



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NUMBER 1185 OF 2015**

**BETWEEN**

**MICHAEL ENOCK MUTSOTSO.....CLAIMANT**

**VERSUS**

**KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT**

*Rika J*

*Court Assistant: Emmanuel Kiprono.*

*S.M. Kilonzo & Associates, Advocates for the Claimant.*

*Kiarie, Kariuki & Associates, Advocates for the Respondent.*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 8<sup>th</sup> July 2015.
2. He avers, he was employed by the Respondent on 10<sup>th</sup> March 2000 as a Clerical Officer, Department of Examinations Administration.
3. He rose through the ranks to the position of Senior Examinations Assistant.
4. He was issued by the Respondent, a letter to show cause why he should not face disciplinary action, dated 7<sup>th</sup> October 2013.
5. He was alleged to have picked Statements of Examination Results Serial Numbers 0020309 and 0020310 from the ICT Department, and failed to declare the Statements as blank, as was the practice. He was required to give a response by 11<sup>th</sup> October 2013.
6. He replied on 10<sup>th</sup> October 2013.
7. He was invited to attend disciplinary hearing which took place on 15<sup>th</sup> November 2013.
8. After hearing, the Respondent purported to interdict the Claimant on advice of the Management Disciplinary Committee, on 9<sup>th</sup> December 2013.
9. On 28<sup>th</sup> February 2014, the Respondent lifted interdiction and imposed the following disciplinary sanctions against the Claimant: -

§ Demotion from Senior Examinations Assistant, Scale EC 7, to Examinations Assistant 1 Scale EC 6 with effect from 1<sup>st</sup> March 2014.

§ Placed under observation for 1 year within which his performance would be closely monitored and evaluated to determine the Claimant's suitability for retention and reinstatement to his former status of Senior Examinations Assistant, Scale EC 7.

§ He would be evaluated after 6 months on 1<sup>st</sup> September 2014, within which his contract could be terminated if no improvement was noted.

10. The Claimant was required to report back to work, on 3<sup>rd</sup> March 2014. He did so.

11. However, in a surprising turn of events, the Respondent issued the Claimant a letter of dismissal on 26<sup>th</sup> March 2014 based on the same allegations, which were the subject of the Respondent's decision communicated in the letter of 28<sup>th</sup> February 2014. His last salary was Kshs. 76,550 monthly.

12. The Claimant appealed the latest decision to the Staff Affairs Committee through a letter dated 11<sup>th</sup> April 2014. The Committee was required under the Human Resource Policies and Procedures Manual, to hear the Appeal within 2 months. Instead, the Committee required the Claimant to appear before the Full Council. This was unnecessary because under the Manual, the decision of the Committee is final.

13. The Council heard the Claimant's Appeal on 20<sup>th</sup> March 2015, upholding the latter decision to dismiss the Claimant from service.

14. The Claimant avers that termination was unfair procedurally and substantively. The primary disciplinary process was flawed. The appeal procedure was similarly flawed. In either process, no valid reasons were established warranting dismissal of the Claimant.

15. The Claimant gave evidence, and closed his case before Hon. Judge Byram Ongaya on 4<sup>th</sup> December 2019. Documents filed by both Parties were by consent, admitted as their exhibits.

16. The Claimant adopted his Witness Statement on record, as summarized in his Pleadings above.

17. Cross-examined, he agreed that he was issued letter to show cause. He replied in writing. He was invited before the Management Disciplinary Committee. He was heard and interdicted. He was subsequently heard by the Staff Affairs Committee on 24<sup>th</sup> December 2013. Interdiction was lifted and the Claimant sanctioned in terms of the letter from the Respondent dated 28<sup>th</sup> February 2014. He resumed duty on 3<sup>rd</sup> March 2014, but received another letter from the Respondent, dated 26<sup>th</sup> March 2014, dismissing him. He appealed. The Full Council upheld dismissal.

18. Redirected, the Claimant told the Court, he was not called to any meeting between the date of his resumption, and the date of dismissal. There were no fresh allegations made against him. There was no evaluation of performance in terms of the letter of 28<sup>th</sup> February 2014. He had been demoted and severely reprimanded. He resumed duty after these sanctions, only to be sanctioned again through dismissal, about a month after resuming duty. 6 months had not lapsed in terms of the letter of 28<sup>th</sup> February 2014. 1 year had not lapsed since interdiction was lifted.

19. Reasons wherefore the Claimant prays for Judgment against the Respondent for: -

- a. Declaration that termination was unfair.
- b. Declaration that appeal process was unfair.
- c. Reinstatement without loss of salaries and benefits.
- d. Re-engagement.
- e. Annual leave of 45 days at Kshs. 137,682.
- f. Costs.
- g. Interest.

ALTERNATIVELY –

- a. [same declaration above]
- b. [same declaration above]
- c. 12 months' salary in compensation for unfair termination at Kshs. 954,600.
- d. 1 month's salary in lieu of notice, at Kshs. 79,550.
- e. Annual leave of 45 days at Kshs. 137,682.
- f. Costs.

g. Interest.

h. Any other suitable orders.

20. The Respondent filed a Statement of Response, dated 9<sup>th</sup> October 2015. It is agreed that the Respondent employed the Claimant on the date and positions captured in the Statement of Claim. It is similarly agreed that the Respondent issued the Claimant a letter to show cause why he should not face disciplinary action, for the specific allegations contained in the letter. The Claimant replied and disciplinary action was instituted, culminating in his dismissal.

21. On 30<sup>th</sup> July 2013, an Officer from the US Embassy in Nairobi called the Respondent. He told the Respondent that the Embassy had received a Statement of Examination Results from the Respondent, which the Embassy suspected was not genuine.

22. Investigations carried out by the Respondent confirmed that indeed, the Statement was a forgery. Entire grades, except 3 of them, had been altered. The mean grade had been altered from D+ to C+. The range of Serial Numbers used to print the Statements was between 0020307 and 0020414. The batch of printed Statements was received by the Claimant from ICT. Investigations involved all the relevant Officers.

23. Against the Claimant, Investigations concluded that: -

a. The Claimant neglected to perform his duties by failing to record the information against missing serial numbers 0020309 and 0020310 with the intention of doing so after he finds the statements;

b. He further failed to report to his supervisors that the statements were missing, in the hope that he would get them; and,

c. The missing statement later materialized as the forged statement intercepted at the US Embassy.

24. He appeared before the Disciplinary Committee, and was subsequently interdicted. The case was tabled before the Staff Affairs Committee, which after 3 sittings, decided to demote the Claimant, awaiting ratification of the Full Council.

25. The Full Council is the ultimate decision-making organ under the Human Resource Manual, mandated to review and ratify decisions of the Staff Affairs Committee, at paragraph 12.34.1. The Full Council reviewed the matter on 19<sup>th</sup> June 2014, and concluded that the offence committed by the Claimant was serious enough to warrant summary dismissal. The Claimant lodged an Appeal with the Council, but rushed to file this Claim before the Appeal could be handled within 2 months as required under the Manual.

26. The Respondent did not act unfairly or unlawfully. The Claimant was aware that the ultimate decision was for the Full Council to take.

27. Evidence for the Respondent was adduced by Archives Officer Jane Kashu on 18<sup>th</sup> March 2021, and Acting Human Resource Director Phoebe Nyangi on 15<sup>th</sup> July 2021, when hearing closed. The matter was last mentioned in Court on 30<sup>th</sup> September 2021, when Parties confirmed the filing of their Final Submissions.

28. Kashu told the Court that the Claimant worked under her. The Claimant's role involved picking of printed Serialized Examinations Statements, from the ICT Department. He was to note and report, if the serial number was missing or cancelled.

29. US Embassy suspected an Examination Statement originating from the Respondent was forged. The Embassy faxed the Statement to Kashu. The stationery was confirmed to be from the Respondent, but its contents was forged. Kashu confirmed there were 9 Statements taken to the US Embassy on one day. The forged one was not among these. The Claimant never mentioned that any serial number was missing.

30. It was the view of Kashu that the Claimant was negligent. If there was anything missing, the Claimant should have reported to his supervisor Kashu. She escalated the matter to Management. She was called as a Witness before the Disciplinary Committee. The Claimant was demoted and transferred. Kashu later heard that he was dismissed.

31. Cross-examined, Kashu told the Court that the Claimant did not have a role in printing of Statements. He was required to verify what was printed. The Printing Officers were accountable also. Kashu did not know if the Printing Officer was disciplined. She only testified in respect of the Claimant. There was a register at ICT. The collecting Officer would note the last serial number collected. It was a continuous process. The Claimant was demoted and transferred to another section. These were disciplinary measures. Kashu told the Court she was not in a position to explain dismissal of the Claimant from Respondent's service.

32. Nyangi told the Court that disciplinary procedure at the Respondent begins with verbal warnings, progressing to written warnings, notice to show cause, interdiction and suspension. The Claimant was taken through disciplinary hearing. Dismissal was done by the Full Council. It is the mandate of the Full Council to make the ultimate decision. The Staff Affairs Committee heard the case first. Its decision was reviewable by the Full Council. It is not true that the Claimant was punished twice.

33. On cross-examination, Nyangi told the Court that the matter went before the Staff Affairs Committee. The minutes of this Committee state that the Claimant had some leeway on reporting. He ought to have reported any missing statement. The Committee said this was an ICT function. The Claimant did not report to his supervisor. The Committee said it was an established practice, and that it was important to establish that the Claimant saw blank statements. Nyangi was not aware if further investigations ensued. The Committee made resolutions. Interdiction was lifted. The Claimant was severely reprimanded and placed under observation for 1 year. The Resolutions are not indicated to

be subject to review by the Full Council. The letter of 28<sup>th</sup> February 2014, should be read with the Policy.

34. Clause 12.31.4 of the Manual defines the role of the Disciplinary Committee. It makes recommendations to the Staff Affairs Committee. The clause states that the Staff Affairs Committee makes the final decision. Nyangi explained that the Manual should be read with the KNEC Act, not in isolation. Nyangi was not able to confirm if the Claimant had resumed duty as advised by the Staff Affairs Committee. Evaluation for 6 months did not take place. Dismissal followed 16 days after the Staff Affairs Committee made its recommendations.

35. Redirected, Nyangi told the Court that the Staff Affairs Committee gives decisions on minor cases. Serious matters are finalized by the Full Council.

36. The issues as identified by the Parties are whether dismissal was substantively and procedurally fair; and whether the Claimant is entitled to the remedies pleaded, costs and interest.

**The Court Finds: -**

**Substantive fairness**

37. The grounds justifying dismissal are contained in the dismissal letter of 26<sup>th</sup> March 2014, which are: failure to record remarks against statements serial numbers 0020209 and 0020310, to indicate that the statements were missing; failure to report to supervisors that the 2 statements were missing; failure to alert supervisors of the missing blank statement number 0020310, which was later used to print statement results for Mary Mwangi Wangui.

38. The Report of the Staff Affairs Committee, Respondent's appendix C, states that, *"because of the various performance gaps identified in the process of printing and dispatch of statements of results between ICT and Archives and Records Section, it is necessary to establish beyond doubt that Michael Enoch Mutsotso saw the blank statements."*

39. The Respondent identified that there were gaps, in retrieval of statements from ICT to the Claimant's Section. Secondly, it had not been established that the Claimant saw any blank statements. These are the findings of an important Committee of the Respondent.

40. On reporting lines, the Committee in the same exhibit filed by the Respondent, found that *"Reporting of routine issues was not emphasized and the Officer had some leeway, in the performance of his duty, and was not required to report every action he took."*

41. This important Committee of the Respondent, upon full consideration of the matters under enquiry, found that reporting on every action taken, by an Officer to his supervisor, was not a standard practice. Officers had discretion in reporting.

42. The Management Disciplinary Committee and the Staff Affairs Committee, who investigated and heard the Claimant on the allegations above, did not establish that the allegations were true.

43. This exhibit is supported by the oral evidence of Respondent's Witness Kashu, who on cross-examination told the Court that the Claimant did not have a role on printing of statements. The Printing Officer was accountable. Nyangi confirmed the contents of Respondent's exhibit C, stating she was not aware further investigations were carried out, in view of these contents.

44. It is therefore puzzling that the position would change after review by the Full Council, leading to a conclusion that the Claimant was guilty of the charges laid out against him.

45. The Court is satisfied that the Respondent did not discharge its obligation on substantive fairness under Section 43 and 45 of the Employment Act. Termination was not fair for want of valid reason or reasons.

**Procedural Fairness.**

46. The Management Disciplinary Committee and the Staff Affairs Committee heard the Claimant.

47. The hearings had been preceded by Notice to Show Cause, which the Claimant responded to.

48. The Staff Affairs Committee, upon hearing the Claimant at length, resolved to impose disciplinary measures other than dismissal.

49. The Claimant was demoted and transferred to another Section. He was placed under observation for 1 year. He would be within this period observed, to determine if he would continue serving, or reinstated to his previous rank. He was recalled and reported for duty from interdiction on 3<sup>rd</sup> March 2014. He states he was paid withheld salary for the period under interdiction.

50. But on 26<sup>th</sup> March 2014, the Claimant received a letter dismissing him from service.

51. There was nothing done by him, or the Respondent, between 3<sup>rd</sup> March 2014 and 26<sup>th</sup> March 2014, which would explain the change in the sanctions already imposed by the Respondent.

52. It is not sufficient to say that the Full Council made the decision and that ultimate decision was for the Full Council to take.

53. The disciplinary procedure is captured in clause 12.31 of Respondent's Human Resource Policies, Procedures and Terms and Conditions of Services Manual.

54. 12.31.1 – All cases of major indiscipline shall be reported by the Head of Department to the Head of Human Resources in writing, who will then report to the Council Secretary. A 'show cause' letter shall be issued to the Employee.

12.31.2 – In cases where the offence was committed in the presence of eyewitnesses, written accounts shall be sought from those who witnessed the incident.

12.31.3- The Head of the Human Resources will constitute a Disciplinary Committee once the Officer's response is received. The Officer will be required to appear before the Committee.

12.31.4 – The Disciplinary Committee will then give its recommendations to the Secretary, who will make a decision finalizing the case based on the gravity of the offence or forward the case to the Staff Affairs Committee, who will deliberate on the case and make a **final decision**.

55. The Claimant was taken through this procedure, culminating in the final decision of the Staff Affairs Committee of 28<sup>th</sup> February 2014.

56. There is nothing in the procedure to support the view that in cases of grave offences, the Full Council intervenes in the manner suggested by Respondent's Witnesses. Clause 12.31.4 made the decision of the Staff Affairs Committee final. It was not necessary to engage the Full Council in the matter after this.

57. The Full Council, even if by any instrument, was allowed to make further interventions, would not intervene without engaging the Staff Affairs Committee and the Claimant, between 3<sup>rd</sup> March 2014 and 26<sup>th</sup> March 2014.

58. The Court does not think it is necessary to look at the Appeal that was filed by the Claimant and what transpired on Appeal. It was not necessary to engage in that process, having received a final determination of the Staff Affairs Committee, on 28<sup>th</sup> February 2014.

59. The Claimant was indeed punished twice, over the same disciplinary allegations. First through demotion, lateral transfer and severe reprimand by the Staff Affairs Committee, and second, through dismissal by the Full Council. The law does not condone double punishment.

60. Termination did not satisfy the standards of procedural fairness under Section 41 and 45 of the Employment Act.

#### **Remedies.**

61. Termination took place in 2014 over 6 years ago. The law only allows the remedy of reinstatement, within 3 years of termination. The remedy is therefore denied to the Claimant by the law.

62. Instead, the Court allows the alternative prayer of compensation. The Claimant worked for the Respondent for over 14 years. He rose to the position of Senior Examinations Assistant from the lowly ranks of a Clerk. He was demoted and transferred, and accepted this, having reported for duty on 3<sup>rd</sup> March 2014. He was 2 weeks later abruptly dismissed over the same allegations. He expected he would have gone on working, and probably within the given period of 1 year, persuade the Respondent to restore him to the position of Senior Examinations Assistant. He was denied the chance for performance evaluation and full restoration. Ultimately, he was robbed of even the lesser role which the Staff Affairs Committee punished him to serve. He was unfairly dismissed. He would have merited reinstatement, but the law prohibits reinstatement. He did not play any role in the circumstances leading to termination. The evidence by the Respondent supported his own view, that he was accused of failing to carry out duties which were not established to be within his job description.

63. ***He is granted equivalent of 12 months' salary in compensation for unfair termination at Kshs. 954,000.***

64. ***The prayer for 1- month salary in lieu of notice is allowed at Kshs. 79,550.***

65. There is no evidence from the Respondent, or submission, discounting the prayer for leave pay. ***The computation given by the Claimant is uncontested and allowed at Kshs. 137,682.***

66. ***Costs to the Claimant.***

67. ***Interest allowed at court rates, from the date of Judgment till full payment.***

#### ***IT IS ORDERED: -***

***a. It is declared that termination was unfair.***

***b. The Respondent shall pay to the Claimant: equivalent of 12 months' salary in compensation for unfair termination at Kshs. 954,000; notice pay at Kshs. 79,550; and annual leave pay at Kshs. 137,682 – total Kshs. 1,171,232.***

***c. Costs to the Claimant.***

*d. Interest allowed at court rates from the date of Judgment till payment in full.*

**Dated, signed and released to the Parties electronically under the Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 28<sup>th</sup> day of January 2022.**

**James Rika**

**Judge**