterate, cross-out; annul, make void, abolish, countermand, revoke order or arrangement for.....”. The Court found that since the applicant had not applied to quash the decision which cancelled the results the orders sought would have been in vain. However the Court went on to hold that “if the respondents were contending that the cancellation was wrong because it was done contrary to the rules of natural justice, the obvious thing for them to do was firstly to apply to the High Court for an order of certiorari to quash the cancellation and thereafter for an order of mandamus to compel the release of results.” In other words the Court of Appeal was of the view that in the circumstances of that case to seek orders of mandamus and prohibition without quashing the decision was an exercise in futility. In this case, the applicant seeks *inter alia* an order to quash the decision of the Council on the ground that the cancellation was done without the applicant being afforded an opportunity of being heard contrary to the provisions of Article 47 of the Constitution. That provision provides:

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

(2) 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.

34. The cancellation of the candidates’ results was obviously an administrative action which was required to be expeditious, efficient, lawful, reasonable and procedurally fair. The 1st respondent was or ought to have been aware that the cancellation of the candidates’ results was likely to adversely affect the candidates’ rights under Article 43(1)(f) of the Constitution hence the candidates were entitled to the reasons for the action. However, this application has not been filed by the candidates whose rights under the said Article were affected or likely to be adversely affected.

35. It is however, not in doubt that the applicant was informed of the reason for the cancellation of the results. One of the functions of the Respondent under section 10 of the Act is to “award certificates or diplomas to candidates in such examinations; such certificates or diplomas, shall not be withheld from the candidate by any person or institution”. In so doing the Respondent, however has the power to “withhold or cancel the results of candidates involved in examination irregularities or malpractices.” Therefore for the Respondent to withhold the results of a candidate, the candidate must have been involved in examination irregularities or malpractices. The reason was that there was a collusion. Although the applicant contends that collusion is not an irregularity as contemplated under the regulations, I beg to disagree. In my view collusion where it exists may well amount to an irregularity since it is capable of bringing the results of the examination in disrepute as the results would then not be said to have reflected the industry of the individual candidates. Dealing with this aspect the Court of Appeal in the above matter held that cheating could constitute an irregularity as contemplated under section 10 of the *Kenya National Examinations Council Act*, 2012 (hereinafter referred to as the Act).
36. The Court of Appeal recognised that where the applicant seeks an order of certiorari to quash cancellation, the Council might well be required to justify to the Court the reason(s) why it thought the respondents had cheated. In this case therefore the 1st respondent was expected to justify to the Court why it thought there was collusion amongst the candidates. The 1st Respondent informed the Court the methods which it used to detect collusion. That method, it was averred, was used uniformly and not arbitrarily or selectively. The applicants have not shown that the method employed by the 1st Respondent was faulty. The Respondents however contended that the Council may not give clearer details of how the IDP Programme works as doing so may compromise the management and conduct of the examinations in future though the programme is tested, unbiased and a fool proof tool in the detection of the irregularity of collusion. In the said case the Court of Appeal appreciated that the marking of examinations must remain confidential as opposed to secretive and that no amount of liberalisation, transparency and accountability would ever convince the Courts that the marking of examinations should be conducted at the Moi International Sports Centre, Kasarani, so that the candidates and anybody else who feels inclined to do so can attend and see that the marking is fair and open. According to the court, in life, there are certain things which must be taken on trust and that when an examiner decides that a particular candidate has failed there cannot be any doubt but that the examiner is deciding on a matter touching on the very future of the candidate and yet, no one in his proper senses would contend that before such a candidate is declared to have failed, the examiner ought to give him a hearing. The Court however appreciated that when it comes to the question whether or not the Council is justified in cancelling particular results, different considerations may well apply.
37. Cancellation of results obviously has nothing to do with the merits of the results. Therefore whereas the decision whether or not a candidate has failed may not call for reasons for the failure, where an allegation of impropriety or irregularity is made against a candidate, it is my view that the candidate ought to be furnished with the reasons why such a decision was made and be afforded an opportunity of being heard on that cancellation. Where the Council does not furnish the applicant with the reasons for the decision, it is my view that the Court may well be entitled to quash the decision. Long before the advent of Article 47 of the Constitution the importance of giving reasons was recognised by the courts in this jurisdiction as exemplified in Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090, where the Court expressed itself as follows:

“The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution “in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property.....The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous

considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law..... The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts..... The provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void..... The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him: but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority..... An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law... It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him.It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

38. It is also my view that where the decision is unreasonable or irrational, the Court would be properly entitled to quash the same. The Court of Appeal expressed itself as follows on this aspect:

"If the Council were to declare in advance that it was going to cancel particular results because the candidates involved were not supporters of the government of the day or some such like irrelevant reason, there cannot be any doubt but that the High Court, on application by the candidates so threatened, would issue an order prohibiting the Council from acting either in excess of its jurisdiction or contrary to the laws of the land."

39. Similarly, it is my view that if a candidate's results were to be cancelled on the ground that he or she does not belong to the governing political party, that decision would be irrational and the Court would be properly entitled to quash it. Even in the exercise of discretion, the authority upon whom the discretion is conferred is expected to exercise it reasonably and in good faith and not to abuse it or apply it selectively or capriciously. No one in my view could have put it better than the Court of Appeal in **Matiba Vs. Moi & 2 Others (No 2) [2008] 1 KLR (EP) 670** where it was held as follows:

"Again the issue whether or not a judge should grant leave to appeal in any particular case is an exercise of judicial discretion. That was agreed on all sides. But being judicial, the discretion had to be exercised according to reason – not capriciously and not according to private likes or dislikes or private opinion. Mr Justice Pall would not, for example, have been at liberty to say: "Mr Matiba is the leader of an opposition party and I do not like opposition parties. I shall accordingly, in the exercise of my judicial discretion, grant President Moi leave to appeal," and more than he could say "President Moi is the leader of the ruling party KANU and because of that, I shall grant to him leave to appeal." These would not constitute valid reasons for the exercise of judicial discretion, as they are all

irrelevant matters, based as they are on personal likes and dislikes.”

40. Once the decision is quashed, it is not for the Court to direct the Council as to the manner of proceeding. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court doubted whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law. Therefore where the Court has quashed a decision, it is not for the Court to direct the Respondent on how to proceed where the Respondent has a discretion to decide on the manner of proceeding. Therefore if the Court finds that the Respondents failed in their duty to furnish the reasons or that the reasons given were unreasonable or irrational, the Court would only be entitled to quash the decision and leave it for the Respondents to take the next legal course available. Of course where the Respondent fails to release the results without any lawful or justifiable cause the Court would be perfectly entitled to compel them to do so after a demand is made by the applicant. As was held by the Court of Appeal in the said case:

“Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be. The same goes for awarding diplomas and certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b).”

41. In this case reasons were given for the cancellation of results. The Respondent has explained though not in details the method which was applied across board. Whether or not that method was efficient is a matter which would call for a hearing. However, as the Court of Appeal in **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru Civil Appeal No. 127 of 2009** recognised, **“...we are not experts in that field. To come to a decision one way or the other evidence will need to be adduced, witnesses be examined and be cross-examined. The procedure of judicial review is not appropriate for that purpose.”**

42. The next issue is whether the Respondent ought to have given the applicant or the candidates a hearing before cancelling the results. Dealing with that issue the Court of Appeal, though *obiter*, expressed itself as follows:

“The question of whether the Council is in law bound to hear a candidate before it cancels the result must remain for consideration on another occasion, though if we were forced to decide it in this matter, we would ourselves be inclined to take the view that it might place an unnecessarily heavy burden on the shoulders of the Council to insist on a hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to the marking of examinations.”

43. Although that view, being *obiter*, is not binding on this Court, as was held in **Abbas G Essaji vs. Gordhan Dewji Solanki [1968] EA 218**, there is nothing in the Civil Procedure which so prescribes the power of the High Court as to preclude acceptance of guidance in a matter from the dicta and judgements of the Court of Appeal where such dicta are sound.

44. Dealing with the same issue in a subsequent case of **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru** (supra), the court expressed itself *inter alia* as follows:

“The right to hearing is fundamental and is entrenched both in the old and the current constitution. It is universally accepted in any process in which the rights of an individual or group of individuals are being adjudicated upon. Yet, in the conduct of public examinations there is, as was stated in the Indian case of *Maharashtra State Board vs. Kurmarsheth & Others [1985] CLR 1083* a need for the court: ‘to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to

those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them.’....Considering the way the rules and regulations are couched, the intention is to ensure there is equal treatment of all candidates involved for purposes of fairly identifying academic and professional ability. The rules and regulations are also intended to assist the examiners identify those candidates who, through improper conduct, want to attain a grade they do not deserve. The rules are also intended to ensure overall integrity of the entire examinations and fairness to the general body of the candidates as a whole.....To afford a hearing it will mean each candidate may need to be called upon to explain an alleged irregularity....By opening room for challenge of the intended decision to cancel an examination result, it will be difficult to deny other candidates like opportunity to question the decisions of the Council which they may be aggrieved about. Will it be in the public interest to allow individual candidates to make representations?.....Considering the foregoing we come to the conclusion that balancing one thing against the other the balance tilts in favour of the public interest of ensuring that national examinations results enjoy public confidence and integrity by letting the experts handle them as they deem best provided what they do is applied equally to all candidates with similar complaints against them.”

45.The next issue for determination is whether the decision by the Council to cancel the results was unfair, irrational or unreasonable. It is not contended that the Candidates herein were subject to a different method of detecting collusion from the other candidates who took part in the said examination. To compel the Respondents to subject the Candidates herein to a different mode of examination of the papers would in my view not only be discriminatory but would open room for challenge of the decisions made by the Respondents in respect of other candidates a process which will bring the whole process of conduct of examinations into disrepute. As was held by the Court of Appeal in **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru** (supra):

“The elaborate procedures and safeguards incorporated in the rules and regulations made by the Council which create structures for addressing the various aspects raised by the respondents are adequate. In our view this constituted a fair procedure which guards against arbitrariness.”

46.Dealing with the issue of setting different standards for candidates taking the same course or training the Court of Appeal in **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR** expressed itself as follows:

“All applications for admission to the School must be considered against the same standards set by the Council. In **Butime Tom V Muhumuza David and Another Election Petition Appeal No. 11 of 2011** to which we were referred by counsel for the appellant, it was held that when regulating a profession the same standards should apply to all persons seeking to enter into the profession..... To exclude the appellant from complying with the fulfillment of the requirement of core subjects would in our view be to propagate the very discrimination the appellant complained about..... We are also of the view that the learned judge correctly applied the principle in the decision in **Susan Mungai V The Council for Legal Education Petition No. 152/2011** to the effect that the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations.”

47.With respect to legitimate expectation, it is my view that the Candidates legitimate expectation was that they would be treated fairly. There cannot be a legitimate expectation that a candidate will pass examination and move to the next stage. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others**, (supra) simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be

treated in one way and the public body wishes to treat him or her in a different way. I am unable to find from the record that the Respondent had promised the Candidates that they would pass the examination in question.

48. I have considered the Notice of Motion dated 16th January, 2014 and it is my view and I so hold that the same lacks merit.

ORDER

49. In the result, the same is dismissed but taking into account the fact that this was a matter of public interest in respect of the candidates' future, I make no order as to costs.

Dated at Nairobi this day 12th of February 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Lagat for the applicant

Miss Njenga for Respondent