



**Shikonde v Teachers Service Commission & 2 others (Cause  
35 of 2021) [2023] KEELRC 761 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 761 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 35 OF 2021  
JW KELI, J  
MARCH 23, 2023**

**BETWEEN**

**JOSEPHAT SHIKONDE ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL EXAMINATION COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant, a teacher and employee of the 1<sup>st</sup> respondent brought the instant claim dated September 28, 2021 upon dismissal from employment seeking the following reliefs:-
  - (a) A declaration that the dismissal of the claimant from employment was unfair and for no valid reasons.
  - (b) An order directed against the 1<sup>st</sup> respondent immediately reinstate claimant to his former position as principal unconditionally with full benefits from the date of interdiction on December 10, 2018 to the date of payment together with interest.
  - (c) Damages for unfair dismissal
  - (d) Costs of this suit
  - (e) Any other or further orders this honourable court may deem fit to grant.
2. The claimant in addition on the May 10, 2022 filed his witness statement dated April 25, 2022 and that of Charles Lisusta his 2<sup>nd</sup> witness of even date and the claimant's further list of documents dated May 5, 2022. The claimant had also filed documents under notice of motion dated February 4, 2019.



3. The 1<sup>st</sup> respondent filed reply dated March 22, 2019 to the statement of claim together with bundle of documents.
4. The respondents further filed witness statement by Joan Alulu dated March 19, 2019, witness statement of Catherine Morogo Kertich dated April 5, 2019, witness statement of Benedette Wekesa dated March 22, 2019 and supplementary list of documents dated April 3, 2019 and received in court on the April 15, 2019.
5. On amendment of the claim the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were joined as parties. They entered appearance through the office of Hon Attorney General and filed response to the claim which was dated January 19, 2022 and received in court on the January 21, 2022.
6. The 1<sup>st</sup> respondent filed amended reply to the amended claim which was dated February 11, 2022 and received in court on the February 16, 2022 together with supplementary list of documents dated February 11, 2022 and the bundle of documents.

### **Hearing On 22<sup>nd</sup> September 2022**

7. The claimant's case was heard in open court on the September 22, 2022. The claimant's witnesses of facts were:-
  - (1) Josephat Shikonde (CW1)
  - (2) Charles Lisutsa (CW2)

#### **8. Claimant's Evidence**

- (1) Witness statement of CW1 dated April 25, 2022 filed in court on the May 10, 2022 adopted as evidence in chief.
- (2) Documents under list of documents dated May 5, 2022 marked as ( exhibits C-1 to 44)
- (3) Amended statement of claim filed in court on the October 26, 2022 .
- (4) Witness statement of Charles Lisutsa dated April 25, 2022 adopted as evidence in chief.

#### **The 1<sup>st</sup> Respondent's Evidence**

9. The defence case was part heard on the same date of September 22, 2022 with the following witnesses of facts:-
  - a. Joan Alulu RWI who testified on oath and adopted her witness statement
  - b. On October 6, 2022 1<sup>st</sup> respondent called Benedette Wekesa RW2 who testified on oath and adopted her witness statement
  - c. On November 1, 2022 3<sup>rd</sup> witness (RW3) Catherine Morogo Kertich testified on oath and adopted her witness statement .

#### **10. The 1<sup>st</sup> Respondent's Evidence**

- (a) Witness statement of Joan Alulu RWI dated March 19, 2019 as evidence in chief.
- (b) D -exhibit 1 – copies of biology exam paper 231/3
- (c) Witness statement of Benedetta Wekesa dated March 21, 2019 and filed in court on April 15, 2019.



- (d) List of documents dated March 20, 2019 produced as ( D- exhibits 2-7) respondents.
- (e) Annexed reply to the Claimant’s annexed statement of claim filed February 15, 2022.
- (f) Witness statement of Catherine Morogo Kertich ( RW3) who adopted witness statement dated April 5, 2019 and filed on April 15, 2019 as evidence in chief.
- (g) (D exhibits 8-15)under list of documents dated February 11, 2022.

**11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ Case**

They did not call witness to produce any evidence.

**Claimant’s Case In Summary.**

- 12. The claimant challenged the dismissal from employment of the 1<sup>st</sup> respondent on allegations of having abetted examination malpractices in the 2018 KCPE examinations while deployed as the center manager at Shikokho Secondary School. The letter of dismissal was dated May 5, 2019.
- 13. The claimant challenged the dismissal and sought for orders of declaration that his dismissal was unfair and for reinstatement to his employment without loss of benefits. The grounds for challenging the dismissal were as follows ( as summarized on his submissions to court):-
  - (a) There were no valid reasons for the dismissal.
  - (b) The dismissal having been on allegations of examination irregularities did not comply with the procedure outlined in the Kenya National Examination Council Act and the KNEC ( handling of examination irregularities ( rules) 2015.
  - (c) The claimant was not subjected to a fair disciplinary process. The evidence was as summarized above being testimonies of CW1 and CW2 and their written witness statements and C-exhibits 1-44.

**1<sup>st</sup> Respondent’s Case in summary**

- 14. The respondents case was that on diverse dates in month of November, 2018 including 5, 12<sup>th</sup> and 19<sup>th</sup> the claimant allegedly facilitated the sneaking out and photocopying of KCSE 2018 question papers of Biology , Physics and Mathematics to be answered by teachers. That answers to the mathematics exam paper were sneaked out and given to the candidate MS, LV and BV. That the claimant in his capacity as the center manager for 2018 KCSE examinations further failed to report to the relevant authority the 3 hour delay in returning the mathematics and chemistry examinations scripts in breach of the code of conduct and ethics for teachers.
- 15. The 1<sup>st</sup> respondent stated that there was sufficient reason to believe the claimant breached the TSC Act, code of regulation for teachers as well as the code of conduct and ethics for teachers. The 1<sup>st</sup> respondent stated that the claimant was subjected to disciplinary process as outlined under the code of regulation for teachers before dismissal.
- 16. The 1<sup>st</sup> respondent produced evidence marked D-exhibits 1-15 and further called witness of facts being RW1,RW2 and RW3 in their defence as well as citing the relevant regulations applicable to the teachers.



## Written Submissions.

17. After the closure of defence the court issued direction for filing submissions. The claimant's written submissions drawn by Emily and Associates were dated December 21, 2022 and filed in court on the December 23, 2022.
18. The 1<sup>st</sup> respondent's written submissions were drawn by Patrick Mulaku and dated January 31, 2023 and filed in court on the February 10, 2023. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents written submissions were drawn by Gilbert Tarus, senior state counsel for Attorney General and dated November 23, 2022 and filed in court on the November 30, 2022.

## Determination

### Issues for determination.

19. The claimant identified the following issues for determination:-
  - a. Whether there were valid reasons for the claimant's dismissal
  - b. Whether the 1<sup>st</sup> respondent complied with the procedure outlined in the Kenya National Examination Council Act and KNEC( Handling of examination irregularities) Rules 2015
  - c. Whether the claimant was subjected to a fair disciplinary process prior to the dismissal.
  - d. Whether the claimant is entitled to the reliefs sought
20. The 1<sup>st</sup> respondent identified the following issues for determination:-
  - a. Whether the claimant was dismissed on valid grounds
  - b. Whether the claimant's dismissal was procedural
  - c. Whether the claimant is entitled to reliefs sought
21. The 2<sup>nd</sup> and 3<sup>rd</sup> identified as sole issue for determination to be whether the suit discloses any reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
22. The court having heard the case and received evidence from the parties was of the considered opinion that the issues placed before the court for determination by the parties were as follows:
  - (a) Whether the suit discloses any reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
  - (b) Whether there were valid reasons for dismissal.
  - (c) Whether there was procedural fairness before the dismissal .
  - (d) Whether the claimant was entitled to reliefs sought.

### Whether the suit discloses any reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

23. This issue was only identified by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Through counsel they submit that under their reply to amended claim paragraph 13 they pleaded the claim does not disclose any reasonable cause of action against them. That order 2 rule 15 of the *Civil Procedure Rules* 2010 gives power to court to strike out pleadings which do not disclose any reasonable cause of action and relied on decision in *D.T Dobie & Co (K)Ltd v Muchina*[1982] KLR as follows:- 'reasonable cause of action



with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claimant's prayer..."

24. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that the claim is one of unfair dismissal by the 1<sup>st</sup> respondent. That the claimant in cross-examination admitted he had no issue with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. There was no reply to the said response by the claimant. The court, having examined the reasons for dismissal, found that the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondents were necessary parties to provide information as to whether or not there were examination irregularities as stated by the 1<sup>st</sup> respondent. The claimant stated that the conduct of the examination was the mandate of the 2<sup>nd</sup> respondent and if there were irregularities as stated, they ought to have the information. The claimant cited the provisions of the Kenya National Examination Council (handling of examination irregularities) Rules 2015 which elaborate the role of the 2<sup>nd</sup> respondent in dealing with examination irregularities. Applying the *DT Dobie* case, the court finds that the facts of the case made the 2<sup>nd</sup> and 3<sup>rd</sup> respondents necessary parties despite not being employers of the claimant. The court declines the invitation to have the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondents struck off from the claim.

#### **Whether there were valid reasons for the dismissal.**

25. The letter of dismissal dated May 9, 2019 stated the reasons for the dismissal of the claimant as follows:-  
‘ 1. You facilitated sneaking out and photocopying of 2018 KCSE examination papers for biology 231/1 on November 12, 2018, physics 231/1 on November 19, 2018 and mathematics 121/1 on November 5, 2018 to be answered by teachers. Mathematics 121/1 was sneaked back and given to candidates Misa Edith index No 3715011055, Lavenda Lakwane index No 37615911956 and Brian Visiwa index No 3715011057 in room 3 on November 5, 2018. 2. You failed to report to the relevant authority a 3-hour delay in returning mathematics 121/1 and chemistry 233/1 examination scripts to the examination container on November 5, 2018 while you were the centre manager Shikokho examination centre.’
26. Section 43 of the *Employment Act* provides for proof of reason or termination as follows:
- (i) In any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so the termination shall be deemed to have been unfair within the meaning of section 45.
  - (ii) The reasons or reasons for the termination of a contract are the matters that the employer at the time of termination of contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
27. Section 45 of the *Employment Act* states:-
- (i) No employer shall terminate the employment of an employee unfairly.
  - (2) 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
    - (c) that the employment was terminated in accordance with fair procedure.’



28. Section 45 (4) of the *Employment Act* reads:-‘1. A termination of employment shall be unfair for the purpose of this part where :-
- (a) the termination is for one of the reasons specified in section 46 or (b) it is found out in all the circumstances of the case the employer did not act in accordance with justice and equity in terminating the employment of the employee”.
29. Section 45 (5) *Employment Act* provides:- ‘whether it is just and equitable for an employer to terminate the employment of an employee and for the purposes of this section, a labour officer or the industrial court shall consider:-
- (a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handing of appeal against the decision.
  - (b) the conduct and capability of the employee upto the date of termination.
  - c) the extend to which the employer has complied with any statutory requirements.....
  - (d) The previous practice of the employer in dealing with the type of circumstances which led to the termination.”
30. The court will apply the foregoing provisions of the law in determining whether the reasons for the dismissal of the claimant from employment by the 1<sup>st</sup> respondent were valid.

### **Claimant’s Submissions**

31. The claimant submits that the reasons for dismissal were not valid as follows:-
32. There was no evidence that the claimant facilitated the sneaking out and photocopying of biology paper 231/1 on November 12, 2012, mathematics paper 121/1 on November 5, 2018. That as per C exhibit 10 the examinations went on well. That RW2 visited the school to monitor exams on November 6, 2018 and did not make a report on the alleged irregularities. That it was absurd she did not raise issue in the register on the irregularities apparently reported the previous day. That there was no report made to the claimant or RW2 or the 2<sup>nd</sup> respondent of exam irregularities as provided under KNEC Act and the Rules 2015. RW1 confirmed at disciplinary hearing and to court she never saw the claimant facilitate the sneaking in or photocopying, she also confirmed she did not see what was written on the alleged paper that a certain learner had. That the biology paper produced in court was 231/3 and not 231/1 which was done on the 16th November 2018 and there was no evidence it came from Shikokho secondary school. That according to C-Exhibit 16 (official results)the official school index No was 37615011 and the candidates numbers ran from 001 to 193. The index numbers of the students under the dismissal letter were Misa Edith index No 3715011055, Lavenda Lakwane index No 37615911956 and Brian Visiwa index No 371501105.

### **1<sup>st</sup> Respondent’s Submissions**

33. The 1<sup>st</sup> respondents submits that to achieve high threshold and to protect the interests of learners, the 1<sup>st</sup> respondent and the claimant entered into a contractual agreement founded upon mutual trust and obligations. The claimant’s contract of employment was governed by his letter of appointment, the *Teachers Service Commission Act*, the code of regulations for teachers, the code of conduct and ethics for teachers as well as administrative circulars and polices issued by the respondent from time to



time. That section 33 (1) of the Teachers Service Commission Act proved that, “ The commission may, subject to the regulations made under this Act, take disciplinary action against any person registered as a teacher under this Act”. That clause 21 of the code of conduct and ethics provides that, ‘a teacher shall evaluate learners honestly based on their performance”. And that “ a teacher shall ensure that internal and external examinations are conducted fairly and without cheating”.

34. That the allegations faced by the claimant in his interdiction letter was that he failed to ensure either by commission or otherwise that external examinations, this being the Kenya Certificate of Secondary Education examinations, which are held in higher regard were conducted fairly and without cheating contrary to clause 21 of the code of conduct and ethics. This indeed constitute a valid reasons to subject the claimant through the disciplinary process. Regulation 140 (b) (i) and (ii) proves that “ the commission may take disciplinary action against a teacher who commits any of the following offences, professional conduct but not restricted to negligence of duty and lateness to duty.” Further , on account that the claimant, in his capacity as the center manager, is alleged to have failed to report to the relevant authority a 3 hours delay in returning the mathematics and chemistry examination transcripts to the examination container on November 5, 2018 contrary to regulation 140 (b) (ii) of the code of regulation for teachers, warranted the respondent to take disciplinary action against him. The claimant indeed during the investigations and as well as in in the cause of the hearing hereof admitted to this delay/breach.
35. That the claimant in his official capacity as a center manager, negligently performed his duties in that:-
- a. The claimant condoned and abetted KCSE malpractices by allowing Kevin Muchalwa TSC/579664 and Ibrahim Angura TSC/549141 to operate from a rented premise to enable them work on mathematics 121/1 on November 5, 2018 questions and sneak them back to candidates while he was the center manager Shikokho examination center contrary to KNEC manual of KCSE examination 2018 and KNEC Act 2012 part (iv).
  - b. The claimant neglected his duty by allowing sneaking out and photocopying of 2018 KCSE examination question papers for biology 231/3 on 12.11.2018 , physics 232/1 on 19/11/2018 and Mathematics 121/1 on 15/11/2018 to be answered by teachers. Mathematics 121/1 was sneaked back and given to candidates Misa Edith Index No. 37615011055, Lavenda Lwkane Index No. 37615011056 and Brian Visiwa Index No. 376150110057 in room NO. 3 on 5.11.2018.
  - c. The Claimant allowed school textbooks for Geography, Biology and Agriculture to be taken to the rented premises on 20.11.2018 to enable teachers answer KCSE examination questions for the candidates.
  - d. The Claimant contravened KNEC rules and regulations by making several mobile phone calls on 20.11.2018 to Kevin Muchalwa TSC/579664 who was not involved in examination administration when examinations were on going while he was the center Manager.
36. That following the allegations facing the Claimant, the Respondent had reasons to believe that the actions of the Claimant amounted to breach of the aforementioned provisions of the law and thus warranted disciplinary action. Evidence collected during the investigations stage buttressed by the evidence adduced during the disciplinary hearing confirmed that indeed there was reasons to subject the claimant to disciplinary hearing. Consequently , and pursuant to the hearing held by the respondents’ disciplinary panel on 18<sup>th</sup> March, 2019, the Claimant was dismissed by the Respondent from service on account of being found culpable of the allegations leveled against him.



## Decision on validity of the reasons for dismissal

37. The Claimant denied the reasons were valid and in his cross examination the following were the findings:-
- (a) He was the exam center Manager as per appointment letter of 17<sup>th</sup> September, 2018
  - (b) The claimant's role was to take overall responsibility and ensure candidates adhere to exam regularities and for exam material not to leave examination room.
  - (c) The Claimant denied there was report of exam irregularities. The claimant relied on C Exhibit 10 to demonstrate the examinations were monitored by the 2<sup>nd</sup> respondent and RW2 and no exam irregularities were recorded. No report was ever produced of the alleged exam irregularities.
  - (d) The Claimant confirmed he had teacher Joan Alulu in the center as invigilator and the said Joan is alleged to have made report to TSC Human Resources Office. The Claimant denied there was a report made on exam irregularities at the sub county office and denied knowledge of such report. ( The said report was not shown to the witness).
  - (e) The Claimant admitted he was issued with a show cause letter on exam malpractice at his center on 26<sup>th</sup> November, 2018 ( page 54) of claimant's bundle ).
  - (f) The Claimant stated he responded to the show cause letter at page 56 of his bundle . He was called to receive letter on 26<sup>th</sup> November, 2018. The Claimant admitted he was in charge of the biology paper KCSE 2018 as per the center Manager.
  - (g) That the biology paper was one of the papers administered as per the timetable.
  - (h) The code of the Biology paper was : Paper 1 231/1, paper 2 231/2 and paper 3 231/3 done on different dates. the court found that the 1<sup>st</sup> Respondent produced Biology paper 231/3( respondent's supplementary list of 3<sup>rd</sup> April 2019 )and not 231/1 cited in the dismissal letter.
  - (i) That Biology paper 3 was scheduled to be done on 16<sup>th</sup> November, 2018 at 8.00 am to 9.45 am.
  - (j) The Claimant confirmed content of interdiction letter on the exam irregularities allegation.
38. On charge of delay in returning exam scripts, Claimant reinstated his response that the driver had gone to repair tyre and picked him late. The claimant told the court it was not his responsibility to make a report he will be returning exam scripts late. The Claimant told the court he delivered the exam scripts within time by 3 pm which was what was required hence no delay. The Claimant said he did not write the minutes hence his position was correct.
39. The Claimant denied intimidating Joan Alulu to write affidavit retracting the accusation and told the court Joan gave him the affidavit ( page 103 of Claimant's documents). The Claimant agreed he was bound by TSC code of ethics for teachers and it had disciplinary control over him. The Claimant admitted TSC had no control over release of exam results.
40. On re-examination the Claimant told the court the exam results had been released at time of 2<sup>nd</sup> interdiction letter of 31<sup>st</sup> January, 2019. That the supplementary document biology paper did not indicate it was for Shikokho Secondary school. That according to exam timetable biology paper 231/3 was done on the 16<sup>th</sup> November, 2018. The Claimant told the court he picked the exam paper on 16<sup>th</sup> November 2018 in the morning accompanied by 2 security officers at the container of Kakamega sub-



county Director of Education. He was escorted to the center by the 2 Security officers. The Claimant told the court he was not able to access exam material 4 days before the exam. That physics paper was done on the 19<sup>th</sup> November 2018. That he was not shown the alleged physics and Maths papers alleged to have been facilitated. The Claimant told the court he never received any communication from KNEC on any malpractice in any paper or candidate. That results came out for all students ( exhibit 16 were the original results of the school) .

41. The Claimant was dismissed at 51 years and was to retire at 60 years.
42. CW2 Charles Lisutsa on cross examination confirmed he was a supervisor from 5<sup>th</sup> November to 20<sup>th</sup> November 2018. CW2 told the court on 20<sup>th</sup> November, 2018 there was a team from the ministry of Education and others who visited the office and alleged there was malpractice in exam center. They were told to write statements and relieved of supervision Exams which were ongoing . CW2 told the court the Security Personnel were under KNEC guidelines to report to him of exam malpractice. He denied he was notified of the malpractice on 20<sup>th</sup> November 2018 or made a report.
43. CW2 confirmed he was dismissed for aiding and abetting and had a case at Kakamega. CW2 denied intimidating Joan(RW1) who had made complaint on the malpractices. CW2 stated that the said affidavit by Joan withdrawing complaint was not raised in Nairobi proceedings.

#### **Defence evidence**

44. RW1 was Joan Alulu. RWI on cross-examination told the court she could not recall when she went to Kakamega and could not recall the name of office where she recorded the affidavit. RWI told the court she was told by her mother, father, and husband people went looking for her . RWI told the court no one approached her. RWI told the court she did not report the alleged threats to the police. RWI denied it was Mr Kioko of TSC who told her to write the affidavit on 29<sup>th</sup> November, after hearing at Kakamega. RWI told the court she did not have the produced exam paper ( supplementary by Respondents). RWI told the court she had not seen the said exam paper before she wrote her statement and there was nothing to show it was for Shikokho Secondary school . RWI told the court on 5<sup>th</sup> November, 2018 she reported exam malpractices at TSC Malinya office to one officer Benedette Wekesa. That at the school she had seen the supervisor bring in Photocopy papers and giving to the learners . That she was in Room 3. RWI told the court she did not take the alleged photocopied papers from the students in her capacity as invigilator. RWI told the court she confirmed the said papers were for mathematics but she did not take them. RWI, later told the court on being asked what papers she gave the security officers, that she took papers from some of the students and gave out. The students had gone out and they came with the papers. RW1 told the court it was her duty to inform security of student going out of exam room for escort but she failed to do that hence no one escorted the students. RWI told the court the Security Officer threw the papers she gave him into the latrine. RW1 admitted she did not inform Benedette she allowed the students to leave the exam room unaccompanied, did not inform her the students came back with exam material which she took, she did not inform Benedette she had given security the material she had allegedly taken from the students. She did not inform Benedette that the security officer had thrown the material to the toilet. RWI told the court that she had not seen the answer sheets for the 3 questions the claimant was accused of having assisted learners on 5<sup>th</sup> November, 2018. RWI was not interdicted.

#### **On re-examination**

45. RWI told the court that it was the Claimant who took her to Kakamega to record the affidavit in place near Equity which could not recall. That she was not in a position to take papers brought in by CW2 as he was her supervisor. That learners were allowed to leave the examination room. That she took the



- exam papers which the learners came in which and submitted to security. That it was RW1 herself who told the security officer to throw the papers to the Pit latrine. RW1 said she did not engage in exam malpractices. RW1 told the court she did not report the alleged threats as her counsel told her it was only hearsay. The court found RW1 was the only eye witness of the alleged malpractice.
46. RW2 was Benedette Wekesa who told the court the biology practical was only paper retrieved on 20<sup>th</sup> November, 2018 and the paper was done on 16<sup>th</sup> November 2018. The same was retrieved after the paper had been done. RW2 told the court the paper was not retrieved from house within the compound and had no such evidence. RW2 confirmed she received report of exam malpractice on the 5<sup>th</sup> November 2018 and informed immediate supervisor. RW2 had no record of exam malpractice communication from her office. RW2 told the court at page 43 ( Claimant’s bundle EXHIBIT 10 ) was record of persons who had visited to monitor the exams, they were from different departments and she was one of them. RW2 confirmed she was at the school on 6<sup>th</sup> November , 2018 and did not encounter malpractice . That at the time she had received report of Joan . That she talked to the principal in the office. RW2 told the court the report of Joan was the basis of letter of interdiction of 31<sup>st</sup> January, 2018 and also the disciplinary process conducted . That the allegations were the same taken to TSC Headquarters.
47. RW2 confirmed the allegations included Physics 232/1 maths 121/3 and specific index numbers of candidates. RW2 gave the index numbers as follows:-  
Edith 3715011055  
Lavenda 376159111956  
Brian 37150111057
48. RW2 confirmed they were the students assisted in the exams. RW2 was shown exam results of the said 3 students. RW2 told the court Physics paper code has 232 . RW2 was shown results of the 3 students and did not know whether there were results for physics. RW2 told the court it was not security in charge of movement of learners in and out of classroom but the center manager . RW2 relied on report by Joan . RW2 confirmed the school code was 3761 5011. RW2 confirmed each school had unique code and results of the 3 students were released. RW2 agreed the role of TSC and KNEC to manage exams was corroborative. RW2 confirmed there was no communication by TSC to KNEC about exam malpractice at Shikokho secondary school. RW2 told the court they need not inform KNEC of disciplinary of teachers on exam malpractice. RW2 told the court Physics paper code has 232 . RW2 was shown results of the 3 students and did not know if there were results for physics. RW2 told the court it was not security in charge of movement of learners in and out of class room but the center manager . RW2 relied on report by Joan.
49. RW2 on the delay charge told the court there was no specific motor vehicle attached to the school and the claimant was sharing with other schools. RW2 told the court they explained at briefing on 6<sup>th</sup> November 2018 the printing and return. RW2 told the court she did not indicate the delay in the tool ministry. RW2 told the court she did not present evidence of delay at the disciplinary hearing. RW2 told the court the returns and picking time was recorded and she did not receive complaints from the center( Malinya Police Station ) of late arrival of exam papers. RW2 confirmed Kelvin Muchalwa was not involved in the exam administration. RW2 was silent on being asked if other teachers were restricted from visiting the center. RW2 told the court the said teachers in the houses where the alleged material was found were reinstated and were in service. On re- exam the RW2 told the court it was not necessary that malpractice be recorded in the monitoring register. That at page 16 of the Respondent’s bundle the Claimant stated there was delay. RW2 stated in the interdiction letter there was no mention



of physics paper but maths. RW2 told the court Joan indicated in her room students with indexes 57, 56 and 55 were issued with photocopied papers and were same in the interdiction letter.

50. RW3 Catherine Mworogo Kertich on cross examination told the court that the exam papers scripts were not availed at the disciplinary hearing. That the investigation report she referred to in her witness statement were the minutes of the County Disciplinary panels which was relied on at the disciplinary hearing at the headquarters. RW3 told the court they did not produce what she called the investigation report. RW3 confirmed it was the subcounty director of education who Released the exam paper and received the scripts and no complaint of late returns had been received from the sub county director. RW3 confirmed that Joan ( RW1) recanted her evidence in finding (page 34 of amended response) where it was recorded Joan recanted her statement and alleged she had not seen clearly what the supervisor carried and stated they were control sheets. RW3 told the court the recanting /denial of Joan was not credible. RW3 told the court at exam center security was ensured by Security officers supervisor, school principal or center manager. RW3 admitted no witness was called at the hearing was as a police officer deployed as security from the center. RW3 admitted there was no report before court to KNEC on exam irregularities at the said exam center. RW3 was aware the alleged students received exam results and the school received the exam results. RW3 confirmed that the panel report at page 60 did not have findings but only recommendations. RW3 confirmed that the teachers specifically named in the letter of interdiction were transferred and were in service in other schools.
51. In Re-examination RW3 told the court the County disciplinary hearing was an investigations meeting and the Claimant was present. That during the hearing the actual exam scripts were not presented.
52. The court took time to analyze the evidence of the parties and was of the opinion that there were no valid reasons for the dismissal. The court was guided by provisions of section 45(2) of the Employment Act on the validity of the reasons to wit:- Section 45 of the Employment Act states:-

‘(i) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fail to prove

(a) that the reason for the terminations valid

(b) that the reason for the terminations is fair reason

(i) related to the employees conduct, capacity or compatibility or

(ii) based on the operational requirements of the employer

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

Section 43 of the employment act places the burden of proof of the validity of the reasons for termination of the employment on the employer.

53. In the opinion of the court the genesis of the process leading to termination of Claimant’s employment was the report by Joan Alulu ( RW1) to Madam Wekesa (RW2). The court found evidence that RW1 did not prove content of alleged papers she saw with the supervisor and admitted later they were control sheets. The court found it absurd that upon confiscating what she called exam cheat, she gave it to a security officer in this case a police officer and instructed the officer to dispose the evidence in pit latrine and having destroyed the evidence proceeded to report to her boss the said exam malpractice



without any iota of evidence. The said police officer was never called as a witness. RW1 admitted in her report she never disclosed having confiscated papers and destroyed them. It was her word without any witness or documentary evidence that the employer used to bring charges of exam malpractice. The register of monitoring of the exam(C-EXHIBIT 10) at the center was produced and no incident was recorded. The alleged exam scripts according to RW3 were never produced at the disciplinary hearing. RW3 stated that the minutes of the county panel was the investigation report. At page 20 of the said minutes(R-exhibit3) RW1 stated she confiscated mathematics paper and gave the security officer to throw away. No issue of Pit latrine was mentioned. The court found there were other invigilators in the center who stated they had not seen any malpractice and none reported at the center. ( page 27 of original response) Kevin Muchalwa told the County team ( page 24 of Original response) that the exam papers found in his room were given for filing after the exam and were ones which had remained. RW1 at page 28 - 29 of amended defence stated a learner had left the class and when back looked restless. That she found he had a paper but she could not confirm the writings which she gave security. RW1 further stated there were 3 other learners working on papers being students index 55,56,57 who she reported to the supervisor. The court found contradiction in evidence of RW1. During cross examination, RW1 said she never witnessed the supervisor give learners photocopied papers. There was evidence of release of exam results for the alleged students and of the school and no report had been made to KNEC on exam malpractice. KNEC was the 2<sup>nd</sup> Respondent and did not support the claim of exam irregularities or produce any evidence. The respondent produced as evidence biology paper 231/3 yet in the dismissal letter it stated 231/1. The said paper did not indicate it was from the alleged exam center. The court found the charges of exam malpractice leading to dismissal of the claimant were based on sinking sand being the allegations by Joan Alulu. The court was not surprised that she recanted her allegations at the disciplinary hearing. There was no proof of any threat as alleged and the RW1 admitted she had not been approached directly by the claimant or CW2 to withdraw the complaint.

54. On the charge of exam scripts return delay the court found that there was no complaint by the sub-county Director of Education who disbursed and received exam papers and the claimant having relied on shared motor vehicle there was no justification of the charge. TSC admitted it was KNEC which has mandate on exams and TSC only helped by providing its employees to administer the exam. The claimant was accused of having violated KNEC regulation without any iota of credible evidence of the malpractice having occurred at the exam center and this was confirmed by release of the exam results for all the students at the center. The 1<sup>st</sup> respondent relied on the county panel minutes to support charge of the delay which the claimant denied. Without corroborative evidence of the charge of delay the court further found the minutes recorded by the employer cannot form basis of a valid reason to justify the charge. There was no report of malpractice of delay by 1<sup>st</sup> Respondent to KNEC or complaint by the incharge of receiving the exam transcripts.
55. The court finds and determines the reasons given for the dismissal do not meet the threshold of valid reasons under section 45 (2) of the Employment Act. The court further finds that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the claimant. The 3 teachers alleged to have assisted the students were all cleared and transferred. The act of dismissing the Claimant was grossly unfair and discriminatory.

#### **Whether there was procedural fairness**

56. The Claimant challenged procedural fairness.



### **The Claimant's submissions**

The regulatory framework for discipline of teacher is The Teachers Service Code of Regulations for Teachers 2015 hereinafter referred to as the CORT. It provides for the process of interdiction under Regulations 147 . Regulation 146 provides for investigations as :-

146. . Investigation of Allegations.

- (1) The commission shall upon receiving an allegation touching on a teacher's Professional misconduct institute investigations either directly or through its agents.
- (2) An investigation under this regulation shall where the allegation is made against a teacher other than a Head of the Institution be instituted by the :-
  - (a) Board of Management of the respective educational institution, acting as an agent of the Commission;
  - (b) County Director in an institution where there is no functional Board of Management, by constituting a team of not less than three technical officers, or
  - (c) Heads of institution, in consultation with the boards of management as the case may be, and the county director, jointly where the allegations made relate to a teacher in an institution other than the one the teacher is stationed.
- (3) where an allegation is made against a head of institution
  - (a) the County director shall institute investigations in liaison with the board of management and
  - (b) the County director or his representative shall constitute a team of not less than three technical officers to institute investigations where there is no board of management or in the case of a primary educations institution.
  - (c) Where an allegation is made against a head of institution or a teacher in an institution other than the one the head of institution or a teacher is stationed.
    - (a) Both boards of management , in consultation with the County director may jointly institute investigations and
    - (b) The County director or board of management in whose jurisdiction the teacher in question is stationed shall lead the investigation process.
- (5) The head of institution or the teacher under investigation shall not be a member of the investigating panel where the head of institution or teacher is the subject of investigations.



- (6) The investigating panel shall, upon investigation, accord the head of institution or a teacher a fair hearing during the investigations process which shall include being:-
  - (a) Presumed innocent until proven that he has a case to answer
  - (b) Informed of the allegations, with sufficient details to answer it
  - (c) Given at least seven days to prepare a defence
  - (d) Given an opportunity to appear in person before the investigation panel unless his conduct makes it impossible for the investigation to proceed in his presence
  - (e) Present when the witnesses are being interviewed by the investigation panel
  - (f) Warned that any incriminating evidence may be used against him during the disciplinary proceedings and
  - (g) Given an opportunity to adduce and challenge any adverse evidence.
- (7) Where a minor is involved in the investigation, the panel shall take precaution to protect the rights of the minor.
- (8) The investigation panel shall, upon completing the investigation compile a written report in regard to the teacher's disciplinary status and shall present the report to the Board the County Director and Secretary.
- (9) The Board of management or head of institution or any other agent shall, in conducting the investigations liaise with the County director's office for the purpose of offering technical advise.
- (10) Where the report of the investigation panel disclose that an offence has been committed, the Board of Management or the County director or the Secretary shall-
  - (a) Where necessary, issue an administrative warning in writing
  - (b) Where a teacher 's misconduct is as result of a medical condition, recommend to the Commission Secretary for approval of any lave or further direction as the case may be; or
  - (c) Interdict the teacher using the Letter of interdiction set out in the Thirty Fourth Schedule.



- (11) The Commission or an officer acting under its direction may under direct investigation into any allegation and may recommend the interdiction of a teacher in accordance with these Regulations.
  - (12) An officer who undertakes or participates in an investigation of an offence, shall neither preside nor sit as a member of the disciplinary panel determining the same.
57. The Claimant contends that the 2<sup>nd</sup> Respondent herein, failed to comply with Regulations 146(3)(a)&(b),5(b)(c),8 and 10(c) in respect of :-
- (a) There was no investigations panel instated to investigate the allegations .
  - (b) The Board of management was not involved in any investigations involving the Claimant.
  - (c) The Claimant was not given the specific details of the allegations e.g
    - (i) No details of how he sneaked the papers from the examination rooms where they were opened from
    - (ii) No details of where he photocopies the papers
    - (iii) Do details of how he sneaked the papers back
  - (d) The Claimant was not ever invited to be present when witnesses are being interviewed by the investigating panel;
  - {e} The Claimant was not granted a minimum of 7 days to prepare a defence to the allegations.
  - (f) There was no written Report prepared by the investigation panel and presented to the Board of Management of Shikoko Secondary School prior to the Claimant’s interdictions.
  - (g) The panel report did not inform the interdiction of the Claimant.
58. The claimant submits that dismissal of the claimant from his employment fails both the procedural and substantive test. It was unfair and was not done in accordance with fair procedure. And relied on the case of CMC Aviation Limited v Mohammed Noor [2015] eKLR where the court of appeal stated that:-

“unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract”.

That the disciplinary process and subsequent dismissal having been founded on a flawed process, it follows that the claimant’s dismissal from employment was unfair and void ab initio for failure to comply with the Regulation 146 of the Code of Regulations for Teachers 2015.



### (c) Failure to give reasons for dismissal of the Claimants Appeal

The Claimant appeal was never subjected to a hearing nor was he given reasons for dismissal contrary to his legitimate expectation nor was he given reasons why the same was dismissed.

#### 1<sup>st</sup> Respondent's Submissions

59. The 1<sup>st</sup> respondent submits that:-

60. The Claimant was granted an opportunity to appear in person during the disciplinary hearing. He was present in person throughout the proceedings held on 18.3.2019. The Disciplinary Committee upon review of the evidence adduced before it, the defense statements of the Claimant, the statements of the relevant witness, the oral testimony adduced, and the relevant regulations arrived at the decision to dismiss the Claimant based on the overwhelming evidence for violation of the Code of Regulations for Teachers. The decision of the panel was duly communicated to the Claimant.

61. (Appeal)

The Claimant, being dissatisfied with the decision of the Commission, notified the Respondent of his intent to appeal the decision to dismiss him and duly exercised his right of appeal by making an application for review vide the letter dated 5<sup>th</sup> August, 2018. The Respondent vide the letter dated 29<sup>th</sup> October, 2019 replied to the Claimant acknowledging receipt of the said letter and notified the Claimant of the requirements that are expected of him before he can institute an appeal.

62. The Claimant complied with the said requirements and further submitted a supplementary appeal letter dated 15.11.2019. vide a letter dated 23<sup>rd</sup> December 2020 the 1<sup>st</sup> Respondent set the claimants hearing for the appeal case on 29<sup>th</sup> January, 2021 at the County Director's office in Kakamega County. During the review case, the Claimant was expected to argue his position within the parameters for review as provided for under regulation 156 (7) of the CORT which provides that, a teacher who applies to the commission for review of the decision of the commissions hall demonstrate that:-

- (i) There is discovery of new evidence or fact which at the time of the hearing was not within the knowledge of the teacher,
- (ii) There was an error or mistake apparent on the face of the record or on the part of the Commission in arriving at the decision
- (iii) There was fundamental flaw in the procedure by the commission, or
- (iv) the decision was made in breach of written law.

63. The Claimant failed to do so thus the finding of the review panel that his dismissal was upheld. The principle of fair hearing in an employment relationship was settled in the South African Case of *Nampak Corrugated Wadeville v Khoza* (JA14/98) [1998] ZALAC 24 quoted in the Court of Appeal in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] where the court held that "A court should therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable". The tests of procedural fairness was summarized by Justice Radido in the case of *Anthony Mkala Chiatavi -vs- Malindi Water Sewerage Company Ltd* 9 2013 ) eKLR where he stated that "The ingredients for procedural fairness as I understand it within the Kenya situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.



Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly, it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction”.

64. In furtherance, as it was held in the case of *Bett Francis Bargnagetuny & Another v Teachers Service Commission & Another* [2015] Eklr, ‘ The general principles that should guide statutory, domestic or administrative tribunals sitting in a quasi- judicial capacity .... Are incorporated in the Regulations .... Accusing an employee of misconduct by way of query and allowing an employee to answer the query before a decision is taken satisfies the requirements of fair hearing or natural justice. The Claimant was given a fare hearing since he answered the queries before he was dismissed.....if an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise greet caution before it interest with the employer’s findings”. In the case of *Andrew Nthiwa Mutuku v the Court of Appeal & 4 others* at Machakos High Court Constitutional Petition No. 8 of 2020 Hon. G V Odunga held that:- “ While an appellate court could well have found the sentence excessive, this court in exercise of its jurisdiction as a constitutional court cannot interfere with the gravity of the sentence unless the same is unconstitutional or violates the petitioner’s right of fair hearing”.

It is crystal clear that the Respondents action in this claim meets the threshold that was outlined by the court of Appeal in the case of *Bett Francis Bargnagetuny & Another -vs- Teachers Service Commission & Another* ( 2015) eKLR . Lest we forget, as a quasi judicial body, the proceedings of the Respondent should not collate to those of a court of law created under the *judicature Act* and *the constitution*.

### **Decision on procedural fairness**

65. The court has found the dismissal was unfair for lack of valid reasons and taking into factor of all circumstances of the case the employer did not act in accordance with justice and equity. The termination was thus substantively unfair. The court finds there was a disciplinary hearing. The court found that the alleged math exam papers was never produced despite notice to produce by claimant in writing and instead biology paper 231/3 was produced in supplementary document dated 3<sup>rd</sup> April, 2019 by Respondent. The biology paper cited in the dismissal letter was 231/1. The court agreed with the Claimant the said paper had no code of the Shikokho Secondary School or any evidence to link it to the school.

The court found there was no investigation report outside the county hearing process nor was there any reporting and investigations of exam malpractice as envisaged under the KNEC examination irregularities rules 2015. The court finds though the Claimant was taken through procedural hearing as stated in *Bett Francis Bargnagetuny & Another -vs- Teachers Service Commission & Another* 2015 eKLR (supra). There was no investigations into the alleged exam malpractices as required under the KNEC (examination irregularities) rules 2015. The court finds indeed there was no investigation report produced at the disciplinary hearing. The court returns a verdict of unfair dismissal even procedurally.

### **Whether the Claimant is entitled to reliefs sought**

66. The court having found the dismissal was unfair applies the provision of Section 49 of the *Employment Act* to determine the remedies. All the teachers accused of assisting the students with irregularities were returned. Previous practice of employer is relied in Section 45 (5) of the *Employment Act*.
67. The substantive remedy sought was for reinstatement and damages for unfair dismissal. The Claimant was employed as a teacher on permanent and pensionable terms by the 1<sup>st</sup> Respondent on the 23<sup>rd</sup> June,



1995. He served without any evidence of previous disciplinary records upto the time of interdiction on grounds which the court cleared him.

68. The claimant was dismissed from service vide letter dated 9<sup>th</sup> May 2019 with effect from 18<sup>th</sup> March, 2019. It is now over 3 years since the Claimant was dismissed as a teacher. Section ( 3) (Vii) of the Employment and Labour Relations Act states:- “ an order for reinstatement of any employee within three years of dismissal” The court found that the Claimant came to court within one year of dismissal and it was the delay in disposal of the case that took the Claimant outside the 3 years of reinstatement. The Claimant told the court he was 54 years old and his retirement age was 60 years. Section 49 (3) (b) provides for re- engagement of the employee in work comparable to that which the employee was employed prior to his dismissal or other reasonably suitable at the same wage. There is no time limit on re-engagement. The damages for dismissal are not available together with re- engagement. The court finds this to be a suitable case for the remedy of re-engagement.

### **Conclusion and Disposal**

69. The court found there were no valid reasons for dismissal of the claimant from employment thus the dismissal was unfair. The court enters judgment for the Claimant against 1<sup>st</sup> Respondent as follows:-
- (a) A declaration that the dismissal of the claimant from employment was unfair.
  - (b) An order that the Claimant is entitled to his full salary and benefits from date of interdiction to date of dismissal.
  - (c) An order of re- engagement of the Claimant to work comparable to his previous employment prior to the dismissal at the same salary within 30 days of this judgement.
  - (d) The 1<sup>st</sup> Respondent to pay Claimant costs of the suit.
70. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA OPEN COURT THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**JEMIMAH KELI,**

**JUDGE.**

**In the Presence of :-**

**Court Assistant: Lucy Macheso**

**Claimant: Kadenyi**

**Respondent : Musundi holding brief for Mulaku. We pray for stay of 30 days.**

**Court Order:-**

**The substantive order of re-engagement takes effect within 30 days hence no justification for order of stay.**

**It is so ordered.**

**JEMIMAH KELI,**

**JUDGE.**

