IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, KEIWUA & NYAMU JJ.A)

CIVIL APPEAL NO. 127 OF 2009

BETWEEN

THE KENYA NATIONAL EXAMINATIONS COUNCIL

AND

REPUBLIC, EXPARTE KEMUNTO REGINA OURU

(suing through father and next friend JAMES OURU) and 128 others

(Appeal from the judgment and order of the High Court of Kenya at Eldoret (Ibrahim J.) dated the 20th day of May 2009

in

MISC. CIVIL APPLICATION. NO. 1 OF 2009

****

JUDGMENT OF THE COURT

Following the grant of leave to take out a motion for an order of judicial review, the 129 respondents herein as the applicants took out a motion on 25th March 2009 for the following orders:

(1) An order of certiorari to remove into the High Court for purposes of quashing the decision of the appellant contained in a letter to the District Education Officer, Nandi East District, dated 3rd March 2009 cancelling the examination results in respect of 128 KCSE candidates for the year 2008 on the ground of alleged irregularity to wit collusion.

(2) An order of mandamus to compel the Kenya National Examinations Council, as respondent, " to reverse its decision to cancel the chemistry (233) examination results of the 128 Kenya Certificate of Secondary Examination Candidates for the year 2008 within 21 days of the order and to release forthwith the entire results to the aforesaid candidates."

(3) In the alternative, an order of mandamus directed to the respondent to compel it to produce

before the court all the chemistry (233) answer booklets for all the 128 affected candidates for the court's inspection.

(4) An order that the applicants be awarded the costs of the motion.

The first 128 respondents in this appeal were all students of St. Mary's Techasis Girls Secondary School, in 2008. They were among several students who had registered for and took the Kenya Certificate of Secondary Examination which was organized by the appellant herein. As at the date of the aforesaid examinations, The Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules 1998, were in force and governed the administration of the Kenya Certificate of Secondary Education examinations.

By regulation 9(1) of the aforesaid Rules, each candidate was required to sit for at least eight subjects selected from designated clusters for him or her to qualify for the award of a certificate in the examination.

By rule 28 of the same Rules the appellant was empowered to:
(1) Withhold results of the examination for any candidate or group of candidates or examination centre suspected of having been involved in examination irregularity or misconduct pending completion of investigations and the final disposal of any consequent disciplinary or other proceedings.

(2) Cancel the results of each candidate or schools if the appellant is satisfied that candidates or schools have been involved in any irregularity or misconduct.

(3) Disqualify all the candidates at a centre if the appellant is satisfied that the examination at any centre has not been conducted in accordance with its regulations or there have been widespread irregularities at the examination centre.

The respondents' case as can be gleaned from the statutory statement in support of the motion and the verifying affidavit is short and straight forward. All the first 128 respondents registered for the 2008 Kenya Certificate of Secondary Examination with each candidate opting to sit for eight subjects, which included chemistry coded as No. 233. The examination was marked and the results thereof were processed. However by its letter dated 3rd March 2009 addressed to the Headmaster St. Mary Tachasis Girls Secondary School through the District Education Officer, Nandi East, within whose area the school fell, the respondents were notified that their results for the examinations had been cancelled. The body of the letter read as follows:

"RE: THE 2008 KCSE EXAMINATION RESULTS

The KCSE examination results for the candidates whose index numbers are shown below have been cancelled in the subject(s) indicated (sic) because they were involved in an examination irregularity. Please bring this to the attention of the candidates."

The appellant then set out the candidates respective index numbers, the subject affected namely Chemistry (233) and the nature of the irregularity committed was given as collusion. The letter was signed by Paul M. Wasanga, MBS, and his designation is given as The Council Secretary/Chief Executive of the Kenya National Examinations Council. The letter is the one which contains the decision which by their aforesaid motion, the respondents wanted quashed by an order of certiorari.

The respondents' complaints as set out in the motion were, that no evidence was made available to show collusion, **rule 28** which empowers the appellant to cancel results contemplates that investigations of any irregularity or misconduct, would be conducted before a decision, but no such investigations had been conducted; that if any investigations were ever conducted, the respondents were not given a hearing, that there was no complaint raised at any time that there had been any irregularity or misconduct and that the circumstances under which the examination was sat did not permit contact

between candidates who were yet to sit for the examination and those who had done so. In view of those complaints the respondents concluded that the decision to cancel their results was reckless, unreasonable, arbitrary, lacking in bona fides and an abuse of office.

Paul M. Wasanga, the Chief Executive and Secretary of the respondent swore an affidavit in response to the motion. He gave his background as a graduate from Cambridge University in Psychometrics, had worked for the respondent for 24 years in various capacities among them as Examination Administrator, Test Developer and Researcher.

In his affidavit Mr. Wasanga has deponed, *inter alia,* that the 2008 Kenya Certificate for Secondary Education had 305,015 candidates, and the first 128 applicants were among them; that before that examination was sat, the respondent circulated to all candidates detailed instructions as to how candidates were to conduct themselves during examinations and warned of dire consequences for any irregularities; that the examinations were held and the marking thereof was concluded on 27th December 2008; that in the course of marking, cheating by various candidates was detected in the Chemistry practical paper coded 233/3, and the cheating was reported to the Chief Examiner of the paper who in turn reported the matter to him; that thereafter the Research Division of the respondent undertook a careful scrutiny of scripts, among other activities, to ascertain whether indeed there had been any cheating; that thereafter the Chief Examiner prepared a report in which he observed that there was a unique response pattern that showed collusion to have taken place; that the Research team vetted the result; that it was observed that each of the 128 respondents who sat the Chemistry practical paper, had various similar values in clusters of between 2 and 17 candidates in question 1(b)(ii). 18 candidates used values different from those obtained from their experiments; that being a practical examination for various reasons it is not possible for individual candidates to obtain the same results as happened in the case of the first 128 respondents; that collusion was also established in question 2 where candidates in clusters of 91, 77 and 44 respectively gave identical wrong observations in questions 2(b) and 29 (c) (ii), using identical expressions and phraseology inspite of the fact that they were supposed to work independently; that after other processes were undertaken, the Research team presented the respondents' case to the Management Team which in turn presented their recommendations to the Security Committee, which in turn considered the case and recommended that the results for that subject be cancelled. Mr. Wasanga further deponed that normally after such scrutiny has been undertaken there would be no basis or reason for any further investigation; that collusion and other irregularities affect the integrity of an examination and hence the need for elaborate security measures to ensure fair grades; that to enhance the integrity of the 149th Examinations Security Committee Meeting held in 2002 harmonised the effect of irregularities on candidates entire results, namely that a candidates' entire result would be cancelled if he is caught having engaged in cheating in any one subject, and that the respondent acted within its mandate to cancel the first 128 respondents' results.

Mohamed K. Ibrahim J. heard the motion. Submissions before him were centred on two basic issues, firstly, whether the appellant in canceling the 2008, Kenya Certificate of Secondary Education results of the 128 ex parte applicants had the capacity to do so, and, secondly, whether in doing so it followed the right procedure and or failed to observe the principles of natural justice.

On the first issue the learned Judge after citing with approval this Court's decision in the case of **Kenya National Examinations Council v. The Republic, ex parte Geoffrey Gathenji Njoroge & 9 Others, Civil Appeal No. 266 of 2006** held that the appellant had the power, authority and jurisdiction of canceling examination results in any examination it conducts, and had the power to do so in the respondents' case provided the correct procedure was followed. The learned Judge then proceeded to consider the next issue. He did not get any assistance from the **Geoffrey Gathenji Njoroge** case, as the court there had reserved consideration to another occasion, the question whether the Council was bound to hear a candidate before canceling his results.

In his consideration of that issue the learned judge held, inter alia, that in exercising its power under **rule 28,** aforesaid, the Council exercises discretionary jurisdiction; that the rule envisages an investigation, inquiry or trial before coming to a decision to cancel results, and in absence of a stipulated procedure for conducting such investigations, inquiry, or trial, the Council has a discretion in the manner

it should conduct such inquiry. That notwithstanding, the learned judge concluded that the Council was obliged to abide by the *"Cardinal Rules of Natural Justice."* As to how the court would meet this requirement the learned judge rendered himself thus:
"Investigations would have entailed giving each of them notice to show cause why their result should not be cancelled. No such notice was issued to any of the applicants before the obviously harsh, drastic and draconian decision of cancellation of the entire results was "made."

It was common ground that the Council did not call upon the candidates to say something before their results were cancelled. The learned judge in his decision was categorical that the Council in canceling the results without hearing the candidates affected, acted in violation of the rules of natural justice, and the Council thereby acted arbitrarily which conduct was abhorrent to all notions and principles of the rule of law. He continued to hold that that decision apart from hurting the feeling of the affected students, had the effect of lowering their dignity, affected their future and to some degree broke their hearts. He then considered what needed to be done, and found solace in an excerpt from the often cited case of **Associated Provincial Picture House v. Wednesbury Corporation** [1914] 1 KB 222 or what is generally referred to as the **Wednesbury Principle:** Lord Green M.R. made the remarks which the learned judge reproduced, in part, as follows :
"Decisions of person or bodies which perform public functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on a relevant law and acting reasonably could have reached that decision."

In the end the learned judge came to the conclusion that the Council by cancelling the students' results without affording them a hearing acted unreasonably and thus frustrated their legitimate expectation of a fair and lawful conduct by the Council of its statutory duty, and the decision amounted to a total miscarriage of justice, a gross violation of the cardinal principles of natural justice and a mockery of the rule of law, whether or not the action was in the public interest. Individual constitutional rights and freedoms of the students were sacrificed *"at the alter of institutional convenience, expediency or unproven public interest."* The learned Judge then granted prayers (1) and (2) of the motion with costs. He said nothing about prayer (3).

The Council was aggrieved and hence this appeal. There are 9 grounds of appeal, but after we heard Mr. Oraro who appeared with Mr. Kiarie for the Council, and Prof. A. Muma who appeared with Mr. P. Lilan and A. Magut for the respondents, our view is that there is one main issue, namely, whether before deciding to cancel the result of an examination the Council is obliged to hear the affected candidates, and if so what form the hearing should take?

Mr. Oraro took us through the procedure for detecting an examination irregularity or misconduct, and upon detection how the investigation or inquiry is made to confirm or disprove an alleged irregularity. Mr. Oraro first referred us to the marking Regulations, which make provision for, among other things, the appointment of examiners, chief examiners, the marking schemes and the handling of examination scripts. The Chief Examiner according to the Regulations is the person responsible to the Council for the successful completion of the marking exercise, and that the marking of scripts in the paper he is in charge over is done fairly and accurately and that the scores are reported to the Council together with recommendations for standard fixing. Under the Chief Examiner are Deputy Chief Examiners and Assistant Chief Examiners. There are also Team Leaders who supervise ordinary examiners and ensure that one marking standard is maintained throughout the marking exercise.

The marking Regulations define the types of dishonesty in examinations and what evidence would suggest possible dishonesty. Those include identical errors in calculations more especially in mathematics and science subjects, correct answers after wrong working, common in mathematics and science subjects, identical wording, eticetera. The Regulations provide that when dishonesty is suspected, the examiner should:
"5.6.1….carry out normal marking of the script or scripts and enter the scores into the mark sheet.

5.6.2. The examiner should refer the suspect scrip to the Team Leader. The Team Leader should

refer the matter to the Chief Examiner.

5.6.3. The Chief Examiner should try to ascertain whether or not dishonesty did take place. If there is strong evidence that dishonesty took place, the Chief Examiner's report form; should give the index number(s), the name(s) of the candidate(s), the nature of irregularity and the evidence.

5.6.4. The marked script of suspected candidates should be returned into the script envelope together with other scripts."

The reason which was given for cancelling the respondents' results was collusion, which according to the Council occurs when a candidate answers his examination questions in conjunction with either another candidate or with the assistance of a third party like the subject teacher. According to Mr. Oraro, the allegations of collusion were investigated by the Chief Examiner who then prepared his report. The Chief Examiner concurred as to the existence of collusion. His report is dated 19th December, 2008. An issue was raised at the hearing of this appeal as to whether the report related to the respondents as nowhere does it identify who the affected students are. The report however states that particulars of the affected candidates were in a sealed envelope. That envelope was not exhibited nor were the contents thereof.

The Chief Examiner's report was handed over to the Research Division. Its report on the matter signed by one Mr. F.K. Kyalo is dated 3rd February 2009. Paragraph 3 thereof reads, in pertinent part, as follows:

"Evidence on suspected cases of examination irregularities reported in the above documents including candidates' answer scripts was analysed candidate by candidate by the Research team so as to confirm whether or not an examination irregularity had actually been committed."

Mr. Oraro expressed the view that as the Research team comprised different people the process was fair and devoid of any arbitrariness. We note that the Research team did not only look at the Chief Examiner's report, but also supervision reports, examination monitoring questionnaires and reports, Examination Head Teachers' Reports, reports from Provincial Directors of Education, and any other material which they considered appropriate including anonymous letters. The team's recommendation regarding alleged collusion was that the candidates' results in the affected subjects be cancelled. That recommendation and the report in support thereof was forwarded to the management team which after going through each candidates's case approved the recommendations of the Research team, and made a further recommendation that:

"… the Research division should ensure that any candidate whose results were cancelled in any paper/subject should not be graded and should therefore receive a mean grade of "Y" as per the 149th Examination Security Committee meeting held on the 17th of December, 2002 once approval is given by the Examinations Security Committee during their meeting of 24th February 2009."

The report of the management team is dated 19th February 2009, which then means the team was basing that recommendation on a proposal which had yet to be approved. The Security Committee is the final body to scrutinize the complaints made against candidates. Their recommendation on the complaint against the respondents was as follows:

"All recommendations made by the Management to the Committee on examinations irregularities in 2008 ILCSE were scrutinized and approved as recommended."

It was Mr. Oraro's further submission that from such an elaborate process the credibility of the results is ensured and fairness is guaranteed. It reveals a clear policy framework for dealing with irregularities. Learned counsel then went on to consider the decision appealed from vis-à-vis the law. Learned counsel submitted that **rule 28**, which we earlier reproduced provides for different steps the Council may take depending on the stage of investigation. It may withhold results pending investigations, or it may cancel results after satisfying itself that there were irregularities. In his view the provisions of **rule 28 (1)** and **(2)** have to be read disjunctively because they deal with different aspects. It was his view that Ibrahim J. fell into error when he, in effect, held that rule 28(1) applies across the board regardless of

the stage of investigations. It was his view that a hearing is necessary in all cases where there is evidence of a malpractice for instance where there exists evidence of cheating. He hastened to add that the procedure an authority adopts is dependent on the facts and circumstances of each case as well as the nature of the subject matter. He cited several authorities to exemplify this; among them, **Lloyd V. Macmohan** [1987] 1 ALL EK 1118 in which it was held that the exercise of discretion has to be fair, honest and to the best of one's ability; **University of Ceylon v. Fernando** [1960] 1 ALL ER 631 in which the court held that where the procedure is not prescribed, it was for the vice-chancellor to determine the procedure to be followed, as he thought best, provided some form of inquiry is made as would enable him fairly to determine the matter in issue; **Bushell v. Secretary Of State**[1980] 2 ALL ER 608, in which Lord Diplock penned that what is important is a fair procedure and that a fair procedure is to be judged not in the light of constitutional fictions but according to the practical realities as to the way in which administrative decisions involving forming judgments based on technical consideration are reached; **Kenya National Examinations Council v Republic, Civil Appeal No. 266 of 1996**, in which this Court held that the procedure of hearing each candidate might place an unnecessarily heavy burden on the shoulders of the Council; **Collymore & Another v Attorney General of Trinidad & Tobago [1969] 2 All Er 1207** in which it was held, among other things, that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, among other factors.

In conclusion on this aspect, Mr Oraro did not think the type of hearing the respondents were seeking and which the superior court ruled that the respondents should have afforded them was practicable in cases of this nature. In his view, the procedure the Council adopted was not only fair, but it was scientific, and meant to give credibility and dignity to the results of the various examinations the council conducts.

In answer, Professor Muma, expressed the view that while the Council had power and authority to cancel examination results, it could only properly do so where evidence is shown to exist of any irregularity or misconduct. In his view, the evidence available is deficient in that it does not disclose either the index numbers of the candidates alleged to have been involved in alleged irregularities or their names. Nor is there evidence connecting the alleged irregularity to any examination centre. In his view, the authorities Mr Oraro cited show that an opportunity to be heard is essential, except that the scope of it varies according to the facts and circumstances of each case. He cited the cases of **Council For The Civil Service Unions & Others v Minister For The Civil Service [1984] 3 All ER 935**, to support that proposition. It was his view that the appellant is relying on a mere assertion from the bar about the process but there is no tangible evidence to show that the respondents were given an opportunity of being heard. Besides, he submitted, the Rules of the Council provide an opportunity to be heard and wondered why that opportunity was not given to the respondents. He made particular reference to the minutes of the ***184th Examinations Security Committee Meeting*** which at paragraph 5:2:2, as material, reads thus:

"5:2:2 under 7.4.1: Investigations were carried out of all the candidates whose results had been pended. All the cases where there was no valid evidence from the investigations were released on 8th January, 2009."

He concluded his submission on that aspect by stating that an inquiry should have been made from the students on the sitting arrangement in the examination room among other matters, before cancelling the results. In his view, it is not only by looking at the examination scripts which is contemplated. Much more needs to be done, he said.

Before we deal with the prayer for mandamus, we propose to deal with the aforesaid submissions which relate to the prayer for an order of certiorari. The respondents' complaint was that they were not afforded a hearing before the decision to cancel their results was made. In considering the issue the starting point is the decision of this Court in ***Kenya National Examinations Council v Republic, (Supra)***, in which the Court held that the procedure of hearing each candidate might place an unnecessary heavy burden on the shoulders of the Council.

There were over 305,000 candidates in the 2008 Kenya Certificate of Secondary Examinations. Out of that number 524, candidates were suspected of having engaged in collusion. The number of candidates involved in irregularities was over 1200. In coming to its conclusion in the case cited above, this Court must have considered the time it would take to hear each of such candidates, the resources such hearing would entail, both financial and human, the delay that would be entailed before the results would be confirmed or otherwise and several other imponderables. Yet it is a rule of natural justice that a person should not be condemned unheard. There is also the issue whether it will be in the public interest to hear

each candidate, and how best such a hearing will be had without in any way encouraging complaints from candidates with weak grades to seek a hearing in an attempt to show that they did not get a fair grade.! It is our view that both the appellants and the respondents have valid points. However, when a court is faced with competing public interests how should it go about dealing with the situation? In the case of **Jashir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others, Civil Application No. Nai. 307 of 2003 (154/2005 UR)**, this Court was faced with a more or less similar situation. In that case a former Judge of this Court A.B Shah, swore an affidavit in a matter he was not a party in, but in which he had sat before retiring from the bench. An application had been made by one of the parties therein seeking a review of the decision of the Court on account of alleged bias involving him. In the affidavit he wanted filed, he was seeking to respond to allegations made against him in the application. The question which the court was called upon to consider and rule on is whether such an affidavit could be admitted. A bench of 7 judges was empanelled to hear the application. In his ruling in the matter Omolo J.A said:
"I must start this Ruling by pointing out that two conflicting principles, both of great importance to those who seek the decisions of the Courts on various issues, are involved in the decision we are called upon to make in the application before us. Those two principles are:

1. That there ought to be and must be an end to litigation, and

2. That justice must be done and be seen to have been done in each case that comes before the courts for determination.

The Courts in the Commonwealth have readily recognized that the two principles must somehow be harmonized in each particular litigation in which their application is brought into issue."

In a supporting ruling Bosire J.A penned thus:
"I have had the advantage of reading in draft form the conclusions he has come to and the reasons thereof and I agree with those conclusions and reasons he has given for them.

... As I stated earlier, there are instances where the public interest principles are in conflict and the courts must balance one aspect against another and decide which one supersedes the other, of course, depending on the facts and circumstances of each case. The conflict here is that the applicants feel they were not given a fair hearing by an impartial court. The principle of finality requires that litigation should come to an end."

In this appeal we are similarly faced with a situation where two public interests are in conflict. The right to a hearing is fundamental and is entrenched both in the old and the current constitution. It is a universally accepted principle 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 v 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."

In its wisdom Parliament enacted the Kenya National Examinations Council Act, Cap 225A of the Laws of Kenya which establishes the Kenya National Examinations Council, with authority to, among other things, conduct examinations within Kenya as it may consider desirable in the public interest; and to make rules, regulating the conduct of examinations and for all purposes incidental thereto. The rules we referred to earlier were made pursuant to the provisions of this Act. Those rules are made with the approval of the Minister for the time being responsible for higher education. Pursuant to the power donated by the aforesaid Act, on 30th August, 2008, the Council released instructions for conducting the 2008 KCSE examination, which covered among other things, the preparation of examination rooms, the manner and centres for distributing examination materials, how candidates would be identified, supervision of examinations and the handling of various papers.
Likewise the Council promulgated Marking Regulations for that year which detailed among other things,

the duties of the examiners, marking procedures, how to handle cases of suspected dishonesty during marking, action to be taken when dishonesty is suspected, the handling of marksheets by examiners and considerations and criteria for standard fixing.
The aforesaid, among other Rules and Regulations, have been made by people whose background, training and experience are relevant to the conduct of examinations and are geared to ensuring that the results of the examinations are credible and have integrity. 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 individual 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.
We earlier set out the various stages investigation of suspected irregularity goes through. The respondents, complain that they were not given a hearing in any of those stages or at all. Prof Muma, as earlier on stated, wondered why the respondents were not contacted to state how the sitting arrangement was in the examination rooms, or why even the invigilators or examiners were not asked to make a report of the examinations on the basis of their observations. On this aspect of the matter, we think, the learned counsel, missed the point.
The Examiners are the first people to give a report of the examination. They are the people who detect suspected collusion or any irregularity after which they make their report. It is their report which, according to the aforesaid rules and regulations which is considered by investigating groups against the laid down standards. To afford a hearing it will mean each candidate may need to be called upon to explain an alleged irregularity. For the candidate to respond to a particular allegation he or she will need to look at the examination script. That will, as stated by this Court in the **Kenya National Examinations Council v Republic (supra)** .place an unnecessary hearing burden on the Council; and in our view it is likely to have a ripple effect generally. If the Council can hear one candidate, what will stop other candidates agitating to be heard regarding their performance? It may be argued that the hearing should be confined to only those candidates respecting who the council evinces an intention of cancelling their results. However, 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 representation? 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. We agree with Mr. Oraro, upon reading the various authorities he cited, that the elaborate procedures and safeguards incorporated in 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 constitutes a fair procedure which guards against arbitriness The approach the respondents seek was rejected in the **Maharashtra State Board Case** (supra) on the basis that the conduct of examinations is a highly specialized exercise requiring men possessing technical expertise and rich experience. The process has worked for many years and unless it is shown that the system is fundamentally flawed and there is a better system which may be used in place thereof, this Court will be reluctant to suggest a different and untested system, moreso because it does not posses the requisite technical expertise.

It was urged on behalf of the respondents that apart from the system the Council employed being in issue, the identity of the candidates suspected of collusion is in doubt. We have carefully considered the procedure set for handling suspected cases of cheating. It is quite clear to us the examination papers for suspected candidates are the ones among other documents, which were being looked at by each investigating team. The instructions to those groups, as pointed out earlier, are that upon completion of the investigation the examination sheets must be put back into a special envelope and forwarded to the next investigating authority. We opine that each examination script has the name of the candidate, and if not, some identification number or mark. Since the scripts are available to the investigators it cannot be said that the candidates concerned are not known or that the questioned results did not relate to them. It would appear to us that the handling of the examination scripts entails some measure of confidentiality. In view of what we have just stated we are satisfied that there can be no doubt as to the identity of the candidates whose results were under investigation.

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 than the examination scripts , and the reports of the markers and examiners? It would be naïve to expect that the headmaster of a school, or the candidates themselves will provide such evidence as would objectively show how the examination in issue was conducted if it was not given in the course of the examination. 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 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 judgment 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.

As regards the second prayer for an order of mandamus, Mr. Oraro for the appellant submitted that Ibrahim, J. erred in ordering the council to release the respondents results. In his view mandamus may only issue to compel an authority to perform a statutory duty but not to determine the decision in any given matter. Prof. Muma on the other hand submitted that all the respondents were asking for is that their examination results be released. Mr Oraro's response was short. He wondered what results are to be released. This issue, although argued at length, we think that it is merely academic. The Council released results, that the respondents did not meet the threshold for a certificate to be issued to them. It was common ground that the result which was cancelled was for chemistry. Upon cancellation of that result, each of the candidates remained with seven subjects for which they could not be graded. **Rule 9 (1)** of the Kenya National Examination Council. (Kenya Certificate of Secondary Education Examination) Rules 1998 (L.N. NO. 18 of 1998), as material provides:

"Candidates shall sit for at least eight subjects selected from the groups specified under rule 8 above;

And **Rule 9(2)** of the said Rules provides:

"9(3) A candidate who does not comply with the requirements specified in sub rule (1) shall not be awarded a certificate in the examination."

In view of the above rule mandamus could not properly issue. It is against the law to require an authority to do what is contrary to the law. Besides by ordering the council to release results, the superior court may have meant that a grade other than *"Y"* be awarded to each respondent which would mean that the court would have acted outside its powers by issuing orders of mandamus. Mandamus issues to compel performance of a public duty imposed by law. The law does not mandate the council to act against its rules. So, contrary to submissions by Prof Muma, that the council should have released the results of other subjects the council could not do so without breaching **rule 9,** aforesaid. Notwithstanding the fact that the recommendation made by the Management committee was to cancel the results for the affected subject namely Chemistry, all the respondent candidates having sat for eight subjects each of them did not qualify to be graded. Hence the cancellation of all the results. In view of the foregoing an order of mandamus was improperly granted.

Considering all the foregoing, we are of the view that this appeal has merit. In the result we allow it, set aside the decision of the High Court allowing the respondent's application dated 25th March 2009 and substitute therefor an order dismissing the respondents' application with costs. We award the costs of this appeal to the appellant. It is so ordered.

Dated and delivered at Nairobi this 10th day of December 2010

S.E.O. BOSIRE

…….
JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR