

## Communication

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# Data Ethics in Kenya: Ministry of Education and National Exam Results

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**Abstract:** This paper analyzes Kenya's strategy of publicly announcing the National Exam results with all the subject's personal identifiers in place. As much as Kenya purports to be aware of, and to uphold the rights of individuals, this analysis reveals that the Ministry of Education is the prime violator of data ethics in Kenya. The paper suggests ways to uphold the Basic Rights of Kenyans and on the need to adhere to the Data Protections Act of 2019 as a basic requirement in handling student data both in school and at the institutional level.

**Keywords:** Data ethics; Exams; 8-4-4; KCPE results; KCSE results; Ministry of Education; Kenya; Constitution of Kenya; Data Protection Act.

The recently-released 2021 KCPE and KCSE exam results raise concerns in regards to specifically how they are released. The public/press release of national exam results with all personal identifiers in place is a contradiction of both the Constitution of Kenya (2010) and the Data Protection Act (2019). The Data Protection Act of Kenya, which became effective on 25<sup>th</sup> November 2019, was meant to serve two goals. First, it was based on and passed to effect Article 31 (c) and (d) of the Constitution of Kenya (2010) which guarantees every person the right to privacy (Republic of Kenya, 2019; Kenya Law Reports, 2010). Second, this Act was passed to regulate the processing and sharing of personal data by ensuring such activities meet ethical standards and thus protects the rights of data subjects and provides them with remedies to protect their personal data from unethical practices.

## 1 When do data violations occur?

During their tenure as students, both in the schools they attend and as candidates (with Kenya National Examination Council [KNEC]) data subjects generate personal data which should be handled with the utmost respect and confidentiality. However, exam results, which reflect the academic performance of a student and which are essentially their property, are shared on school notice boards, the press and social media platforms for all to see points (Advance Africa.com, 2022; Media Team, KNEC News 2022; Musau, 2022).

## 2 Who are the Data Violators?

The Ministry of Education (ME), schools and teachers, as the data controllers and processors, have, for almost the entire lifespan of the 8-4-4 curriculum, been unconstitutionally and unethically releasing national exam-results/data via all the major media outlets with all of the data subjects' personal identifiers in place (Advance Africa.com, 2022; Media Team, KNEC News 2022). In exam data, identifiers include the name, age, sex, index number, school, score in

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each subject and the total marks and grade. As recently as April 2022 (2021 KCSE) and March 2022 (2021 KCPE) when these national exam results were announced — which was at least two and a half years after the passage of the Data Protection Act, and almost eight years after the actualization of the Constitution of Kenya — the ME still released these results the traditional way: publicly with all the identifiers in place.

On the same token, schools in Kenya, as is their norm, posted these national exam results in their offices and on their notice boards for all to see and share. Data discretion is hardly observed, especially with the arrival of the results in schools. Schools are also known to share term exam results as well. On many school notice boards across the nation, student's *personal data* (marks for the three exams, average and position in class) are printed and pinned up in defined locations for all students and any other party to see. In both public and private classrooms across Kenya, the story is the same: a clear violation of the student's right to privacy. The public is not free from blame either as they take photos of national results pinned on school noticeboards and share on social media.

### 3 Why the Public Announcement of Examination Results?

So why would the ME, knowing the stipulations of both the Constitution and the Data Protection Act, still release national exam results this way? The obvious and simple answer to this question is that it is hard to go against tradition! Public announcement of national examination results, with all the identifiers in place, is how 8-4-4 results have always been released by the ME and by schools and no one has seriously complained about it! Secondly, given the competition between public and private schools there is pressure for results to be publicly released in detail to showcase the performance of mostly the private schools and thus attract business. Moreover, guardians and candidates that perform well don't seem to mind the fame either. Although it is appropriate to alert the public that the eagerly awaited results are ready, what is wrong is the public release of personal data with all the identifiers in place, without informed and written consent from either the students or their guardians, the legal owners of the data as per the requirements of the Data protection Act (Republic of Kenya, 2019, p 905).

### 4 Ethical Concerns

Several ethical issues arise from these exam results release strategies. The first issue is that of privacy which also touches on rights. Article 31 of the Constitution of Kenya stipulates that “every person has the right to privacy, which includes the right not to have... (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.” (Kenya Law, 2010, p. 44) Essentially, this Article, which is under the Bill of Rights, guarantees the privacy of persons in Kenya. Although 8-4-4 has been accused of ranking students, this does not require sharing a student's personal data with the other students in school let alone with the public/nationally. Ranking must provide privacy to the owners of the data and should therefore, as a minimum requirement, keep the owner of the data anonymous and their subject scores confidential. Consequently, the ME must undertake measures to uphold and maintain the anonymity and privacy of students so as to be in compliance with both the Constitution of Kenya and the Data Protection Act.

The second ethical issue is that of *harm*. As stated in Article 29 (d) of the Constitution of Kenya “every person has the right to freedom and security of the person, which includes the right not to be subjected to torture in any manner, whether physical or psychological” and thus harm should be avoided at all times (Kenya Law, 2010, p. 43). From the point of view of the candidate that has performed very well, it is a temporary moment of joy and pride to emerge as one of the top 100 candidates nationwide. But is all this publicity positive? If a candidate performed very well in their KCPE the whole nation is alerted to their academic potential and they may receive unsolicited attention. Come KCSE four years later, this same student is expected to outshine the rest and top the nation once more. One may wonder why those that top KCPE are nowhere to be found in the KCSE list four years later, a situation that warrants further research. Conversely, what of those that performed poorly? These students may experience hurtful comments and ridicule which may make them feel inadequate, like failures and thus cultivating feelings of low self-esteem and lack of self-confidence. Clearly, this kind of exam release is socially, emotionally and psychologically harming young Kenyans

and should cease. The ME, as well as school officials and class teachers engaged in displaying students results for all to see must consider the consequences of their actions, particularly on the student's wellbeing.

The third issue is *respect of intellectual and property rights* of both the candidate and their guardians. Academic institutions need to understand that the data they hold and share with other students, parents and the public is constrained by the *student's/parent's intellectual property rights and specifically by Article 40 (3) of the Constitution of Kenya* (Kenya Law, 2010, p. 50). Simply put, data produced by the student's cannot be assumed to belong to the school. It is personal data and belongs to the student and their guardian and consent must be received from them before sharing.

This brings us to the fourth ethical issue: *informed consent*. As a universal principle of ethics, informed consent requires that both the parents and the students, freely and voluntarily, without compulsion or threats from school teachers or heads, consent to their information being shared (Republic of Kenya, 2019, p. 905). When enrolling children in school, the application forms do not in any way disclose to the guardians how personal data generated by their children will be shared, at that moment or in the future. Thus, the schools, throughout the entire enrollment and teaching process, in both primary and high school, fail to disclose, and therefore fail to get, *written informed consent* from both the parent/guardian and from the student on matters data. Schools need to be aware that displaying internally-conducted school tests and exams results in class, or to, in any way, announce a student's performance to the other students is in complete violation of their right to privacy. Guardians and their children should never be caught unawares that their personal data is being shared in school (class, office or noticeboards) or nationally, via any media, without their written consent. Moreover, schools need to be aware that they can never, in any circumstance, be deemed to replace the authority of the parent/guardian, and therefore disclose a student's results.

## 5 Recommendations: What Should Happen Now?

First, as dictated in Article 21 (1) of the Constitution of Kenya it is a fundamental duty of the State and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights (Kenya Law, 2010, p. 34). Moreover, Article 73 (1) stipulates that the authority of the ME, Schools, teachers (in this case) and state officers (a) is a public trust to be exercised in a manner that (i) Is consistent with the purposes and objects of this Constitution; and (ii) demonstrates respect for the people (Kenya Law, 2010, p. 83). It is about time public officers and academic institutions observe these stipulations and deliver quality service. This means all institutions and individuals should respect, and thus ethically handle, personal data so that the dignity of the person is upheld. The ME and its subsidiaries need to be the epitome of upholding the Constitution of Kenya and should require schools to give parents/guardians their due respect and authority when it comes to deciding where and to whom their children's personal data should be shared to preserve their wellbeing.

Second, violators need to face the consequences. The Data Protection Act dictates that such violations should incur data processors and data controllers a penalty of 3 million KES or imprisonment for a term not exceeding 10 years (Republic of Kenya, 2019, p. 936). The government should be diligent in enforcing this as it is the only way to induce accountability and compliance across the nation. Third, the government should engage in sensitizing the public and all institutions on what data ethics entails. Schools and teachers need to understand that there are consequences suffered by those whose personal data has been shared; the most serious being identity theft which could ruin someone's life. Sensitization and awareness creation will eliminate the occurrence of such violations in the guise of ignorance.

Conclusively, adhering and upholding the law of the land in Kenya means that the release of academic data is within the prescribed standards. This will eliminate such unethical practices which will, if left unchecked, infringe upon and threaten the success of the Competency Based Curriculum (CBC). It is in our interest as Kenyans to participate in the nurturing of a just society. I therefore call upon concerned authorities to ensure the universal adherence to these provisions and their strict enforcement which will effectively facilitate the cessation of such unethical practices.

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