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KENYA NATIONAL EXAMINATIONS COUNCIL ACT

NO. 29 OF 2012

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KENYA NATIONAL EXAMINATIONS COUNCIL ACT

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SCHEDULE – CONDUCT OF BUSINESS AND AFFAIRS OF THE COUNCIL

NO. 29 OF 2012

KENYA NATIONAL EXAMINATIONS COUNCIL ACT

[Date of assent: 12th October, 2012.]

[Date of commencement: 19th October, 2012.]

An Act of Parliament to provide for the establishment, powers and functions of the Kenya National Examinations Council and the conduct of examinations; to provide for the repeal of the Kenya National Examinations Council Act, and for connected purposes

[Act No. 29 of 2012, Act No. 18 of 2014, Act No. 31 of 2015, Act No. 30 of 2016, Act No. 27 of 2017.]

PART I – PRELIMINARY

1. Short title

This Act may be cited as the Kenya National Examinations Council Act, 2012.

2. Interpretation

In this Act, unless the context otherwise requires—

“**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to education;

“**candidate**” means a person registered to take an examination conducted by or on behalf of the Council;

“**certificate**” means a document issued by the Council and designated as such showing results obtained by a particular candidate in an examination;

“**Chief Executive Officer**” means the chief executive officer of the Council appointed under section 14;

“**Council**” means the Kenya National Examinations Council established under section 3;

“**diploma**” means a document issued by the Council and designated as such showing results obtained by a particular candidate in an examination;

“**effective date**” means the date on which this Act comes into force;

“**electronic device**” includes a programmable calculator, mobile phone and other device as may be prescribed;

“**examination**” means an examination conducted under this Act by or on behalf of the Council;

“**examinations material**”, whether in print or electronic form, means—

- (a) an examination paper;
- (b) notes for the preparation of an examination paper;
- (c) instructions for the setting up of equipment or the preparation of instruments for an examination; or
- (d) any other document or material which is intended to form part of an examination paper or to enable an examination paper to be prepared,

but does not include examination papers from previous examinations or any other material which is legitimately published in order to assist candidates in any examination;

“**examination paper**” includes a question paper, examination instructions or the draft or copy of an examination paper or instructions in respect of an examination which has not been taken, and includes an electronic form thereof;

“**former Council**” means the Kenya National Examinations Council established under the repealed Act;

“**teacher training institution**” means an institution offering training for teachers but does not include a university;

“**offensive material**” means anything capable of causing injury, or temporary or permanent incapacitation of a person;

“**Technical and Vocational Education and Training Authority**” means the Technical and Vocational Education and Training Authority established under section 6 of the Technical and Vocational Education and Training Act (No. 29 of 2013);

“**Tribunal**” means the National Examinations Tribunal established under section 40B.

[Act No. 27 of 2017, s. 2.]

PART II – ESTABLISHMENT, POWERS AND FUNCTIONS OF THE COUNCIL

3. Establishment of the Council

(1) There is established a council to be known as the Kenya National Examinations Council.

(2) The Council is a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
- (c) borrowing money or making investments;
- (d) entering into contracts; and
- (e) performing all other acts or things for the proper performance of its functions under this Act which may lawfully be done or performed by a body corporate.

(3) The Council shall be the successor to the Council known as the Kenya National Examinations Council existing immediately before the commencement of this Act.

4. Composition of the Council

The Council shall consist of—

- (a) a Chairperson appointed by the President under section 5;
- (b) the Principal Secretary of the Ministry responsible for matters relating to education or a representative of the Principal Secretary;
- (bb) the Principal Secretary to the National Treasury or his representative;

- (c) the officer in charge of quality assurance and standards in the Ministry responsible for matters relating to education;
- (d) the Director of the Kenya Institute of Curriculum Development;
- (e) the Secretary of the Teachers Service Commission;
- (f) the following persons appointed by the Cabinet Secretary—
 - (i) one member to represent the interest of persons with disabilities;
 - (ii) one person to represent the post school technical and business training institutions in Kenya, including polytechnics;
 - (iii) one person to represent private sector involved with management of Education as the Cabinet Secretary may determine;
 - (iv) *deleted by Act No. 18 of 2014, Sch.;*
- (g) the Chief Executive Officer.

[Act No. 18 of 2014, Sch.]

5. Appointment and qualifications of Chairperson

(1) The Chairperson shall be appointed by the President.

(2) A person shall be qualified to be appointed as the Chairperson, if the person—

- (a) holds at least a masters degree from a recognised university;
- (b) has at least fifteen years experience in a senior position in the public service or as a practitioner in a relevant profession or industry; and
- (c) satisfies the requirements of Chapter Six of the Constitution.

6. Qualifications of members

To be appointed as a member of the Council, other than an *ex officio* member, a person shall—

- (a) possess at least a first degree from a recognised university;
- (b) have at least ten years experience in a senior position in the public service or as a practitioner in a relevant profession or industry; and
- (c) satisfy the requirements of Chapter Six of the Constitution.

7. Term of Office of Chairperson and members

The Chairperson and the appointed members of the Council shall serve for a term of four years, and shall be eligible for re-appointment for one further term.

8. Council may co-opt members

(1) The Council may co-opt not more than two members in order to benefit from any special skills as may be necessary for the better carrying out of the functions of the Council.

(2) A member co-opted under subsection (1) shall—

- (a) have no right to vote on any matter before the Council;
- (b) serve for such period as the Council may determine.

9. Vacation of office

(1) A member of the Council, other than an *ex officio* member, may at any

time resign from office, in the case of the Chairperson by notice in writing to the President, and in any other case to the Cabinet Secretary.

(2) A member of the Council may be removed from office, in the case of the Chairperson by the President, and in any other case by the Cabinet Secretary, if the Chairperson or member, as the case may be—

- (i) has been absent from three consecutive meetings of the Council;
- (ii) is convicted of a criminal offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding ten thousand shillings;
- (iii) is convicted of an offence involving dishonesty or fraud;
- (iv) is adjudged bankrupt or enters into a composition scheme or arrangement with his or her creditors;
- (v) is incapacitated by physical or mental illness or is deemed otherwise unfit to discharge his or her duties as a member of the Council; or
- (vi) fails to comply with the provisions of this Act relating to disclosure.

10. Functions of the Council

(1) The functions of the Council shall be to—

- (a) set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels;
- (b) 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;
- (c) confirm authenticity of certificates or diplomas issued by the Council upon request by the government, public institutions, learning institutions, employers and other interested parties;
- (d) issue replacement certificates or diplomas to candidates or diplomas to candidates in such examinations upon acceptable proof of loss of the original;
- (e) undertake research on educational assessment;
- (f) advise any public institution on the development and use of any system of assessment when requested to do so, and in accordance with such terms and conditions as shall be mutually agreed between the Council and the public institution;
- (g) promote the international recognition of qualifications conferred by the Council;
- (h) advise the Government on any policy decision that is relevant to, or has implications on, the functions of the Council or the administration of examinations in Kenya;
- (i) do anything incidental or conducive to the performance of any of the preceding functions.

(2) In the performance of its functions under subsection (1), the Council shall have powers to—

- (a) make rules regulating the conduct of examinations and for all purposes incidental thereto;

- (b) make rules regulating the confirmation of examination results and for purposes incidental thereto;
- (c) make rules regulating the conduct of issuance of replacement certificates or diplomas and for all purposes incidental thereto;
- (d) make rules regulating the conduct of issuance of certificates or diplomas and for all purposes incidental thereto;
- (e) withhold or cancel the results of candidates involved in examination irregularities or malpractices;
- (f) appoint any officer responsible for education or training, including heads of education and training institutions to assist in the administration of examination as may be prescribed by the Council in consultation with the Cabinet Secretary;
- (g) equate certificates issued by accredited foreign examining bodies with the qualifications awarded by the Council;
- (h) conduct examinations on behalf of foreign states or entities upon request by such states or entities;
- (i) conduct academic, technical and other examinations outside Kenya on request;
- (j) offer examination services and other advisory services relevant to examinations to private institutions in Kenya upon request by such institution and on such terms as the Council may determine;
- (k) invite such body in or outside Kenya, as the Council may consider necessary, to conduct on its behalf, academic, technical and other national examinations within Kenya, or to conduct these examinations jointly with the Council and to award certificates or diplomas to successful candidates in such examinations;
- (l) co-operate with such bodies, under paragraph (k), in the performance of its functions;
- (m) advise the bodies invited under paragraph (k) upon the adaptation of examinations necessary in Kenya and to assist any such bodies to conduct such examinations.

10A. Ranking of institutions of basic education

(1) The Cabinet Secretary shall, in every academic year, rank institutions of basic education that offer primary education or secondary education based on—

- (a) academic performance in national examinations; and
- (b) performance in co-curricular activities.

(2) For purposes of ranking under subsection (1)—

- (a) the Kenya National Examination Council shall submit to the Cabinet Secretary, data regarding the academic performance, in national examinations, of institutions of basic education that offer primary or secondary education; and
- (b) every County Director of Education shall submit the data regarding the performance, in co-curricular activities, of institutions of basic education that offer primary or secondary education to the Director-General for transmission to the Cabinet Secretary.

(3) The Cabinet Secretary shall, as soon as practicable after the receipt of the data referred under subsection (2), announce and publish the results and ranks of institutions as prescribed in subsection (1).

(4) The Cabinet Secretary may make rules for the purpose of ranking of institutions of basic education that offer primary or secondary education.

(5) Without prejudice to the generality of subsection (4) the Cabinet Secretary may provide for—

- (a) the form and method of categorization of institutions of basic education that offer primary or secondary education for ranking purposes;
- (b) the announcement and publication, of the results in national examinations and co-curricular activities, of institutions of basic education that offer primary or secondary education and their ranking;
- (c) the criteria to be used in ranking;
- (d) submission and management of data under subsection (3); and
- (e) any other matter that requires to be prescribed under this section.

(6) In this section, the words—

- (a) "County Director of Education"; and
- (b) "Director General",

have the respective meanings assigned to them under the Basic Education Act (No. 12 of 2013).

[Act No. 30 of 2016, s. 2.]

11. Powers of the Council

The Council shall have all powers necessary for the proper performance of its functions under this Act and in particular, but without prejudice to the generality of the foregoing, it shall have power to—

- (a) enter into association with such other bodies or organizations within or outside Kenya as it may consider desirable or appropriate and in furtherance of the purposes for which the Council is established;
- (b) offer services to any person, institution or foreign government upon such terms as the Council may from time to time determine; and
- (c) undertake any activity necessary for the fulfilment of any of its functions.

12. Conduct of business and affairs of the Council

(1) The conduct and regulation of the business and affairs of the Council shall be as provided in the Schedule.

(2) Except as provided in the Schedule, the Council may regulate its own procedure.

13. Committees of the Council and delegation

(1) The Council may establish such committees as it may deem necessary for the performance of its functions.

(2) The Council may either generally or in any particular case, delegate to any committee or to any member, officer, employee or agent of the Council, the exercise of any of the powers or the performance of any of the functions of the Council under this Act.

14. Chief Executive Officer

(1) There shall be a Chief Executive Officer of the Council who shall be appointed by the Council through a competitive recruitment process.

(2) The Chief Executive Officer shall hold office for a period of five years on such terms and conditions of employment as the Council, in consultation with the Salaries and Remuneration Commission may determine, and shall be eligible for re-appointment for one further term.

(3) The Chief Executive Officer shall be an *ex officio* member of the Council and shall have no right to vote at any meeting of the Council.

(4) The Chief Executive Officer shall be—

- (a) responsible for the day to day management of the Council;
- (b) responsible for the affairs and transactions of the Council, the exercise, discharge and performance of its objectives and functions, and the general administration of the Council;
- (c) the Secretary of the Council.

15. Qualifications of Chief Executive Officer

A person shall not be appointed the Chief Executive Officer unless that person has—

- (a) at least a masters degree, from a recognised university, in education or other field relevant to the mandate of the Council;
- (b) experience, of at least ten years, in—
 - (i) matters pertaining to education, training or research; and
 - (ii) policy formulation and procedures of government; and
- (c) proven leadership ability and integrity, and satisfies the requirements of Chapter Six of the Constitution.

16. Removal of Chief Executive Officer

(1) The Chief Executive Officer may be removed from office by the Council for—

- (a) inability to perform functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct;
- (c) bankruptcy; or
- (d) incompetence.

(2) Before removal under subsection (1), the Chief Executive Officer—

- (a) may be suspended from office by the Council;
- (b) shall be informed in writing of the reasons for the intended removal; and
- (c) shall be given an opportunity to put in a defence against any such allegations.

17. Staff of the Council

The Council may appoint such officers, agents and other staff as are necessary for the proper and efficient discharge of its functions under this Act, and upon such terms and conditions of service as the Council may determine.

18. The common seal of the Council

(1) The common seal of the Council shall be kept in the custody of the Chief Executive Officer, and shall not be used except upon the order of the Council.

(2) The common seal of the Council, when affixed to a document and duly authenticated, shall be judicially and officially noticed, and unless the contrary is proved, any necessary order or authorisation by the Council under this section shall be presumed to have been duly given.

(3) The common seal of the Council shall be authenticated by the signature of the Chairperson of the Council and the Chief Executive Officer:

Provided that the Council shall, in the absence of either the Chairperson or the Chief Executive Officer, nominate one member of the Council to authenticate the seal of the Council, in any particular matter, on behalf of either the Chairperson or the Chief Executive Officer, as the case may be.

19. Protection from personal liability

No member, officer, agent or staff of the Council shall be personally liable for any act or omission done or omitted in good faith in carrying out any of the functions of the Council under this Act.

20. Liability for damages

The provisions of section 19 shall not relieve the Council of the liability to pay compensation or damages to any person for any injury caused by the exercise of any power conferred by this Act.

PART III – FINANCIAL PROVISIONS**21. Funds of the Council**

(1) The funds of the Council shall consist of—

- (a) such moneys or assets as may accrue to or vest in the Council in the course of the exercise of its powers or the performance of its functions under this Act;
- (b) such moneys as may be payable to the Council pursuant to this Act or any other written law;
- (c) such gifts as may be given to the Council;
- (d) such moneys as may be appropriated by Parliament for the purposes of the Council; and
- (e) all moneys from any other source provided or donated to the Council.

(2) All the funds of the Council and the balance at the end of each financial year shall be retained by the Council for the purposes for which the Council is established and shall, for that purpose, establish a reserve account.

22. Financial year

The financial year of the Council shall be the period of twelve months commencing on the first day of July and ending on the thirtieth day of June in each year.

23. Annual estimates

(1) At least three months before the commencement of each financial year, the Chief Executive Officer shall prepare estimates of the revenue and expenditure of the Council for that year.

(2) The annual estimates shall make provision for all estimated expenditure of the Council for the financial year concerned and in particular, the estimates shall provide for the—

- (a) payment of the salaries, allowances and other charges in respect of members and staff of the Council;
- (b) payment of pensions, gratuities and other charges in respect of members and staff of the Council;
- (c) procurement of goods and services by the Council;
- (d) proper maintenance of the buildings and grounds of the Council;
- (e) maintenance, repair and replacement of the equipment and other property of the Council; and
- (f) creation of such reserve funds to meet future or contingent liabilities in respect of retirement benefits, insurance or replacement of buildings or equipment, or in respect of such other matter as the Council may deem appropriate.

(3) The annual estimates shall be approved by the Council before the commencement of the financial year to which they relate and, once approved, the sum provided in the estimates shall be submitted to the Cabinet Secretary for approval.

(4) No expenditure shall be incurred for the purposes of the Council except in accordance with the annual estimates approved under subsection (3), or in pursuance of an authorisation of the Council given with prior written approval of the Cabinet Secretary, and the Principal Secretary to the Treasury.

24. Accounts and audit

(1) The Council shall cause to be kept proper books and records of accounts of the income, expenditure, liabilities and assets of the Council.

(2) Within a period of three months after the end of each financial year, the Council shall submit to the Auditor-General, the accounts of the Council together with—

- (a) a statement of the comprehensive income and expenditure of the Council during that year; and
- (b) the financial position of the Council on the last day of that year.

(3) The accounts of the Council shall be audited and reported upon in accordance with the provisions of the Public Audit Act, 2003 (No. 12 of 2003).

25. Investment of funds

(1) The Council may invest any of its funds in securities in which for the time being trustees may by law invest trust funds, or in any other securities or banks which the Treasury may, from time to time, approve for that purpose.

(2) The Council may place on deposit, with such bank as it may determine, any moneys not immediately required for the purpose of the Council.

PART IV – OATH OF SECRECY, OFFENCES AND PENALTIES

26. Oath of secrecy

(1) The Council may require an officer, agent or staff performing the work of the Council or being engaged in the conduct of any examination or the handling

of any examination paper or material, to take and subscribe such oath of secrecy as the Council may prescribe.

(2) An officer, agent or staff who, having complied with the provisions of subsection (1), does or omits to do any act in contravention of the oath of secrecy, commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years or a fine not exceeding one million shillings, or to both.

27. Unauthorised possession of examination paper, material or information

(1) A person who, before or during an examination, has in his or her possession or under his or her control any examination paper or any part thereof, or any material or information purporting to relate to the contents of any paper or material for that examination, without lawful excuse, commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding ten years, or a fine not exceeding two million shillings, or to both.

(2) For purposes of proving an offence under subsection (1), it shall not be necessary for the prosecution to prove that the paper, material or information for the examination is real or false.

(3) A person who, negligently or wilfully, assists or causes any examination candidate to obtain or gain unauthorised possession of any examination paper, material or information or any part thereof, commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding ten years, or a fine not exceeding two million shillings, or to both.

28. Examination malpractices

Without limiting the generality of section 27, a person who—

- (a) before or during an examination, gives an examination paper or material to a candidate or another person without lawful authority;
- (b) discloses the contents of an examination paper or material to a candidate or another person without lawful authority;
- (c) makes a change in the original answer script of a candidate without lawful authority;
- (d) fraudulently replaces the original answer script of a candidate;
- (e) fraudulently alters the results, work or marks of a candidate;
- (f) fraudulently alters the examination number, photograph or other identification of a candidate; or
- (g) without lawful authority, alters the records of the Council with regard to an examination or examination results in relation to a candidate,

commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years, or a fine not exceeding one million shillings, or to both.

29. Loss or misuse of examination paper or material

A person who, having in his or her possession or under his or her control any examination paper, material or any information relating thereto, negligently or wilfully loses such examination paper, material or such information, or uses such examination paper, material or such information in a manner prejudicial to the proper and fair conduct of any examination, commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years, or a fine not exceeding one million shillings, or to both.

30. Damage or destruction to examination material or facilities

A person, who wilfully and maliciously damages examinations material or facilities, or any evidence that could have led to a conviction under this Act, commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding five years, or a fine not exceeding five million shillings, or to both.

31. Impersonation

A person who, for the purpose of an examination—

- (a) is not registered to take a particular examination but, with intent to impersonate, presents or attempts to present himself or herself to take the part of a candidate;
- (b) registers for an examination using a false name or identity; or
- (c) falsely uses a certificate, testimonial, signature, photograph or a document of some other person to represent that other person,

commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding two years, or a fine not exceeding two million shillings, or to both and shall, in addition to this penalty, be prohibited from taking an examination for a period not exceeding three years immediately after the commission of the offence.

(2) A person who is registered to take a particular examination but knowingly allows another person to take that examination on his or her behalf commits an offence and is liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding two million shillings and may in addition to this penalty, be prohibited from taking an examination for a period not exceeding three years immediately after the commission of the offence.

32. Copying at an examination

A candidate who, during an examination—

- (a) copies from the script of another candidate;
- (b) communicates with another candidate with intent to assist that candidate answer an examination question;
- (c) communicates with another candidate with intent to seek the assistance of that candidate in answering an examination question;
- (d) is in possession of a textbook, electronic device or material in the examination room without lawful authority;
- (e) copies from notes, electronic device or a textbook without lawful authority; or
- (f) receives external assistance without lawful authority,

shall be disqualified from taking the entire examination and if the person has already taken a paper at the examination, the paper shall be cancelled by the Council and may be prohibited from taking an examination for a period not exceeding three years immediately after the commission of the offence.

33. Possession of offensive material and disturbances at examinations

(1) A person who, at or near an examination venue or any other place appointed for an examination—

- (a) has in his or her possession any offensive weapon or other material or uses any offensive weapon or other material on any other person; or
- (b) acts or incites any other person to act in a disorderly manner,

for the purpose of disrupting the conduct of an examination or of harming, intimidating, assaulting or obstructing a candidate or any person involved in the conduct of the examination, commits an offence and is liable on conviction to imprisonment for a term not exceeding three years, or a fine not exceeding five hundred thousand shillings, or to both.

(2) If the offender under this section is a candidate, the Council shall, in addition to the penalty prescribed in subsection (1), cancel the entire results of the candidate and prohibit the candidate from taking an examination for a period of not exceeding three years immediately after the commission of the offence.

34. Presentation of forged certificate, etc.

A person who presents—

- (a) a forged certificate or diploma, result slips or statement of results; or
- (b) someone else's certificate or diploma, result slips or statement of results purporting it to be hers or his,

to a prospective employer or to an institution of learning with intent to gain employment or admission commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both.

35. Counterfeiting of certificates and diplomas

A person who counterfeits, for commercial purposes, a certificate or diploma issued by the Council commits an offence and is liable, upon conviction, to imprisonment for a term not exceeding ten years, or a fine not exceeding ten million shillings, or to both.

36. Disclosure of interest in examination or examination paper

(1) If a person engaged in the conduct of examinations or performing work connected with examinations is directly or indirectly interested in a private capacity in an examination or in any examination paper or information relating thereto or if the spouse, a child or parent of such person is a candidate in such examination, that person shall, as soon as practicable before the commencement of his or her duties in respect of such examination, disclose such interest to the Council or its nominee and he or she shall, unless the Council otherwise directs, cease to perform such duties.

(2) A person who contravenes the provisions of subsection (1) shall—

- (a) if the person is a staff of the Council, be subject to the Council's disciplinary process; or
- (b) if the person is an independent contractor, be liable to have the contract with the Council vitiated.

37. Request for information

(1) The Chief Executive Officer, or an officer deputed in that behalf by the Chief Executive Officer, may, in writing, request any person to furnish the Council with such information or to produce such documents or records as he or she deems necessary and relevant for the performance of the functions of the Council.

(2) A person who—

- (a) refuses or fails without reasonable cause, to comply with a request under subsection (1); or

- (b) in furnishing such information, makes a statement which he or she knows to be false,

commits an offence and is liable, on conviction, to a fine not exceeding thirty thousand shillings, or to imprisonment for a term not exceeding six months, or to both.

38. Council to keep information confidential

The Council shall keep information acquired under section 37 for its purposes confidential, and shall disclose such information only to the extent it considers necessary for the proper performance of its functions.

39. Improper disclosure of information

(1) No officer, agent or staff of the Council shall disclose information acquired under this Act except—

- (a) in the course of his or her duties under this Act; or
(b) with the written consent of the Council.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years, or to both.

40. Aiding and abetment of offence

A person who aids, abets, induces, incites or does an act in a manner that facilitates the commission of an offence under this Act, commits an offence and is liable, upon conviction, to the penalty prescribed under the respective section in relation to that offence.

40A. Offences by examination officers

A member, officer, agent or staff of the Council whose omission or commission leads to an examination irregularity commits an offence and is liable upon conviction, to imprisonment for a term not exceeding five years or a fine not exceeding five million shillings, or both.

[Act No. 27 of 2017, s. 3.]

PART IVA — THE NATIONAL EXAMINATIONS APPEALS TRIBUNAL

[Act No. 27 of 2017, s. 4.]

40B. National Examinations Appeals Tribunal

(1) There is established a Tribunal to be known as the National Examinations Appeals Tribunal.

(2) The Tribunal shall consist of—

- (a) a chairperson, nominated by the Judicial Service Commission who shall be an advocate of the High Court of Kenya of at least fifteen years standing;
- (b) two persons nominated jointly by the associations for the time being representing head teachers and principals in the country;
- (c) one person having at least ten years' experience in marking examinations; and
- (d) one person nominated by the Technical and Vocational Education and Training Authority.

(3) The nominating bodies under subsection (2) shall nominate and submit the names of at least two nominees, being one man and one woman, to the Cabinet Secretary for appointment.

(4) The Cabinet Secretary shall appoint the members of the tribunal by notice in the *Gazette*.

(5) A person shall not be eligible for appointment under subsection (4) if at the time of appointment the person is an employee of the Council or was an employee of the Council five years before the date of appointment.

(6) In making appointments under subsection (4) the Cabinet Secretary shall—

- (a) ensure that not more than two-thirds of the appointees are of the same gender; and
- (b) have regard to the principle of regional balance.

[Act No. 27 of 2017, s. 4.]

40C. Tenure

(1) The chairperson of the Tribunal shall serve for a term of four years and shall be eligible for reappointment for one further term.

(2) A Member of the Tribunal shall serve for a term of three years and shall be eligible for reappointment for one further term of three years.

[Act No. 27 of 2017, s. 4.]

40D. Remuneration

The members of the Tribunal shall be paid such allowances as the Cabinet Secretary may, in consultation with the Salaries and Remuneration Commission, determine.

[Act No. 27 of 2017, s. 4.]

40E. Vacancy in office of member

The office of a member of the Tribunal shall become vacant if the member—

- (a) resigns by notice in writing addressed to the Cabinet Secretary;
- (b) is convicted of an offence and sentenced to imprisonment for a term of at least six months without the option of a fine;
- (c) is absent from three consecutive meetings of the Tribunal without the permission of the Chairperson;
- (d) is adjudged bankrupt;
- (e) is convicted of an offence involving fraud, dishonesty or moral turpitude;
- (f) is unable, by reason of mental or physical infirmity, to discharge the functions as a member of the Tribunal;
- (g) is otherwise unfit or unable to discharge the functions of the office; or
- (h) dies.

[Act No. 27 of 2017, s. 4.]

40F. Sittings of the Tribunal

The Tribunal shall be *ad hoc* and shall sit at such times and in such places as the Tribunal may appoint.

[Act No. 27 of 2017, s. 4.]

40G. Quorum

(1) The Tribunal shall be properly constituted if at least three of the members of the Tribunal are present.

(2) The chairperson shall preside over all the meetings of the Tribunal and in the absence of the chairperson the members shall elect one member from amongst themselves to chair the Tribunal.

[Act No. 27 of 2017, s. 4.]

40H. Jurisdiction to hear appeals

The Tribunal shall consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council.

[Act No. 27 of 2017, s. 4.]

40I. Secretariat of the Tribunal

(1) The Cabinet Secretary shall designate a public officer serving in the Ministry responsible for matters relating to education to be the secretary to the Tribunal.

(2) The Cabinet Secretary may, in consultation with the secretary, designate such other public officers as may be necessary to assist the Tribunal in the discharge its functions under this Act.

[Act No. 27 of 2017, s. 4.]

40J. Appeals from decisions of the Council

(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 (1) shall be made by the parent or guardian of the minor.

(6) An appeal under subsection (1) shall be—

(a) in writing; and

(b) lodged with the Tribunal within a period of fourteen days from the date of the decision of the Council.

(7) The parties to an appeal lodged under subsection (1) may appear before the Tribunal in person or be represented by an advocate or any other person whom the Tribunal may permit to be heard on behalf of such party.

[Act No. 27 of 2017, s. 4.]

40K. Procedure of the Tribunal

(1) The Tribunal shall transmit a copy of the application made under section 40J and any other supporting documents to the Council within seven days of receipt of the application.

(2) In any proceedings under this Part, the Tribunal shall act without undue regard to technicalities and shall not be strictly bound by the rules of evidence.

(3) The Tribunal shall—

- (a) within thirty days from the date of receipt of the application determine an appeal relating to examination results in respect of national examinations conducted at primary school level; and
- (b) within sixty days from the date of receipt of the application determine an appeal relating to examination results in respect of national examinations conducted at secondary school level.

[Act No. 27 of 2017, s. 4.]

40L. Powers of the Tribunal

The Tribunal shall have the power to summon witnesses, take evidence on oath or affirmation and order the production of documents.

[Act No. 27 of 2017, s. 4.]

40M. Decision of the tribunal on appeal

(1) Upon the hearing of an appeal the Tribunal may—

- (a) confirm, set aside or vary a decision of the Council; or
- (b) make such other order that it may consider appropriate.

(2) The Tribunal shall communicate its decision to the parties in writing within seven days from the date of the decision.

[Act No. 27 of 2017, s. 4.]

40N. Enforcement of orders for costs

(1) Where the Tribunal awards damages or costs in any matter before it, it shall, on application by the person in whose favour the damage or costs are awarded, issue to him a certificate stating the amount of the damages or costs.

(2) A certificate issued under subsection (1) may be filed in the High Court by the person in whose favour the damages or costs have been awarded and upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such.

[Act No. 27 of 2017, s. 4.]

40O. Appeals to the High Court

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.

[Act No. 27 of 2017, s. 4.]

40P. Rules and procedures of the Tribunal

(1) The Tribunal shall make rules, within ninety days of the coming into effect of this Act, for regulating the practice and procedure for the Tribunal.

(2) Notwithstanding the provisions of subsection (1), the Rules regulating the practice and procedure of the Tribunal shall not provide for the payment of any fees by any of the parties to an appeal and shall prescribe forms and anything required to be prescribed under this Part.

[Act No. 27 of 2017, s. 4.]

PART V – LIMITATION OF RIGHTS AND FUNDAMENTAL FREEDOMS

41. Limitation on right to go on strike

(1) The right to go on strike guaranteed under Article 41(2)(d) of the Constitution is hereby limited under Article 24 of the Constitution only to the nature and extent contemplated under subsection (2).

(2) No person engaged in the management, organisation or administration of any national examination may go on strike during an examination period if to do so would, in the opinion of the Council—

- (a) compromise the integrity of such examinations;
- (b) compromise security information associated with such examination;
- (c) compromise the rights and fundamental freedoms of other persons engaged in such examinations; or
- (d) compromise the good order in the conduct of such examinations.

42. Limitation on right to access information

(1) The right to access to information guaranteed under Article 35 of the Constitution is hereby limited under Article 24 of the Constitution to the nature and extent contemplated under subsection (2).

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

- (a) compromise the integrity of any examination administered by the Council;
- (b) compromise the examination process; or
- (c) compromise the right to privacy of any individual.

PART VI – MISCELLANEOUS PROVISIONS

43. Council may require assistance from State organ or public entity

(1) The Council may require any State organ or public entity to provide such facilities and services of its employees as may be necessary to assist the Council in performing its functions or exercising its powers under this Act, and the State organ or the public entity shall provide accordingly.

(2) Any misconduct by an employee of any such State organ or public entity, during the service of the Council, shall be punishable by the State organ or the public entity, as the case may be.

44. Council may require assistance from Teachers Service Commission

(1) The Council may require the Teachers Service Commission to provide such services of persons employed or registered as teachers by the Commission as may be necessary to assist in the administration of examinations on temporary basis.

(2) The Council and the Teachers Service Commission shall develop a common code of conduct to regulate the conduct of persons employed under subsection (1).

(3) Any infringement of the code of conduct by a person employed under subsection (1) shall be punishable by the Teachers Service Commission.

45. Nullification of examination and investigations

(1) Where the Council is satisfied that there has been an irregularity in the course of any examination, the Council shall suspend or nullify such examination or any part thereof.

(2) Where the Council is satisfied that there is reasonable cause to believe that the examination results of any candidate have been obtained by irregular means, the Council shall nullify the examination results of such candidate.

(3) In the exercise of its powers under this section, the Council may conduct such investigations as it may deem necessary, and during such investigations, the Council shall withhold the examination results of any candidate pending conclusion of the investigations.

(4) In the course of investigations under this section, the Council may call for such information or the production of such documents as the Council may require, and within such period, in such place and from such person as the Council may determine, to assist in the investigations.

46. Imposition of penalty on institutions for examinations irregularity

Where more than two-thirds of the candidates at an institution which is registered to offer examinations are found to have acted contrary to the provisions of this Act, either before, during or after the examination, the Council shall prohibit such institution from organizing, supervising or acting as an agent of the Council in the conduct of an examination for a period determined by the Council.

47. Annual report

(1) The Council shall, within three months after the end of each financial year, prepare and submit to the Cabinet Secretary a report on its operations and activities for the immediately preceding financial year.

(2) Without limiting what may be included in the annual report, the annual report shall include—

- (a) the performance of the Council in the execution of its functions;
- (b) the audited financial report of the Council; and
- (c) such other information as the Cabinet Secretary may direct.

(3) The Cabinet Secretary shall cause the report to be laid before the National Assembly as soon as is reasonably practicable after the National Assembly next sits after the Cabinet Secretary has received the report.

48. Rules

(1) The Council may make rules generally for the better carrying into effect the provisions of this Act.

(2) Without limiting the generality of the foregoing, rules made under this Act may provide for the following—

- (a) conduct of examinations;
- (b) the nature and extent of examinations irregularity and the penalty thereof;

- (c) the determination and management of examinations;
- (d) equating of certificates including prescribing what examinations may be equated by the Council;
- (e) the terms and conditions of service, including pension and other retirement benefits of the staff of the Council;
- (f) measures for the discipline of the staff of the Council;
- (g) the financial procedures of the Council;
- (h) examination fees and other charges payable to the Council;
- (i) prescribe any other matter which requires to be prescribed under this Act.

(3) Despite paragraph (h) of subsection (2), no examination fees or other examination charges shall be levied from Kenyan citizens in respect of—

- (a) the Kenya Certificate of Primary Education Examination or its equivalent; and
- (b) the Kenya Certificate of Secondary Education Examination or its equivalent.

[Act No. 31 of 2015, s. 2.]

49. Repeal of Cap. 225A

The Kenya National Examinations Council Act is repealed.

PART VII – TRANSITIONAL PROVISIONS

50. Former Council to continue for two months

(1) The former Council shall continue in office for a period of not more than two months from the effective date as appointments are made to the Council and the former Council shall for all intents and purposes be deemed the Council appointed under this Act.

(2) Despite subparagraph (1), the former Council shall not, while in office by virtue of subsection (1), make any appointments to any office of the Council under this Act.

51. Assets and liabilities of former Council

(1) On the effective date, all the funds, assets and other property, both movable and immovable, which immediately before such date were vested in the former Council shall, by virtue of this section vest in the Council.

(2) On the effective date, all rights, powers and liabilities, which immediately before such date were vested in, imposed on or enforceable against the former Council shall, by virtue of this section, be vested in, imposed on or enforceable against the Council.

52. Reference to former Council

Any reference in any written law or in any document or instrument to the former Council shall, on and after the effective date, be construed to be a reference to the Council.

53. Proceedings of former Council

Any proceedings pending immediately before the effective date to which the former Council was a party shall be continued as if the Council was a party thereto in lieu of the former Council.

54. Annual estimates of former Council

(1) The annual estimates of the former Council for the financial year in which the effective date occurs shall be deemed to be the annual estimates of the Council for the remainder of that financial year.

(2) Any such estimates under subsection (1) may be varied by the Council in such manner as the Cabinet Secretary may approve.

55. Agreements, deeds, etc., of former Council

Every agreement, deed, bond or other instrument to which the former Council was a party or which affected the former Council and whether or not of such a nature that the rights, liabilities and obligations thereunder could be assigned, shall have effect as if the Council were a party thereto or affected thereby instead of the former Council, and as if for every reference therein to the former Council they shall be substituted in respect of anything to be done on or after the effective date.

56. Administrative decisions of former Council

The administrative decisions made by the former Council or by the Minister, as the case may be, which are in force immediately before the effective date shall, on or after such date, have force as if they were directions made by the Council or the Cabinet Secretary under this Act.

57. Staff eligible for re-appointment

(1) Any staff or officer, including the Chief Executive Officer, of the former Council immediately before the effective date shall, on that date become a staff or officer of the Council, or the Chief Executive Officer, as the case may be for their unexpired term, if any.

(2) Where a staff or officer of the Council, or the Chief Executive Officer has served their term as contemplated under subsection (1), such staff, officer or the Chief Executive Officer, as the case may be, shall be eligible for re-appointment under this Act.

SCHEDULE

[Section 12.]

CONDUCT OF BUSINESS AND AFFAIRS OF THE COUNCIL**1. Meetings**

(1) The Council shall meet not less than four times in every financial year and not more than four months shall elapse between the date of one meeting and the date of the next meeting.

(2) Notwithstanding the provisions of subparagraph (1), the Chairperson may, and upon requisition in writing by at least six members shall, convene a special meeting of the Council at any time for the transaction of the business of the Council.

(3) Unless three quarters of the total members of the Council otherwise agree, at least fourteen days' written notice of every meeting of the Council shall be given to every member of the Council.

(4) The quorum for the conduct of the business of the Council shall be seven members including the Chairperson or the person presiding.

(5) The Chairperson shall preside at every meeting of the Council at which he or she is present but, in his or her absence, the members present shall elect one of their members to preside, who shall, with respect to that meeting and the business transacted there at, have all the powers of the Chairperson.

(6) Unless a unanimous decision is reached, a decision on any matter before the Council shall be by a majority of votes of the members present and voting and, in the case of an equality of votes, the Chairperson or the person presiding shall have a casting vote.

(7) Subject to subparagraph (4), no proceedings of the Council shall be invalid by reason only of a vacancy among the members thereof.

2. Disclosure of interest by Council members

(1) If any member of the Council is directly or indirectly interested in any contract, proposed contract or other matter before the Council, and is present at a meeting of the Council at which the contract, proposed contract or the matter is the subject of consideration, that member shall, at the meeting and as soon as practicable after the commencement thereof, disclose the fact and shall not take part in the consideration or discussion of, or vote on, any questions with respect to the contract or the matter, or be counted in the quorum of the meeting during consideration of the same:

Provided that, if the majority of the members present are of the opinion that the experience or expertise of such member is vital to the deliberations of the meeting, the Council may permit the member to participate in the deliberations subject to such restrictions as it may impose but such member shall not have the right to vote on the matter in question.

(2) A disclosure of interest made under this paragraph shall be recorded in the minutes of the meeting at which it is made.

(3) A member of the Council who contravenes subparagraph (1) commits an offence and is liable to imprisonment for a term not exceeding six months, or to a fine not exceeding one hundred thousand shillings, or to both.

3. Execution of instruments

Any contract or instrument which, if entered into or executed by a person not being a body corporate, would not require to be under seal, may be entered into or executed on behalf of the Council by any person generally or specially authorized by the Council for that purpose.

4. Minutes

The Council shall cause minutes of all resolutions and proceedings of meetings of the Council to be entered in books kept for that purpose.
