



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

**AT NAIROBI**

**CAUSE NUMBER 915 OF 2016**

**BETWEEN**

**RICHARD ISAAC MWANGANGI .....CLAIMANT**

**VERSUS**

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

*Rika J*

*Court Assistant: Emmanuel Kiprono*

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*S.K. Muendo & Company Advocates for the Claimant*

*Obura Mbeche & Company Advocates for the Respondent*  
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**JUDGMENT**

1. The Claimant filed his Statement of Claim, on 18<sup>th</sup> May 2016. He states, he was employed by the Respondent State Corporation, as an Estates/ Properties Officer, on 15<sup>th</sup> December 2009. He rose through the ranks, becoming the Deputy Secretary, Administration, on 1<sup>st</sup> October 2013. On 1<sup>st</sup> January 2015, he was deployed to the Business and Technical Examinations and Administration Office, as the Deputy Secretary, Administrative Offices.
2. He held this Office, as of 24<sup>th</sup> March 2016, when he was alleged by the Cabinet Secretary Ministry of Education, to have been involved in 2015 national examination irregularities and leakages. He was arrested by the DCI on 24<sup>th</sup> March 2016, detained over 12 hours and released without charge. He was suspended on 29<sup>th</sup> March 2016. He was issued letter to show cause on 15<sup>th</sup> April 2016, over the allegations. He replied on 19<sup>th</sup> April 2016. Instead on being invited to a disciplinary hearing, he was handed a letter retiring him in public interest. He was alleged to have given an unsatisfactory response to the letter to show cause.
3. He never handled the KCPE and KCSE examinations of 2015. He was confined to Business and Technical examinations. He states, he was not heard in accordance with Section 41 of the Employment Act. There was no valid reason given to him, to justify termination, as required by Section 43 of the Act. He states that he was defamed by the Cabinet Secretary in the national media, who announced that there was examination irregularities and leakages.
4. The Claimant prays for Judgment against the Respondent as follows: -
  - a. Declaration that the Claimant was wrongfully and/ or constructively summarily dismissed.
  - b. Suspension and retirement be lifted, and the Claimant reinstated.
  - c. The position of Deputy Director Administration not to be filed until hearing and determination of the Claim.

- d. Compensation as set out in paragraph 23 of the Statement of Claim.
- e. An order that the Claimant continues serving for remaining 9 years of service.
- f. General damages for reputational damage and / or defamation.
- g. Costs.
- h. Any other suitable relief.

5. The Respondent filed its Statement of Response on 13<sup>th</sup> July 2016. It is agreed that the Claimant was employed by the Respondent, as stated in the Claim. On 24<sup>th</sup> March 2016, the Government disbanded the Respondent Council and created a new one, in an effort to contain persistent examination irregularities and leakages. The DCI was called in. Several Employees including the Claimant were interrogated. The Council of the Respondent met on 29<sup>th</sup> March 2016, and resolved to suspend the Claimant, to allow for investigations. Suspension was in accordance with the Human Resource Policies, Procedures and Terms of Service [HR Manual]. The Claimant was issued letter to show cause, by the Respondent, as stated in the Claim. The Council held a meeting on 23<sup>rd</sup> April 2016, and decided that the Claimant, alongside other Employees, is retired in public interest. He was issued a letter retiring him, dated 25<sup>th</sup> April 2016. This was in accordance with the HR Manual, which lists retirement in public interest, as one of the punishments in disciplinary proceedings. The Respondent states it is a stranger to the allegations on defamation. It urges the Court to dismiss the Claim with costs.

6. The Claimant gave evidence and rested his case, on 17<sup>th</sup> February 2020. He adopted his Witness Statement, which is a replica of the Statement of Claim, summarized at the outset of this Judgment. He exhibited Documents, as contained in a list filed with the Claim on 18<sup>th</sup> May 2018, running from page 1 to 19.

7. Cross-examined, he told the Court that the Respondent sets, supervises and administers national examinations, including KCPE, KCSE and TVET. He was in Business and Technical Office. He was not a member of the management team, which includes the CEO and Directors. The Claimant would assist top Managers, and if delegated, assist Directors. He was in charge overall of administration responsibilities. He agreed he was to an extent, involved in examinations. Some responsibilities, such as policing of examinations, were outsourced. During examinations, everyone is involved. It is a peak period. Most Officers, not all, are involved. He was not arrested over TVET examinations. In 2014, 2015 and 2016, there was uproar over examination irregularities and leakages. There was public outcry. The Claimant and his colleagues were Public Officers. Public confidence in the Respondent was central to Respondent's operations. If public confidence was eroded, there was no need to have the Officer.

8. Following investigations, the Claimant was named as one of the culprits. He received letter to show cause. He was arrested by the Police. He was alleged to have been complicit to the irregularities and leakages. He replied to the allegations. He was issued letter of retirement in public interest. His terms and conditions of service allowed the Respondent to take this decision. He was, in his view, paid peanuts on retirement. He was paid salary for days worked in the last month, but denied other benefits including notice of 3 months and outstanding annual leave. He did not collect his certificate of service.

9. Redirected, the Claimant told the Court he was not involved in KCPE and KCSE, as part of his duties. He was not involved in printing and circulation of examination papers. He explained this in his reply to the letter to show cause. He was not liable for the public outcry regarding examination irregularities and leakages. His contract did not have a clause on retirement in public interest. He merits compensation for unfair termination.

10. Corporation Secretary Befly Jemurgor, gave evidence for the Respondent on 21<sup>st</sup> January 2021, closing the hearing. She testified that she was not employed by the Respondent, at the time the dispute arose in 2015. The Council was dissolved in 2016, and new members appointed. Many senior management staff were sent away. Jemurgor relied on Respondent's employment record in her evidence. She adopted her Witness Statement and Documents filed by the Respondent.

11. She did not know the Claimant personally. There was massive leakage in 2015 national examinations. It led to questions of credibility and public outcry. The Board was dissolved and a new one put in place. It was resolved 7 senior staff, among them the Claimant, are suspended. This was based on a highly confidential report, prepared by the National Intelligence Services [NIS]. Leakage was deemed a national security issue.

12. The Claimant was taken through a disciplinary process as pleaded by the Parties. It was determined that the Claimant alongside others, is retired in public interest. Terms and conditions of services allowed for his retirement in public interest.

13. On cross-examination, Jemurgor restated that she did not know the Claimant personally. She affirmed that he was employed by the Respondent as stated in the Claim. There was no fraud in his Technical and Business Department. The report leading to the action against the Claimant was confidential. Jemurgor did not see it herself. There was no internal report prepared by the Respondent, implicating the Claimant. She did know the date of the confidential report. She did not know if the Claimant was arrested or charged over the allegations. The Respondent issued him a letter to show cause. There was no committee convened to hear him. He was not given opportunity to explain himself. He was retired in public interest. Public confidence in the Respondent was harmed. This is not a reason based on the Employment Act, to justify termination. The Respondent did not act merely to please the public. Termination was fair.

14. Redirected, Jemurgor told the Court that the mass media highlighted examination leakages and the attendant public outcry. The report of the NIS was confidential. All staff were involved in examination administration. Internal investigation could not be carried out, because even the CEO of the Respondent, was affected. He opted to resign. Since then, reforms have been implemented in examination administration.

15. The issues as understood by the Court are: whether the Claimant was retired in public interest fairly and on valid ground; and whether he is entitled to the remedies sought.

***The Court Finds: -***

16. The facts relating to his employment history with the Respondent; the terms and conditions of service; and the fact that he was retired by the Respondent in public interest, ostensibly for being involved in national examination irregularities and leakages, are not disputed.

17. The dates when the occurrences surrounding retirement of the Claimant took place, are not disputed. The Claimant's pay slip of March 2016, indicates his last gross monthly salary, was Kshs. 286,150.

18. The Court proposes to look into the prayers contained in the Statement of Claim first, in order to have a clear perspective of the issues in dispute.

19. The declaratory order sought, that the Claimant was constructively dismissed, has no support in law and evidence. It is the common evidence of the Parties that the Claimant was retired in public interest. Retirement in public interest cannot conceivably amount to constructive dismissal. Constructive dismissal requires that the Employee resigns, believing himself to have been fired, due to a hostile and intolerable work environment created by the Employer. The Claimant did not resign. He was retired by the Respondent. The Court does not think that where termination is expressly initiated by the Employer, the Employee can succeed in claiming constructive dismissal. Dismissal is constructive if not obvious or stated explicitly. It is constructive if it is derived or inferred. Retirement of the Claimant in public interest was explicit, not derived or inferred. It was not constructive dismissal.

20. The prayer for lifting of suspension is misconceived. Suspension cannot be in place, after the Claimant was retired in public interest.

21. The prayer for reinstatement is statutory-barred, under Section 12 [3] [vii] of the E&LRC Act. The Claimant left employment on 25<sup>th</sup> April 2016. The 3-year limit under this law, expired in April 2019.

22. The prayer asking for the position of Deputy Director not to be filled "*pending hearing and determination of this Claim,*" ought not to have been pleaded as part of the final orders. It could only be pleaded as a protective measure, in an interlocutory application. It is absurd to ask the Court, to issue an order, pending hearing and determination of a Claim, which at the time the order is made, has already been heard and determined. The Claimant ought to have distinguished final orders from interlocutory orders.

23. If the Claimant is seeking reinstatement, should he also pray separately, for an order that "*the Claimant continues serving for the remaining 9 years of service,*"? Why should the letter of dismissal/ retirement be withdrawn? The Court is of the view that this prayer is not necessary in light of the prayer for reinstatement and the prayers associated with reinstatement.

24. He prays for damages for reputational damage and/or defamation. He has not supported this prayer through evidence, or shown the legal basis warranting grant of such damages. He makes a blanket claim that the Cabinet Secretary defamed him, by stating in the national media, that there were irregularities and leakages in the examinations. The Claimant did not give details of the media houses involved, or the date of defamation. It was common evidence of the Parties that there were examination irregularities and leakages. The prayer has no foundation.

25. Most of the prayers by the Claimant are legally untenable, repetitious and unclear.

26. At paragraph 23 of the Statement of Claim, the Claimant prays for salary for "*the remaining 9 years of service.*" This is done separate from the prayers for reinstatement and the prayer to continue serving for the remaining 9 years of service. It is declined for the same reasons these other 2 prayers have been declined.

27. In the end the Court is of the view that the issues in dispute are as stated at paragraph 15 above, and the crystallized reliefs to be considered are: -

- 3 months' salary in lieu of notice.
- Annual leave balance.
- Compensation for unfair termination.
- Certificate of Service.
- Costs.
- Any other suitable relief.

28. Did the Respondent have valid reason to justify retirement in public interest?

29. It is common ground that there were irregularities and leakages with regard to the KCPE and KCSE examinations, around the years 2014-2016. There are newspaper cuttings exhibited by the Respondent, showing there was public outcry over the issue, and a call for remedial measures. The newspaper cuttings captured the mood of the public, with banners such as the following: -

- In failed States, leaked exams and stolen money are a way of life.
- Fraud in our learning system: our students' future is bleak.
- Action needed to save integrity of exams.

- Cheating in exams won't stop any time soon because too many people benefit.
- Address crisis of confidence in exam body.
- Dismay as exam results cancelled.
- Exam leaks portends ill for our collective future.
- Father sues KNEC over girl's results.
- Ruto demands action to end exam cheating.
- Ministry given one month to act on exam cheating.

30. That there were widespread examination irregularities and leakages, public outcry and urgent need for redress, cannot be gainsaid. The Respondent and the parent Ministry, cannot be faulted for taking measures to reform the examination system, by cracking down on those who were involved in the vice. The need for restoration of public confidence in the administration of the national examinations, cannot be gainsaid.

31. The Council was disbanded, and a new one installed. The CEO opted to resign on the heat of the moment. Senior Officers were retired in public interest. They included the Claimant.

32. The Respondent sought to apportion individual responsibility on the Claimant. On 29<sup>th</sup> March 2016, the Chairperson KNEC Board, Prof. George Magoha, wrote to the Claimant a letter of suspension. The decision was premised on the KNEC Act, and Section 16 [1] and [2] of the Human Resource Policies and Procedures Manual. The letter states that suspension was to enable the Respondent investigate the Claimant's role in the malpractice and examinations leakages.

33. A letter to show cause, titled 'Gross Misconduct,' dated 15<sup>th</sup> April 2016 followed. The allegations against the Claimant were outlined: -

- Together with others, allowed examination leakages right from the Test Development Department which is responsible for setting the national examinations.
- Together with others, identified potential targets for business for which the Claimant would supply papers and later raid schools that had supplies of leaked papers allegedly to make arrests, only for the Claimant to receive bribes.
- Passed on soft copies of those examination materials sent abroad for printing, to unauthorized persons.
- Together with others, after marking of the national examinations, manipulated data at will, to favour candidates of Schools that had paid out money in bribes.
- Identifying preferred centres in Western and North Eastern Kenya and selling them the KCPE and KCSE materials.
- Acted in a manner that has brought the integrity of KNEC to disrepute as a result of wide leakages and irregularities associated with the 2015 national examinations.

34. The Claimant replied through his letter of 17<sup>th</sup> April 2016. He characterized the allegations as false and malicious. He went further, protesting that: -

- His designation was Deputy Director, Field and Administration- Business & Technical Examinations. He facilitated making of Business and Technical examinations. He did not work in the Test Development Department which dealt with KCPE and KSCE. He did not have contact with Officers from that Department.
- He did not have any contacts with Schools in Kenya. It was not possible for him to identify potential targets for business as alleged. He was never involved in monitoring of national examinations, and could not have conducted any raids on any School.
- He did not handle hard or soft copies of any KCPE or KCSE national examination papers. He could not send to anyone what he did not have.
- Examination data is handled by ICT Department. The Claimant did not work there. He could not have manipulated data.
- He did not identify centres in Western and North Eastern Kenya for selling, and did not sell, any examination papers to such centres.
- He was therefore not involved in any acts that brought the integrity of the Respondent into disrepute.

35. The Claimant stated that he was ready to face anyone who had incriminated him.

36. The Respondent did not take the Claimant through a disciplinary hearing. The allegations against him were therefore not tested, through a disciplinary hearing. He was never given the chance to face persons who incriminated him.

37. The allegations in the letter to show cause, seen against the reply by the Claimant, leaves a lot of doubt on the validity of the decision to retire the Claimant in public interest.

38. Respondent's Corporation Secretary, Jemurgor, told the Court that the Claimant was Deputy Director, Field Administration in the Business and Technical Department. She testified that there was no fraud in this Department. There was no complaint of fraud. There was no disciplinary committee convened, to give the Claimant a hearing. Jemurgor stated categorically that the Claimant was not given an opportunity to explain himself. Her evidence is that there was no internal report, implicating the Claimant. The Respondent relied on a report of the NIS, which was confidential and not shared with the Claimant. There is nothing on record suggesting that if there was such a report, the NIS sought the view of the Claimant in preparation of its report. The Respondent does not say in what way, this confidential report, implicated the Claimant. The Claimant was arrested by the DCI and detained for 12 hours, after which he was released without charge. Why

would an Officer implicated in breach of national security be let free without any criminal charges? Could not the Respondent avail the Claimant at the very least, a redacted version of the NIS report? There was a way of meeting the statutory standards of fair termination, without compromising national security. The letter to show cause raised very serious allegations against the Claimant. He was arrested by the DCI, but not charged with any offence. He was set at liberty the same day he was arrested.

39. The allegations against the Claimant were not established. The Council was disbanded and a new Council set up, which met on 29<sup>th</sup> March 2016. It is recorded in its minutes that the Council was taken through a confidential report by Belio Kipsang, and a decision to suspend the concerned Senior Officers made. There was no specific reason given, apportioning individual responsibility on the Claimant. The letter to show cause, which followed was generalized, stating that the Claimant acted together with others.

40. His reply to the letter to show cause was not discounted. The Council met again on 23<sup>rd</sup> April 2016. The minutes of that meeting states, without being specific to individual Officers, that their responses to the letters to show cause were considered, and found unsatisfactory. It was resolved the Council issues dismissal letters wholesale, effective from 25<sup>th</sup> April 2016. There was no mention of any hearing of individual cases.

41. The letter that issued to the Claimant on 25<sup>th</sup> April 2016 was on retirement in public interest, and not dismissal, as had been resolved in the Council meeting of 23<sup>rd</sup> April 2016.

42. The record suggests that the Respondent and the parent Ministry were rightly, responding to public outcry concerning widespread examination irregularities leakages. The process of remedying this problem however noble, appears to the Court to have been rushed. The old Council was dismantled; a new one set up; and collective liability was swiftly apportioned on serving Senior Officers, without caring to evaluate the individual roles. The new Council was barely in office, when it was required to oversee the interment of the old Council, and Officers serving under the old Council. The CEO hurriedly resigned. The minutes of the meetings held by the new Council, which Council came into office through a gazette notice dated 14<sup>th</sup> March 2016, suggest the Minister and/or his Principal Secretary, dictated the course of events to the new Council. New Council members just went along with the tide. There was no objectivity.

43. The existence of retirement in public interest as a form of punishment in the Respondent's HR Manual, does not take away the right of an Employee to procedural and substantive justice, under Sections 41, 43 and 45 of the Employment Act. Punishment comes after a hearing, and establishment of valid grounds in justification of the decision.

44. In the High Court decision, *Geoffrey Muguna Mburugu v. Attorney-General [2003] e-KLR*, which was cited with approval in this Court's *D.K. Njagi Marete v Teachers Service Commission [2013] e-KLR*, it was held that an authorized officer, must approach the issue of retirement in public interest with an open mind, and behave in a quasi-judicial manner. The Courts in both decisions held that the circumstances attending to the actions taken against the respective public servants, did not take the cases out of the category of any kind of dismissal.

45. The Claimant's case did not fall outside the law governing termination, under Sections 41, 43 and 45 of the Employment Act. He was entitled to the full gamut of protections and guarantees available to other Employees under Sections 41, 43, 45 and 47 [5] of the Employment Act. These protections and guarantees were sacrificed to satisfy what was perceived as a public demand.

46. The Court is satisfied that retirement in public interest did not meet the minimum standards of fairness, under the Employment Act. The Claimant merits compensation for unfair termination.

47. He was employed on 15<sup>th</sup> December 2009, and retired on 25<sup>th</sup> April 2016. He worked for 7 years. He expected to continue working for 9 years. His record was tainted. He was transferred from one department to another, through a letter from the CEO Dr. Joseph Kivilu, dated 5<sup>th</sup> December 2014. He was reported to have failed in supervision of contracted works, and had poor working relationship with staff and external customers. The Court has taken into account also, that the Respondent did not show the Claimant to have been responsible for the circumstances which led to his retirement in public interest. He was not paid terminal dues on retirement. It is noted that the remedy of reinstatement, has been taken away from the Claimant, through a curious provision in the law, which requires that reinstatement can only be granted 3 years from the date of termination. There is already a time-bar of 3 years on filing of Claims under Section 90 of the Employment Act. Parties who have filed their Claims within 3 years from the date of termination, ought not be encountered with another time-bar on grant of the remedy of reinstatement. They have little, or no influence on how long the Court takes, to complete the hearing. There is no time-bar to the remedy of re-engagement, which has close relationship with reinstatement. Why gag the remedy of reinstatement? Grant of all remedies, once Parties have filed their Claims within the prescribed period, should be left entirely at the discretion of the Court. This provision appears to be just another barrier, placed in the way of grant of the remedy of reinstatement.

**48. The Claimant is granted equivalent of his 10 months' gross monthly salary for unfair termination, at Kshs. 2,861,500.**

49. The Court has not seen any clause in the contract or HR Manual, entitling the Claimant to 3 months' notice or 3 month's salary in lieu of termination notice. His letter of appointment dated 15<sup>th</sup> December 2009, gave notice of 1 month, or equivalent salary in lieu thereof. There was no variation in subsequent letters, promoting the Claimant. The various letters indicate that, "other terms remain the same." The HR Manual under clause 14.3.2 states that, "termination shall be by notice of not less than one calendar month, or the payment of a month's salary in lieu of notice." **The Claimant is granted 1-month salary in lieu of notice at Kshs. 286,150.**

50. He did not specify what number of days he is owed in annual leave. The prayer for 'leave days' balance,' is bare. It was not substantiated through evidence. It is rejected.

**51. Certificate of Service shall be released to the Claimant by the Respondent, under Section 51 of the Employment Act.**

52. *No order on the costs.*

**IN SUM, IT IS ORDERED: -**

*a. Termination was unfair.*

*b. The Respondent shall pay to the Claimant: compensation for unfair termination, equivalent to 10 months' gross monthly salary at Kshs. 2,861,500; and notice at Kshs. 286,150 – total Kshs. 3,147,650.*

*c. Certificate of Service to issue.*

*d. No order on the costs.*

**DATED AND SIGNED AT CHAKA, NYERI COUNTY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 9TH DAY OF APRIL 2021.**

James Rika

Judge