



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 508 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DR. JOSEPH M. KIVILU.....CLAIMANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT

JUDGMENT

1. The Claimant filed his claim vide a Memorandum of claim dated 31st March 2016 which was later amended on 18th May 2017 in which he prays for the following remedies.

(i) A declaration that the purported suspension of the Claimant by the Respondent vide its letter dated 29th March 2016 is in contravention of the constitution of Kenya 2010 and particularly Article 42 and 47 is unlawful and unfair

(ii) A declaration that the Respondents actions in initiating and thereafter failing to conduct or otherwise conclude the purported disciplinary proceedings against the Claimant is unlawful, illegal and amounts to an unfair

labour practice on the part of the Respondent.

(iii) A declaration that by their overall reprehensible conduct in this matter, the Respondent has constructively discharged the Claimant from employment and that the said discharge is unfair, illegal and unlawful

(iv) The Claimant further submits that constructive discharge by the Respondent was unfair, unlawful, and illegal. The Claimant therefore claims contractual payment as well as compensation for constructive discharge and prays for judgment for the following sums;

a) Under KNEC's HR Manual the salary withheld during suspension is payable to the employee at the end of the suspension period irrespective of the outcome of any disciplinary proceedings whether or not the employee is reinstated, accrued salary for April 2016 to March 2017 less house allowance paid (Kshs.503,250 – 80,000) x 12 = Kshs.5,079,000

b) The Claimant did not take annual leave for 3years and is entitled to the payment of the same. The Employment contract provides for 30 working days leave for every year worked.

Since KNEC has a five days working week an average month is 21 working days hence the following formula. Three years leave @30 working days per year ($30/21 \times 3 \times 503,250 = \text{Kshs.}2,156,785.70$)

c) Leave allowance is provided for in the employment contract. The leave allowance for the year starting July 2016 is due at Kshs.50,000

d) The contract has a 3 months' notice period and since no notice was issued by the employer, the Claimant claims for the same. Three months' salary being pay in lieu of notice = Kshs.1,509,750

e) Gratuity due under the contract @31%. The Claimant was working diligently to complete his tenure under which he is entitled to the gratuity. Since the employer unfairly discharged the Claimant he is entitled to the gratuity he would have earned over a full contract duration since it would be unfair for the employer to benefit from their own wrongdoing. The same works out as follows; $31/100 \times 503,250 \times 12 \times 5 = \text{Kshs.}9,360,000$

f) Twelve months salary being compensation for unfair/unlawful termination Kshs.503,250 x 12 = Kshs.6,039,000

g) Interest on above sums from the due date at courts rates

(v) Aggravated damages for the Respondent's reprehensible treatment of the Claimant.

(vi) An order that the Respondents issue the Claimant with a certificate of service.

(vii) Any other further order that the honourable court may deem fit to grant.

2. In response the Respondent filed a response to the memorandum of claim dated 11th April 2016 which was amended on 12th July, 2018.

3. The matter proceeded for hearing on 6th June 2020 when the Claimant testified in court. In his testimony he states that he was employed by the Respondent in April 2011 where he rose through the ranks to the position of a CEO on the 28th October 2014 in which position he served until his suspension on the 29th March 2016. The grounds of National Examinations Malpractice. The Claimant testified that since his suspension no disciplinary action has been commenced against him nor any criminal charges preferred against him.

4. The Claimant further testified that on 4th April 2016 the Respondent issued him with a show cause letter which he responded to through a letter dated 12th April 2016 and since then a disciplinary hearing has never been held. He testified that he was forced to report weekly to the National Area CID Headquarters as the Ministry was preparing a case against him which was suspended after the CID department indicated that KNEC had not provided any evidence in support of the allegations made against him.

5. The Claimant testified that he remained suspended for a period of 1 year during which time he was unable to meet his financial obligations to his family and it caused him a lot of mental anguish forcing him to tender his resignation on 24th March 2017.

6. He states that the decision to resign was not voluntary but was precipitated by the Respondent's unlawful actions towards him.

7. The parties filed a partial consent dated 26th February 2018 settling the claims of:

a) Gratuity

- b) Leave allowance
- c) Salary withheld during suspension
- d) Outstanding 97.5 leave days

8. The Claimant states that he is entitled to the accrued leave agreed at 97.5 days, general damages for constructive dismissal, three months' pay in lieu of notice, interest and cost of the suit.

Respondent's Case

9. The Respondent called one **Betty Jemugor Bisem** the corporation secretary and deputy director of the Respondent as its witness.

10. In her evidence she stated that she is aware of the consent recorded in court on the 26th November 2018 in which the parties agreed on 97.5 leave days and the only dispute remaining was on the computation of the same.

11. The witness stated that leave is pegged on basic salary and their computation is $360,000/30 \times 97.5$ which amounts to Kshs.1,170,000.

12. The witness further states that she is aware of the prayer on three months pay in lieu of notice and states that the Claimant should be the one to pay the Respondent as he resigned.

13. The witness testified that in 2015 there were KCSE Malpractices that were published everywhere in the newspapers and in the process to resolve the situation a new council was appointed which council resolved to suspend the CEO to pave way for investigations. A show cause letter was issued which the Claimant responded to. She stated that the disciplinary process was ongoing when the Claimant resigned on 24th March 2017 by which time investigations had not been concluded.

14. The witness states that the Claimant was receiving house allowance during his suspension and that he was never dismissed as he resigned before disciplinary process could be concluded.

15. On cross examination the witness stated that the Respondent's Human Resource Manual states that suspension does not exceed 6 months. She also confirms that between 29th March 2016 when the Claimant was suspended and 24th March 2017 when the Claimant resigned the Claimant was not called for any disciplinary hearing as was required by the Ruling of Abuodha J. paragraph 7.

Claimant's Submissions

16. The Claimant submits that the indefinite suspension vide the letter dated 29th March 2016 was unprocedural and contrary to right to fair labour practices as enshrined in Article 41 of the constitution of Kenya 2010. The Claimant submits that he was suspended for a period of 1 year with no indication as to the disciplinary hearing being undertaken. He further submits that he was arrested but no charges were preferred against him. The Claimant relies on Clause 12.32.1 of the Respondent's Human Resource Manual provides as follows regarding suspension;

"Where an employee has been charged with a criminal or grave offence, the Council Secretary may order his suspension from the exercise of his duties, pending the consideration of the case."

17. The Claimant further relied on Appendix 6 annexed to the Respondent's response to the memorandum of claim which is an extract of the Respondents Human Resource Manual. At page 59 of the response, Clause 12.29.1 provides for suspension and states as follows;

"Suspension refers to a disciplinary measure where the services of an employee are temporarily

stopped pending his/her dismissal/termination from service arising from conviction of a serious offence; when as a result of the proceedings for dismissal taken against him, the Council Secretary considers that the officer ought to be dismissed; or when an officer is reported to have absconded duty. Suspension shall not exceed six (6) months.”

18. The Claimant further submits that the right procedure was not followed in suspending him having served as a Chief Executive Officer as outlined in Section 16(2) and (3) of the Kenya National Examination Council Act, 2012, which provide as follows;

“16. Removal of the Chief Executive Officer

(1) *The Chief Executive Officer may be removed from office by the Council for-*

(a) inability to perform functions of the office arising out of physical or mental incapacity;

(b) gross misconduct

(c) Bankruptcy; or

(d) Incompetence.

(2) *Before removal under subsection (1), the Chief Executive Officer -*

(a) May be suspended from office by the Council;

(b) Shall be informed in writing of the reasons for the intended removal; and

(c) Shall be given an opportunity to put in a defence against any such allegations.

19. The Claimant relies in the holding by Wasilwa J. in **Kenya Union of Commercial Food and Allied Workers v MEC Sacco Society Limited, Cause No. 167 of 2014**, stated as follows as regards suspension;

“Coupled with fair administrative action is the right to be heard without unreasonable delay as provided for under Article 50(2)(e) of the Constitution. To subject an employee to suspension for over 1 year with the pretext of investigation is to flout the Constitution with impunity. Suspension should be for a reasonable period of time.

It is therefore this court's finding that the Respondents have violated the grievants rights by placing them on suspension for over 1 year.”

20. The Claimant also relies on the case of **Davis Gitonga v Judicial Service Commission, Petition No. 116 of 2018**, considered the issue of delay in conducting the disciplinary process and in finding in favour of the petitioner held as follows;

“83. I do agree with the Petitioner that a disciplinary process that takes 15 months to handle is long, coupled with undue delay and painful to the employee who has to wait with uncertainty on the date that awaits him.

84. This breaches the requirement of Article 47 of the Constitution to have the administrative process handled expeditiously and in the evidence it turns out to be unfair as justice delayed is justice denied.”

21. The Claimant submits that further to the indefinite suspension, he was subjected to unfair practices by the Respondent. He was arrested at the instance of the Respondent and required to report to the police every week, which caused him financial distress by the Respondent only paying him house allowance

during the entire period of the suspension. He submits that Failure to conduct the disciplinary hearing and keeping the Claimant on indefinite suspension without paying him his salary under the contract as well as subjecting him to arrest by the police caused the Claimant untold mental anguish, economic distress, social and professional embarrassment which ultimately led the Claimant to tender his resignation as the Chief Executive Officer of the Respondent. It was not voluntary but rather, the Respondent made it impossible for the Claimant to proceed with employment and therefore constructively dismissed him.

22. The Claimant relies in the case of **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited, Cause No. 339 of 2011**, the Rika. J. considered the issue of constructive dismissal in detail and stated as follows;

“48. The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.”

23. The Claimant therefore submits that the Respondent forced him to resign from his position therefore he is entitled to the claim for unfair/constructive dismissal and urges the court to award him 12 months' salary as damages.

24. The Claimant further states that he is entitled to three months' pay in lieu of notice as provided in clause 3 of his contract. He relies in the case of **Humphrey Sitati v Board of Management, Lenana School, Cause No. 370 of 2018** held as follows as regards payment of salary in lieu of notice where the employee is deemed to have been constructively dismissed;

“9. In view of the finding, that the indefinite suspension of the Claimant without pay was a breach that went to the root of the contract of service, I make declaration that the said suspension was unfair and unlawful and it amounted to constructive termination. Under section 49 of the said Act, the Claimant is entitled to one month's salary in lieu of notice plus 3 months' salary compensation for the unfair dismissal.”

25. The Claimant submits as agreed in the consent he is entitled to 97.5 accrued leave days in his computation he submits his computation as below;

$$(97.5/21) \times 522,000 = \text{Kshs.2,423,571.40}$$

26. The Claimant submits that an alternative method for computing the accrued leave assume that the employee took leave at the date of termination and spread out the leave forward, then pay his salary for the period covered, noting that the leave is based on working days.

- a) March 2017 after termination on 24th March 2017 5 working days
- b) April (excluding weekends and public holidays) working days
- c) May (excluding weekends and public holidays) 22 working days
- d) June (excluding weekends and public holiday) 21 working days
- e) July (excluding weekends)..... 21 working days
- Total..... 87 working days

f)... Leave days in August to make 97.5..... 10.5 days

27. Thus spreading 10.5 working days in August 2017 means that his leave would have terminated on 15th August 2017 and he would have been paid for the above duration as follows:

a) From 25th March to 31st March 2017 (7/31x 522,000 = Kshs.117,871.00

b).. April - July 2017 salary (4 x 522,000) Kshs.2,088,000.00

c).. August 2017 (15/31 x 522,000 = Kshs.252,580.60

Total leave pay..... = **Kshs.2,458,451.60**

28. The Claimant submits that the conduct of the Respondent being a government institution was oppressive, arbitrary and unconstitutional and therefore seeks for 12 months' salary compensation for constructive termination and an additional award for aggravated damages.

29. On the issue of costs the Claimant relies on Section 27 of the Civil Procedure Act which provides that costs follow the events. He further submits that interest should accrue from March 2017 when the Respondent unfairly kept the Claimant from his dues.

Respondent's Submissions

30. The Respondents submits that Employment Act No.11 of 2007 does not provide for constructive dismissal but the same is conceptualized in case law but the court in **Simon Ngugi Kamau v Silpack Industries Limited [2015] eKLR**, at **paragraphs 29 and 30** to state that in a claim of constructive dismissal the **burden is** upon the employee to prove the Respondent was responsible for introducing the intolerable condition and that there was no other way of resolving the issue except resignation contrary to the requirements of **Sections 43 and 45 of the Act** which place the duty of proving that the termination was fair upon the Respondent.

31. The Respondent submits that the Claimant has failed in discharging the burden of unfair termination/dismissal since he was placed on suspension on 29th March 2016 to allow investigations into malpractices and examination leakages and thereafter was issued with a notice to show cause. The Respondent submits that the investigations were being conducted by the police and thus the disciplinary process could not proceed pending the conclusion of the investigations but the Claimant resigned on 24th March 2017.

32. The Respondent submits that the provisions of clause 12.29.1 of the KNEC Human Resource Manual annexed at page 59 to the initial Response to Memorandum of Claim could not apply to the Claimant, who was the Chief Executive Officer and was the party in charge of executing the provisions of the Respondent's Human Resource Manual.

33. His suspension was therefore subject to his Letter of Appointment and **Section 16 of the Kenya National Examinations Council Act, No. 29 of 2012 (the 'KNEC Act)**. Section 16 of the KNEC Act does not provide for a cap on the suspension period.

34. It further submits that decision making in a public body cannot be equated to the same process in a private institution and the Board could not move to singularly proceed without the benefit of concluded Police investigations.

35. The Respondent further submits that the Claimant filed the instant suit under certificate of urgency and therefore they were obligated to await the court's ruling thereby paralysing the disciplinary process. It further submits that the Claimant resigned without notice therefore cannot claim constructive dismissal. It further submits there is no provision for general damages in Employment Act.

36. The Respondent further submits that parties narrowed down issues for consideration vide the consent filed on 26th February 2018 and aggravated damages is not listed therefore urges the court to limit itself to the issues agreed between the parties.

37. The Respondent submits that the special circumstances conceived by the Court of Appeal in the case of **D.K. Njagi Marete v The Teachers Service Commission [2020] eKLR** relied on by the Claimant in his submissions are inapplicable herein and hasten to add that in that case the Court of Appeal declined to award aggravated damages.

38. The Respondent submits that the Claimant resigned from employment effective 24th March 2017 and failed to give notice of resignation as such he was in breach of clause 21 of his appointment letter as such urges the court to dismiss the prayer.

39. The Respondent submits that parties agreed on 97.5 leave days as such submits its computation. The Respondent proposes to compute outstanding leave pay based on a 30-day month. The Respondent's computation is based on the following:

No. of leave days 97.5

Claimant's monthly basic salary: Kshs.360,000

Computation: $97.5 \text{ days} \times 360,000/30 = \text{Kshs.1,170,000}$

40. The Respondent submits that the Claimant having failed to prove that he was constructively dismissed he is not entitled to the costs and interest.

41. The Respondent's urges the court to dismiss the suit as the Claimant failed to prove his case.

Determination

42. I have considered the pleadings and evidence adduced in Court. I have further considered the submissions filed by the parties.

43. The issues for determination are

(i) Whether the Claimant was constructively dismissed.

(ii) Whether the Claimant is entitled to the orders sought.

Constructive Dismissal

44. Constructive dismissal is not expressly provided for in the Employment Act or in any other legislation in Kenya that makes provision for employment. The subject has however been discussed in many decisions of this and other courts. It is therefore an issue that is settled in our jurisprudence.

45. Constructive dismissal is defined in **Black's Law Dictionary 10th Edition** as –

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

46. In the English case of **Western Excavating ECC Ltd v Sharp (1978) 2 WLR 344**, Lord Denning defined constructive dismissal thus:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

47. Here at home, the Court of Appeal had the opportunity to elaborately address the subject in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR** where the Court stated:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

48. In the said decision, the Court of Appeal set out the principles for determination of constructive dismissal as :

a. What are the fundamental or essential terms of the contract of employment”

b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer”

c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

d. An objective test is to be applied in evaluating the employer’s conduct.

e. There must be a causal link between the employer’s conduct and the reason for employee terminating the contract i.e causation must be proved.

f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.

g. The employee must not have accepted, waived, acquiesced or conduct himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.

h. The burden to prove repudiatory breach or constructive dismissal is on the employee.

i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”

49. In the instant decision, it is the Claimant’s case that he was sent on indefinite suspension without a salary on 29th March 2016, made to report to Nairobi Area CID Headquarters weekly and subjected to financial embarrassment as he was unable to meet his financial obligations to his family. That this caused him mental anguish causing him to resign on 24th March 2017.

50. The Claimant's letter of resignation is reproduced below in order to appreciate its full tenure and purport –

“Joseph Mbithi Kivilu (PhD)

P. O. Box 2026

Machakos, 90100

24th March 2017

THE CHAIRPERSON, KNEC BOARD

George A. O. Magoha (Prof.)

Through

The Acting CEO

Kenya National Examinations Council

P. O. 73598- 00200, City Square

Nairobi.

SUBJECT: LETTER OF RESIGNATION AS THE CEO OF THE KNEC

After working for 15 years in senior positions in reputable organizations in South Africa, including the Umalusi, the Quality Assurance body responsible for all examinations in that Country, I decided to return to Kenya in 2010. While in the Country, I applied for an advertised position of a Senior Deputy Secretary (SDS) in charge of the Department of Test Development at KNEC. The interviews were conducted towards the end of 2010 and I was competitively selected and appointed to the position to start on the 1st April 2011.

My training in educational assessment (psychometrics) at both masters and doctorate degree levels, coupled with my experience in matters of public examinations in both South Africa and in Canada made me the most suitable candidate having strategic advantage to bring about the required transformation in the Council on many critical issues such as development, administration and processing of examinations amongst others. My performance was exemplary as assessed by the CEO through the performance contract appraisal system.

After serving diligently for three years as the SDS - Test Development, I was in April 2014 appointed by the Council as the acting Chief Executive Officer as the Council searched for a new CEO. I acted for six months until 28th October 2014 when upon conclusion of the competitive recruitment, I was appointed substantively to the position of CEO by the then Cabinet Secretary of the Ministry of Education Science & Technology (MOEST).

During my time as CEO of the Council, I was concerned about

the values of integrity, honesty and fairness in KNEC and therefore made great effort to ensure that these values were entrenched into all the operations of the Council. I encouraged both staff and stakeholders to practice these values as we sought lasting solutions to the various challenges facing the Council.

Performance contract appraisals during the one year and five months period that I served as the CEO were very good and confirmed that the Council was under good stewardship. As explained to

the Council in my letter dated the 12th April 2016 (in response to the "show cause" letter of 4th April 2016), the conduct and administration of the 2015 national examinations happened in a most difficult environment where there was a bitterly fought nationwide teacher's strike. The KNEC Management's advice- to the MOEST was to allow the KNEC to postpone the examinations by at least three weeks. This, it was hoped, would give time to the MOEST, the TSC and the Teachers' unions to conclude their negotiations and end the strike before examinations could be administered.

However, the KNEC's advice was ignored and the MOEST instead demanded that the KNEC replace teachers who were on strike with retired teachers as contracted professionals to invigilate, supervise and mark the 2015 examinations. The KNEC had no choice but to administer the said examinations despite knowing that a conducive environment for administering the examinations was lacking. The efforts that were made by the KNEC to check malpractice during that difficult period are set out in my letter dated the 12th April 2016. In light of the foregoing, an objective observer would commend the KNEC for successfully administering the examinations and having the results released in December 2015 and March 2016 notwithstanding those challenges.

On the 24th March 2016, I was arrested and forced to write a statement at the Nairobi Area CID Headquarters in answer to false accusations made by the MOEST and the KNEC Council regarding alleged 2015 examination malpractices. I was then forced to report weekly to the Nairobi Area CID Headquarter while the CID officers and MOEST were preparing a case against me. The weekly reporting was however suspended after Page 2 of 4 two months when the CID Department indicated to me that the KNEC had not provided evidence in support of the allegations they had made against me. I am however required to remain in the country just in case I am required by the CID to provide relevant information.

I consider my arrest and subsequent harassment as unfair considering that they were based on false accusations and fabricated reports on my role as the CEO in the examination malpractices that affected the 2015 examinations.

To date the MOEST and the KNEC have failed to provide credible evidence on the accusations that were levelled against me. This is grave injustice to me. I have suffered great damage to my personal character, social standing in the eyes of the public and my professional peers.

Further, and as you may recall, the KNEC Council suspended me from duty as CEO. KNEC on the 29th March 2016 and on 4th April 2016 instituted a disciplinary process against me by issuing to me a "show cause" letter as to why serious disciplinary action should not be taken against me. I was required to give my response to it by 12th April 2016. Despite the short period that I was given to answer to weighty charges I complied and responded to the charges through my letter dated 12th April 2016 (delivered to the KNEC through my advocates). I thereafter waited for communication from the KNEC as to the date I would be heard in my own defence or for any response at all.

I have, to date, not heard from or received from the KNEC any communication on the disciplinary process the KNEC Council instituted despite there being a stringent procedure laid out in the KNEC HR Policies, Procedures, Terms and Conditions of Service Manual and as is generally laid down in the country's myriad laws that require fair treatment of all persons in all spheres of life. The least the KNEC should have done is conclude the disciplinary process began against me! Even after the decision by the court made on the 24th June 2016 that upheld the suspension but directed that a fair disciplinary process be initiated immediately and that I be given an opportunity to defend myself against the various accusations, the KNEC instead of complying with that requirement, appears to have gone into a deep slumber. Noteworthy also is that the Manual requires that a suspension last for a maximum of 6 months.

As a result of the delayed justice I have struggled to financially sustain myself and my family has suffered greatly as a result. The failure to honour the Court ruling and to conclude the disciplinary

process has adversely affected me emotionally, professionally and has led to financial ruin. I have been unable to take up job offers both locally and internationally because of the requirement by the CID that I stay within the country and in case I am required to attend a disciplinary hearing. Having to wait for one year for justice to be done through the disciplinary process has caused me to suffer emotional stress, social isolation and financial distress. I have also not been able to get any gainful employment since I am legally an employee of the KNEC.

Given KNEC's conduct above I am forced to conclude that the KNEC made false and malicious allegations about my ability/performance as then CEO and that the KNEC having failed to produce any credible evidence in support of the allegations made to the CID and the charges in the "show cause" letter, are unlikely to do so now or any time in future. In order therefore to free myself from the suffering outlined above occasioned by the KNEC's mistreatment and to enable me plan for my future I have no choice but to hereby tender my resignation as the CEO KNEC. My resignation takes effect from the date of this letter.

Kindly work out my dues including salary arrears during the period of suspension, leave days arrears, gratuity for the period I served and all other dues legally owed to me. Do communicate your workings to my lawyer whose contacts are given below who will also write to you as to my demand for other benefits and compensation for the unlawful termination which I deem your actions to have constituted.

Yours faithfully

SIGNED

Joseph Mbithi Kivilu”

51. The letter of resignation aptly captures the Claimant’s frustrations at the time of resignation. He made it clear that he was resigning in order to bring his suffering to an end, and enable him to plan for his future.

52. The Respondent does not contest that it sent the Claimant on suspension and thereafter did nothing in respect of the disciplinary process after the Claimant had responded to the show cause letter on 12th April 2016 until the time that the Claimant resigned.

53. The Respondent’s reason for delaying the disciplinary process of the Claimant is that investigations were being conducted by the police. No evidence has been submitted by the Respondent to prove that any active investigations were ongoing up to the time of the Claimant’s resignation. It did not controvert the Claimant’s averment that the CID released him from reporting weekly as the Respondent had not provided evidence to support the allegations against him. The Respondent has further not demonstrated that it took any further action to conclude the disciplinary process after the Claimant responded to the show cause letter or that it followed up with the CID on the investigations.

54. It is further the Claimant’s position that the Respondent failed to comply with its own regulations which require that disciplinary process be concluded within 6 months. The Respondent however submits that the Claimant was not subject to its Human Resource Manual as he was the Chief Executive Officer and in charge of executing the provisions of the Manual.

55. The Claimant’s letter of appointment provided at paragraph 20 as follows –

“20. EMPLOYMENT LAWS AND STAFF RULES AND REGULATIONS

You will also be subject to provision of the Employment Act (Cap 226 of the Laws of Kenya) and to KNEC Staff Rules and Regulations as issued and/or amended from time to time.”

[Emphasis added]

56. The Claimant's letter of suspension refers to the legal basis for the suspension of the Claimant at the first paragraph thereof as follows –

Dr. Joseph M. Kivilu

Chief Executive Officer

Kenya National Examinations Council

P. O. 73598 – 00200,

NAIROBI

SUBJECT: SUSPENSION LETTER

*At its meeting held on 29th March, 2016 the Board resolved to suspend you from your position as the Chief Executive Officer of the Kenya National Examinations Council (KNEC) with immediate effect. This decision is premised on the **KNEC Act, Section 16 (1) and (2) and the KNEC Human Resource Policy and Procedures Manual.***

This follows the decision to investigate your role or otherwise in the malpractice and examinations leakages as widely reported.

Further information will be communicated to you in due course. In the event, please make arrangements to hand over any Council property under your custody to the Human Resource Management Office.

SIGNED

George A. O. Magoha (Prof.)

CHAIRPERSON, KNEC BOARD”

[Emphasis added]

57. The Human Resources Policy under which the Claimant was suspended provided for suspension as follows –

12.29 Suspension

12.29.1 *Suspension refers to a disciplinary measure where the services of an employee "are temporarily stopped pending his/her dismissal/termination from service arising from conviction of a serious criminal offence; when as a result of the proceedings for dismissal taken against him, the Council Secretary considers that the Officer ought to be dismissed; or when an officer is reported to have absconded duty. Suspension shall not exceed six (6) months.*

[Emphasis added]

12.29.2 *While an employee is thus under suspension, he will not be entitled to any salary, but the Council Secretary may grant such a suspended employee an alimentary allowance of the monthly basic pay (to be recovered from his dues on reinstatement) as he may deem appropriate — depending on the merit of the case.*

12.29.3 *An employee on suspension will be eligible to payment of full house allowance and medical entitlement.*

12.29.4 Where disciplinary or criminal proceedings have been taken against an employee under suspension and such an employee is not dismissed from service, the whole or any salary withheld under paragraph (12.33.3) above will be restored to him, upon the termination of such proceedings.

12.29.5 Where disciplinary or criminal proceedings have been taken against an employee under suspension and such an employee is dismissed from service, the whole or any salary withheld under paragraph (12.32.3) above will be paid to him. The dismissal action will take effect from the date the decision is taken.”

58. The Respondent's submissions that the Human Resource Manual did not apply the Claimant is therefore not factual. The Claimant's letter of appointment and the letter of suspension both made reference to the Human Resource Manual.

59. It is clear from the foregoing that the Respondent failed to comply with its own Human Resource Manual which provides that suspension should not exceed 6 months. It is further clear from the Manual that the suspension may have been premature. The Claimant had not been charged with a criminal offence as his case was still under investigation at the time of his suspension.

60. The Human Resource Manual further provides for alimentary allowance which the Claimant was never paid, hence his dire financial status as expressed in his letter of resignation.

61. I find that in the circumstances herein, the Respondent was guilty of subjecting the Claimant to such hardship that the Claimant was no longer able to continue with the employment and was entitled to repudiate the same. I therefore find that the Claimant has proved constructive dismissal by the Respondent.

Remedies

62. As submitted by the parties, they entered into a partial settlement of the following issues –

- a) Gratuity*
- b) Leave allowance*
- c) Salary withheld during suspension*
- d) Outstanding 97.5 leave days*

63. The only remedies remaining for consideration by the Court are therefore the following –

- (i) Outstanding annual leave of 97.5 days*
- (ii) Pay in lieu of notice*
- (iii) Compensation*
- (iv) Aggravated damages*
- (v) Certificate of service*

(i) Outstanding annual leave.

64. The Respondent does not dispute that the Claimant is entitled to 97.5 annual leave days earned but not taken. The parties only disagree on the formula for commutation thereof into cash.

65. Section 28 of the Employment Act provides for annual leave with full pay expressed in working days. This means that all the leave days are earned on working days. The formula for converting the same into cash is therefore based on working days per month which are for the Claimant, 20 days. It is also based on basic pay as allowances are not affected by annual leave. (Refer to **Rule 6 of Regulations of Wages (General Order) under the Labour Institutions Act**).

66. In the Claimant's case therefore, the formula for conversion of leave days into cash is monthly basic salary divided by number of working days per month thus $360,000/20 \times 97.5$ which comes to **Kshs.1,755,000**. I thus award the Claimant the said sum in lieu of annual leave.

(ii) Pay in Lieu of Notice

67. Having found that the Claimant was constructively dismissed, he is entitled to notice. His letter of appointment provided for three month' notice or pay in lieu. Notice is based on gross salary. I therefore award the Claimant the sum of **Kshs.1,566,000** based on a gross pay of Kshs.522,000 per month.

(iii) Compensation

68. Having found that the Claimant was constructively dismissed, he is entitled to compensation. I have considered the circumstances under which the Claimant lost his job as expressed in his letter of resignation. I have further considered the fact that the Respondent violated its own regulations governing suspension in the manner in which it handled the Claimant's case, the fact that he was arrested at the behest of the Respondent but never charged, also the fact that he was kept on suspension without pay for almost one year without any communication to him as to the cause of the delay in concluding his disciplinary case.

69. I have further taken into account the Claimant's reasonably long service with the Respondent which from the evidence on record, was exemplary but for the incident that led to the circumstances that are the subject of this suit. The Claimant worked for the Respondent for 6 years. I have further taken into account the Claimant's position being that of Chief Executive Officer and the publicity surrounding his arrest and suspension from office.

70. I thus find that this is a case that deserves maximum compensation which I accordingly award the Claimant at **Kshs.6,264,000**.

(iv) Compensation

71. The circumstances when punitive damages are payable in an employment case were set out in the case of **Rookes v Bernard** where Lord Devlin set out the circumstances when punitive damages are applicable being in cases of: -

(1) Oppressive, arbitrary or unconstitutional actions by the servants of government.

(2) Where the defendant's conduct was "calculated" to make a profit for himself.

(3) Where a statute expressly authorises the same.

72. In the case of **D. K. Njagi Marete v Teachers Service Commission (2020) eKLR**, the Court of Appeal declined to award aggravated damages stating thus –

*33. The appellant sought for exemplary damages. As stated by this Court in **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR**.*

*“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of **Rookes v Barnard [1964] AC 1129** where*

Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,

ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and

iii) where exemplary damages are expressly authorized by statute”.

*34. In the circumstances of this appeal, we are not satisfied that the respondent's actions were so arbitrary and oppressive as outlined in **Obonyo and Another v Municipal Council of Kisumu** (supra) so as to justify an award of exemplary damages. We are fortified in this finding due to the fact that the appellant went ahead to secure employment shortly after the termination of his employment. Our consideration of the circumstances herein alongside the case law on the subject as well as Section 49(f) and 49(g) of the Employment Act lead us to find that the claims for exemplary or aggravated damages must fail.”*

73. I have further taken into account the anguish of the Claimant in the award of maximum compensation to cater for the improprieties that bedevilled his disciplinary process. I do not find the Respondent guilty of deliberate oppressive, arbitrary or unconstitutional actions nor was there any proof of calculated conduct on the part of the Respondent to justify the award of aggravated damages. The same is accordingly declined.

(v) Certificate of Service

74. The Claimant is entitled to a certificate of service in terms of Section 51 of the Employment Act. The Respondent is directed to issue the same if it has not yet done so.

(vi) Costs

75. I award costs of this suit to the Claimant.

(vii) Costs

76. Interest shall accrue on decretal sum from date of judgment with the exception of pay in lieu of leave which shall attract interest from date of filing of suit.

77. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue

technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE