

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E235 OF 2022

(Before D. K. N. Marete)

SAMUEL KIBUTHI KAHIROCLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

This matter arose out of a Statement of Claim dated 20th December, 2021. It does not disclose any issue in dispute on its face.

The Respondent in a Respondent's Statement of Defence dated 31st August, 2022 denies the claim and prays that it be dismissed with costs.

The Claimant's case is that on 26th November, 2018, he was issued with a show cause letter that stated that he had caused delay of a Physics Practical Examination at St. Peters Thunguma by;

- (a) Failure to adequately prepare the laboratory the previous day.*
- (b) Reporting to the examination center late on the 23rd November, 2018.*
- (c) Reporting to the examination center drunk.*

The Claimant's other case is that vide a letter dated 29th November, 2018, he was invited to a disciplinary hearing scheduled on the 6th December, 2019. He was further interdicted vide a letter dated 10th December, 2018 that also informed him on the need to put up his defence. On 25th April, 2019, the Claimant wrote to the Respondent requesting for his application of a review to be conducted expeditiously. On 17th February, 2020, a review was held and the decision to dismiss him was upheld in a letter of 3rd June, 2020.

The Claimant avers that he is a law-abiding citizen who was keen on his reputation and thereby subjected himself to the disciplinary process and rebutted the charges preferred against him. These were false, malicious and outrageous.

The claimant further avers that the disciplinary process was marred with irregularities. He was subjected to intimidation by being arrested without charges. The outcome of the process was pre-determined. It is his case that the termination was done in breach of the provisions of the Employment Act, 2007, the TSC Act and his Terms and Conditions of Service. This is because;

- (a) *The reason(s) for the termination was not valid; KNEC which was in conduct of the examination did not make any complaint against our client.*
- (b) *There were no proper procedures as to the termination of our client's services.*
- (c) *His representations before the Disciplinary Board were not considered as the outcome had been pre-determined.*
- (d) *The disciplinary was biased, witch-hunt and meant to punish our client having successfully challenged the commission's decision in Nyeri ELRC No. 188 of 2017(sic.)*

The Claimant prays as follows;

- (i) *A declaration that the Claimant was unfairly, unlawfully and wrongfully terminated.*
- (ii) *An order for reinstatement of the Claimant without loss of benefits.*
- (iii) *Payment of consolidated salaries due to the Claimant from the date of termination until reinstatement.*
- (iv) *Compensation for unlawful termination equivalent to 12 months salary.*
- (v) *Costs of the claim.*
- (vi) *Interest of (iii) above at court rates.*
- (vii) *Any other relief that this court may deem just and fit to give.*

The Respondent's case is that its operations are governed by (but not limited to) the Constitution of Kenya, 2010, Teachers Service Commission Act, 2015 the code of Regulation for Teachers and the code of Ethic for Teachers.

The Respondents further case is that prior to the proceeding leading to this claim, the parties and a subsisting employment relationship that was governed by *inter alia* the provisions of the Basic Education Act, No. 14 of 2013, Teachers Service Commission Act, No. 20 of 2012, Code of Regulations for Teachers (Code of Regulation), Code of Conduct and Ethics for Teachers (COCE) compiled and published by the Respondent and as well as Administrative Circulars issued from time to time. The Claimant was thus bound to uphold the highest standards of professional ethics as a teacher based on the guidelines provided in the CORT, COCE and other administrative circulars as appropriate.

The Respondent's other case is that the Claimant was employed by the Respondent in 1996 and issued with TSC No. 357630 and was lastly posted at St. Peters Thunguma Secondary School as a Physics teacher. His services were terminated on 8th October 2019. Again, the Respondent raises this Memorandum of Defence without prejudice to its right to raise and argue an objection on a preliminary point of law thus: that the Claimants Claim is time barred by virtue of section 90 of the Employment Act and ought to be struck out.

The basic ingredients and foundation of the Respondent's case is that on or about 23rd November 2018, the Respondent through its agents received a report that the Claimant while a teacher St. Peters Thunguma Secondary School, neglected his duty as a Physics teacher to prepare and set up the examination room for physics practical (232/3), to be done on 23/11/2018 a day of examination as required. He also reported to the examination Centre late during the Physics practical and also

indulged infamous conduct in that he reported to the examination centre while under the influence of alcohol on 23rd November 2018 the examination date.

The Respondent's further case is that following the said report, the Respondent through its agents in Nyeri County, together with the officials from the Ministry of Education, promptly instituted a team to conduct an assessment regarding the conduct of examination in the afore mentioned school. The Panel accordingly proceeded for the assessment on 23rd November 2018 and considered both oral and written statements of the following; Muchoki Thairu Godfrey (examination centre manager), Lawi Kaberia (Centre Supervisor), Stephen K. Mwangi, (Invigilator), Peter Kimani and Richard Masiiori (Security officers). Based on the Report, the following observations were made;

- a. *The Claimant was found to be guilty of negligence of duty as per the Third Schedule TSC Act,*
- b. *The Physics practical examination (paper 232/2) had not started as scheduled since the Claimant arrived late,*
- c. *The Claimant appeared to be drunk and was smelling of alcohol at the time he reported to the examination centre,*

After a deliberate consideration of the veracity of the allegations and the evidence adduced in the aforementioned assessment, the panel recommended that the Respondent initiate disciplinary action against the Claimant.

The Respondent avers that it convened a disciplinary hearing at its Nyeri County offices on 6th November, 2018 where the Claimant was present and admitted as follows;

- (a) *The Claimant admitted that he had not adequately prepared the examination room for the Physics practical.*
- (b) *He admitted to have reported to the school at 8.25 am on the day of examination and*

(c) He accepted to have taken alcohol the previous night before the said examination date.

He was thereon interdicted upon deliberation of all the evidence adduced during the trial for a case of neglect of duty. He was further requested to prepare a written defence within twenty-one days in which he would be invited to defend his case.

On 19th February, 2019, the Respondent's Disciplinary Panel convened to hear the Respondent's case whereby he was given a chance to present his case and also cross-examine the witnesses present. This prompted the following findings;

- (a) The Claimant admitted he had not adequately prepared the examination room,*
- (b) He admitted the he reported to the school at 8.25 am on the examination day (sic.)*
- (c) The supervisor appeared as a witness and confirmed that he saw the Claimant staggering and unstable as he set up the for the examination and (sic.)*
- (d) The school principal further confirmed his statement and verbally corroborated that the Claimant was drank that morning and smelled of alcohol.*

Upon deliberation, consideration and evaluation of the statements on record and the evidence adduced at the disciplinary hearing and in view of the gravity of the Claimant's profession misconduct, a decision of dismissal from the teaching service and also removal from the Register of Teachers was arrived at. He was dully informed of this vide letter dated 21st March, 2019 which also informed him of his right to appeal within ninety (90) days of such decision.

The Respondent's case is that the Claimant lodged an appeal within time and was invited for a hearing on the same on 17th February, 2020 but failed to appear for such appeal hearing. The review committee went on to uphold the earlier determination of dismissal and communicated this to the Claimant vide a letter of 3rd June, 2020.

The Respondent in all conclude their case as follows;

- (i) *The Claimant was accorded a right to be heard in person at all the fora as can be discerned by the proceedings.*
- (ii) *Proper investigations were instituted into the matter before any decision was taken against the Claimant who was accorded an opportunity to be heard at that juncture,*
- (iii) *Indeed, the Claimant was accorded an opportunity to present his witnesses during the disciplinary hearing.*
- (iv) *The Claimant was invited to appear for the hearing of his review application, which he failed to attend,*
- (v) *The Claimant is under the Jurisdiction of the Respondent with regards to disciplinary of teachers pursuant to article 237 of the Constitution and the relevant provisions of CORT. Accordingly, KNEC did not have to make any complaint for the Respondent to conduct its legal obligations.*
- (vi) *The Respondent's investigation and subsequent disciplinary process accorded to the Claimant was purely objective and the same had no nexus to Nyeri ELRC No. 88 of 2017 as averred by the Claimant. He only seeks to mislead this Honourable Court in that regard.*

In view of this, it comes out clear that the dismissal of the Claimant from the teaching service was lawful and effected in accordance with the spirit and letter of the law, particularly the Code of Regulation where he was accorded a fair hearing and due process pursued.

This matter came to court variously until the 21st July, 2025 when it was heard *inter partes*.

At the hearing, the Claimant re-stated his case by adopting his Statement of Claim dated 20th December, 2021, his witness statement and Bundle of Documents of the same date. It is his case that this termination of employment was unfair and on grounds that he was late for twenty minutes and was

drunk on alcohol. He, however, on cross examination agreed that teaching is a regulated and structured profession guided by a Code of Regulations and that the TSC can assign other duties including national examination. This is besides agreeing to all other assertions by the Respondent which he seems to evade at re-examination.

The Respondent in defence brought in the testimonies of Lawi Kaberia Ibrahim and Lawrence Maina Kariuki, the exam supervisor and TSC officer and Sub County Director for Tetu and Nyeri Central within Nyeri County who thoroughly told the story of the event relating to the examination debacle and also the disciplinary process leading to the Claimant's dismissal.

The issue for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
2. Whether the Claimant is entitled to the relief sought.
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in their written submissions dated 5th September, 2025 posits that the termination from employment was strictly unlawful whereas the Respondent is of a contrary view.

The Claimant on trial adopted his witness statement and reiterated that he was a diligent teacher who had served for twenty-two (22) years prior to the termination of his employment. They further reiterate the reasons for termination and a narration of the event all the up to the dismissal and the disciplinary committee's upholding of the decision to terminate at appellate level.

The Claimant further submits that his termination from employment was unlawful and in breach of the express provisions of the Employment Act, 2007, the TSC Act, and the Terms and Conditions of Service as follows;

- (a) The reason(s) for the termination was not valid; KNEC which was in conduct of the examination did not make any complaint against our client.*
- (b) There were no proper procedures as to the termination of his services.*
- (c) His representations before the Disciplinary Board were not considered as the outcome had been pre-determined.*
- (d) The disciplinary was biased, witch-hunt and meant to punish him having successfully challenged the commission's decision in Nyeri ELRC No. 188 of 2017.*

Again, the disciplinary process was marred with irregularities and intimidation as he was arrested and incarcerated without any charge(s) being preferred against him. While in police custody, his blood samples were illegally extracted or taken without justifiable cause and without his consent. The said police was later to release him when they realized that he was not drunk. He submits that he was subjected to a flawed process whose outcome was pre-determined and intended to whitewash the illegalities meted upon him.

The Claimant on cross-examination and re-examination further affirmed and submitted that he had completed preparing the exam room the previous day and only ran late for 20 minutes because of a mechanical problem involving his case which he had duly communicated to the school principal. This 20-minute lapsed did not in any way jeopardize the examinations as it was a reason that had not been foreseen.

The claimant in a narration of the Respondent's case submits that their three witnesses reinforced their respective cases by adopting their witness statements. It was his testimony that on the material date of

the physics practical examination, he and the school principal went to school to collect examination papers. The exam was to start at 800 hours and the claimant was absent from the station. It was his further testimony that attempt to reach were futile. He ultimately reported after 800 hours and exhibited an irregular walk and smelled of alcohol.

The witness stated that the laboratory had not been prepared but on cross-examination, the witness contradicted the report dated 23rd November, 2018 and the minutes of 6th December, 2018 both of which acknowledged that the Claimant had communicated with the school principal and indicated that he was on his way. Besides, in Dw1's statement at paragraph 11, they stated that the laboratory had not been prepared at all whereas the reports and the minutes clearly indicate that it was some items that were missing but did the lab had been prepared. The claimant further submits that these contradiction in the evidence of RW1 points out to a witness who had been coached to lie but could not hold the lies together and this casts doubt on his evidence and particularly that he was drunk on the material day and morning.

Another failure of the evidence of the Respondent comes out in the testimony of RW2. This is on their averment that the Respondent's disciplinary procedure was proper. However, on cross-examination, the witness justified that it was himself, Mr. James Nganga and Mary Kamunya who conducted the initial evaluation and recommended disciplinary action and the institutional of legal proceedings by the police. The witness also confirmed that this trio formed the panel who sat to hear the case on 5th December, 2018, a clear case of conflict of interest. This is beside a confirmation that in some instances, exams have been delayed due to natural circumstances.

Lastly, the Claimant faulted the testimony of RW3 on the role and justification of the Respondent in the process of the Respondent's termination of the employment of the Claimant. This notwithstanding, the witness acknowledges that there are instances when examinations delay. Again,

she noted that the representation of the Claimant explaining why he delayed in reporting to the examination centre was taken into account while dismissing him.

The Claimant further faults the termination of his employment for failure to observe the provisions of section 45(2) of the Employment Act, 2007 on unfair termination. This comes out thus;

A termination of employment by an employer is unfair if the employer fails to prove-

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason –

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

c. that the employment was terminated in accordance with fair procedure.

It is their case that an employer exercises their right to terminate the contract of an employee where there is a valid reason or reasons that touching on the grounds of misconduct, poor performance, or physical capacity.

The claimant further submits that there were three reasons cited for unlawful termination. They included failure to adequately prepare and set up the examination, reporting to the examination late and reporting to the examination under the influence of alcohol. This Court will take notice that indeed the Claimant prepared the examination room as per the testimonies of the Respondents. What the Respondent seems to cite is failure to adequately prepare the examination room. We submit that adequate preparation is relative and must be viewed in contrast to its consequences.

To this, the claimant answers as follows;

- (i) The Respondent acknowledged that physics practical examination is a one-day affair and in schools where the number of students was high, the rooms would be prepared after every practical session.
- (ii) There is no documentation of any kind indicating that the exams were to start at 800 hours.
- (iii) The evidence adduced by the Respondent's witnesses were their personal pronouncements and these also acknowledged that there were several instances when the exams delayed for various reasons including transportation and the vagaries of nature.
- (iv) The testimony on no preparation of the lab is contradicted by the narrative of the document produced in evidence which merely indicate inadequate preparation.
- (v) No evidence is adduced as itemization on what was not done to deem the preparation inadequate.
- (vi) The claimant adequately explains that his delay in getting to the examination centre on time was due to a mechanical problem and this was communicated to the school principal as is evidenced the documents.
- (vii) This is a natural phenomenon which cannot be met with dismissal and deregistration as a teacher more so having served for 18 years.
- (viii) This is vindictive.
- (ix) The case and evidence of drunkenness is a frame-up and cannot be true. This, as earlier set out lead to arrest of the claimant by the police upon arrival at the examination centre. While in custody, blood samples were illegally extracted to establish whether he was under the influence of alcohol but was released on ground that there was no offence disclose against him.
- (x) This amounted to intimidation and was clearly intended to coerce the claimant into submission.
- (xi) The act of terminating the employment of the claimant on ground of drunkenness even after the police had given him a clean bill of health speaks volumes about its illegality.

- (xii) The entire exercise by the Respondent was a scheme intended to punish the Claimant for reasons only known to them. There was no complains from KNEC who is in charge of examinations.
- (xiii) There is no evidence that the learners were affected or even the results of the exam compromised in any way by the inaction by the Claimant.

The Claimant further submits that his termination of employment was bereft of fair procedure in that the composition of the panel members of the initial investigating process and the disciplinary hearing were the same and mixed-up. The Respondent's witness, RW2 at cross-examination testified that it was himself, Mr. James Ng'ang'a and Mary Kamurua who conducted the evaluation and recommended disciplinary action and institution of legal proceeding by the police. This witness further confirmed that this trio also formed part of the panel who sat to hear the disciplinary case on 6th December, 2018, a clear case of conflict of interest and bias in the proceedings. The three individuals having recommended the disciplinary process against the Claimant could not purport to sit at the disciplinary hearing on 6th December, 2018 and come-up with a finding that the Claimant had a case to answer. This renders the process as irregular, unprocedural, biased, unfair and unlawful.

Again, the evidence of RW3 failed to establish that the Claimant was invited to the hearing of the appeal against his dismissal. The witness did not come out clear as to why the letter dated 15th January, 2020 inviting the Claimant to the appeal hearing was not signed by herself as author. There was no evidence either that this was delivered to the Claimant. An attempt to explain that this was because it was a file copy was not made any better by the witnesses was not able to explain the decision dated 3rd June, 2020, which was also a file copy and authored by herself was signed. It comes out clear that whereas the Claimant was entitled to appear before the review panel, there is no indicator that he was ever invited to attend these proceedings and that the decision of the review panel was made ex-parte.

The Claimant in the penultimate submits that the process of his termination of employment was flawed and tainted with irregularities for its bias composition and failure to invite him to the appeal hearing. On this, the Claimant seeks to rely on authorities **of Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR** and **Joseph Mwaniki Nganga v United Millers Limited [2022] eKLR** where the courts applied the requirement of sections 41 and 43 of the Employment Act, 2007 on failure to demonstrate the validity and fairness of the reason(s) for termination and also that the termination was conducted in accordance with fair procedure.

The Respondent in their written submissions dated 4th September, 2025 espouses a case of fair termination of the employment of the Claimant by the Respondent and seeks to buttress this by relying on of **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another** which emphasizes on the place of the parties in bringing out a case of termination of employment.

The Respondent further submits in reiteration on their case that the Claimant through and through admitted a case of not adequately preparing the examination room besides a reporting late for the examination as well as having taken alcohol the night preceding the examination. Moreover, they submit that the Claimant was subjected to a fair and lawful disciplinary procedure as illustrated in their case and their elaborate written submission on the matter.

This notwithstanding, the contradiction of the Respondent case as illustrated in the case and submissions of the Claimant cast a shadow on the lawfulness of the termination on the employment of the Claimant. From the onset, this court is taken through evidence that the lateness of the Claimant did not in any way distract the physic practical examination at St. Peter's Thunguma Secondary School as

set out. The exam took place, albeit late and was carried out fruitfully with no complaints from the learners or the KNEC who are the national managers of examination at that level.

The evidence of the Claimant and also the documentary evidence of the Respondent indicate that the delay in the arrival of the Claimant was occasioned by a mechanical fault on his car which was reported to the school principal ahead of time. Coupled with the fact that the Claimant arrived at 825 hours and not 800 hours as was expected, this cannot have been inordinate considering the reasons for lateness was an act of nature and beyond the control of the Claimant. In any event, the Claimant argues and submits that these practical exams take the whole day and are set and scheduled on a need-by-need basis. No evidence, documentary or otherwise has been tendered by the Respondent to indicate that the exam must of necessity have started at 800 hours.

The Claimant further submits that he has had a long stint of service spanning 22 years with the Respondent and the decision by the disciplinary panel of the Respondent to dismiss him and deregister him from the teachers' register are too severe a punishment and not commensurate with the offence, if at all, committed. This was harsh and vindictive in the circumstances.

The Claimant further submits a case of bias on the part of the constitution of the disciplinary panel that heard his case. This is because the three individuals who investigated, established and recommended case of disciplinary action and institution of legal proceeding by the police are the same combination that formed a panel to hear his case on 6th December, 2018. The Claimant rightly argues and submits that these were conflicted and should not have participated in any further disciplinary trials relating to this case. This amounted to being a judge in their own cause and outrightly tramples the rule against bias as espoused in the latin maxims: *nemo judex in causa sua and audi alteram partem*.

Moreover, the Claimant rubbishes the allegation that he reported to work drunk. He disowns the allegations of being drunk, staggering and smelling of alcohol and submits that this was a frame-up intended to destroy his career. It is his case that he was arrested on arrival and subjected to illegal and humiliating blood tests to establish drunkenness that was later released when the police realized that no offence had been disclosed against him. He deems the entire saga or arrest and recommendation for disciplinary process a witch-hunt that was orchestrated against him by the Respondent for challenging the commission's decision in Nyeri ELRC No. 188 of 2017. This was biased and unlawful *in toto*.

Lastly, the Claimant submits that he was not invited to the review panel for his case despite agitating for the same. The evidence of the Respondent on his invitation letter dated 15th January, 2020 is not concrete or credible in that the letter is not signed. There is no evidence whatsoever that this letter was delivered to him. The argument and evidence that the letter was not signed because it was a file copy is not corroborative as there is evidence of a signed copy of another letter dated 3rd June, 2020 was signed yet this was also a file copy. The Claimant's case at review was heard and determined in his absent and therefore making the termination process a fuss and illegality.

The Claimant's case overwhelms that of the Respondent. This is because of various irregularities and anomalies outlined in their case and submissions as above. I therefore find a case of unlawful termination of employment. This answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to the relief sought. He is. Having successfully traversed a case of unlawful termination of employment, he become entitled to the relief sought.

In finality, I must add that this matter mirrors the same situation this Court had in authorities of **Peter Kinyua Mugo vs Teachers Service Commission [2022] KEELRC 13180 (KLR) (31 October 2022)**

(Judgment) where the facts and circumstances of the case bordered on a termination of employment based on examination supervision inadequacies. Here, this Court was treated to a contextualization of law and justice. This is the same in the present case.

Again this is echoed in the authority of **David Kimathi M’Ithinji vs Teachers Service Commission [2022] KEELRC 13086 (KLR) (31 October 2022) (Judgment)** where like in the instant case, the complainant teacher put in a case of the punishment being oppressive bearing in mind the circumstances of his case. It was their case that the sentence of dismissal and or termination from employment was excessive, harsh and draconian in the circumstances. Does this ring a bell?

I am therefore inclined to allow the claim and order relief as follows;

- (i) A declaration be and is hereby issued that the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
- (ii) The Claimant be and is hereby reinstated to employment without loss of salaries, emoluments, rank and promotion.
- (iii) The Claimant is ordered to report back to work on 26th February, 2026 at 800 hours.
- (iv) Twelve (12) months compensation for unlawful termination of employment.
- (v) The commissioner for labour be and is hereby ordered to, with the involvement of the parties compute the amounts payable under (iii) above
- (vi) The costs of the claim shall be borne by the Respondent.
- (vii) Interest at court rates from the date of this judgment of court till payment in full.

Delivered, dated and signed this **25th** day of **February** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Kafuna instructed by Kairu Mbutia Law LLP Advocates for the Claimant
2. Mr. Sitima C/O Teachers Service Commission for the Respondent.