

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 87 OF 2017

THOMAS MASILA MACKENZIE.....CLAIMANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL (KNEC)....RESPONDENT

JUDGMENT

1. Thomas Masila Mackenzie was an employee of the Kenya National Examinations Council aka KNEC from 4th January 2007. He worked until 2013 when he was promoted to the position of the Principal Examination Secretary – Research and in September 2014 was transferred to the Principal Examination Administrator – Field Administration Division, a position he held until 29th March 2016. He averred that he was unlawfully and unfairly suspended by the Respondent contrary to the provisions of the Kenya National Examination Council Act, 2012, the Kenya National Examinations Council Human Resources Policies, Procedures and Terms and Condition of Service of Service Manual that came into effect on 1st September 2013 and revised on 1st January 2016. He averred that he earned Kshs. 255,590/- made up of basic salary – Kshs. 168,560/-, house allowance – Kshs. 58,000/-, responsibility allowance – Kshs. 12,000/-, commuter allowance – Kshs. 14,000/- and Kshs. 3,000/- telephone allowance. The Claimant averred that he sought judicial review against the decision to suspend him and despite obtaining relief from this Court he was issued with a notice to show cause letter dated 15th April 2016 which he averred was a deliberate cover-up of the unlawful and unfair letter dated 29th March 2016. He averred that he responded to the show cause letter on 20th April 2016 and stated therein that he had no integrity issue and he had not committed any offence and there was no basis to warrant the suspension. The Claimant averred that the Respondent wrote to him on 20th April 2016 lifting the suspension and sending him on leave of absence pending the conclusion of purported disciplinary process commenced by the show cause letter. He averred that the Respondent through impunity and breach of court order retired the Claimant on 25th April 2016 purportedly in the public interest vide a letter dated the same date contrary to the Human Resources Policies, procedures and Terms and Conditions of Service Manual, the Constitution, the Employment Act 2007 and the provisions of the Fair Administrative Actions Act 2015. The Claimant averred that the letter retiring him in the public interest was sent by post to his postal address. The Claimant averred that the judicial review matter was determined on 4th November 2016 where the learned Judge recommended at paragraph 52 of the judgment that the Claimant was at liberty to mount a civil suit for recovery of damages for the unlawful and unfair termination of employment. The Claimant averred that he had served the Respondent with distinction and never during his tenure had he been served with any notice to show cause, warning or subjected to any disciplinary proceedings. The Claimant thus sought a declaration that his retirement was unlawful, unfair and a violation of the Claimant’s fundamental rights and freedoms. He also sought reinstatement to his position with full salary and benefits or in the alternative payment for the remainder of his period of employment with the Respondent until attainment of the retirement age of 60 years. The Claimant also sought damages for the unlawful and unfair termination and violation of his fundamental rights and freedom, unpaid salaries and salary in lieu of notice as well as the costs of the suit together with interest.

2. The Respondent filed a defence in which it denied being in contempt of any court order. It averred that the Claimant was one of the key personnel of the Respondent charged with the execution of the Respondent’s mandate. The Respondent averred that it turned out that during the Claimant’s tenure of office the Respondent was plagued by exams leakage and cheating at an alarming proportion never before witnessed in the country and this occasioned a huge public outcry. The Respondent averred that on 24th March 2016 in an effort to contain the deteriorating situation in the administration of both the Kenya Certificate of Primary Education and the Kenya Certificate of Secondary Education exams decided to dissolve the Council of the Respondent and appoint new Council members. The Respondent averred that upon appointment the new Council moved to restore public confidence by weeding out any person whose conduct, commission or omission could have led to the unfortunate state of affairs. The Respondent averred that after preliminary investigations by the Council supported by State security and intelligence agencies, several managers were suspected of being behind exam leakages one of them being the Claimant. The Respondent averred that the Council resolved at a meeting on 29th March 2016 to suspend the Claimant together with other senior employees from their duties to allow for further investigations and fulfillment of disciplinary procedure requirements if need be. The Respondent averred that in compliance with court orders lifted the suspension of the Claimant and there was no order barring the Respondent from undertaking any disciplinary process against him. The Respondent therefore placed him on paid leave pending the conclusion of investigations and disciplinary process. The Respondent averred that given the public interest generated by exams leakage it was only proper that the Claimant be cleared of wrongdoing before being allowed to resume duty and it was imperative that the Claimant respond to the show cause letter issued to him. It averred that in any event the Court had not barred the Respondent from taking any disciplinary action against him and in the absence of any response to the show cause letter the Respondent was left with no alternative but to retire the Claimant in the public interest. The Respondent averred that since the retirement of the Claimant and other managers exam leakage at the Respondent’s outfit was checked and it would be injudicious to allow the individual complaint of the Claimant override the public interest. The Respondent thus urged the dismissal of the Claimant’s claim.

3. The Claimant testified as did the Respondent’s witness Befly Jemurgor Bisen. The testimony was in line with pleadings of parties as captured in the preceding 6 pages of this Judgment and no useful purpose will be served reproducing the verbatim record here.

4. The Claimant submitted that his claim was for the following reliefs; a declaration that the Respondent’s reason for retiring him is unlawful, unfair and violation of his fundamental rights and freedoms and he thus sought reinstatement to his position with full salary and

benefits or in the alternative payment of for the remainder period of employment until attainment of the age of 60, damages for unlawful and unfair termination and violation of his fundamental rights and freedoms and unpaid salary in lieu of notice and costs of the claim and interests. The Claimant submitted that the Respondent unfairly, unprocedurally, and unlawful suspended him from his position with a view to investigate the purported role or otherwise in the malpractice and examination leakages as widely reported. The Claimant submitted that he filed a Judicial Review Application No. 3 of 2016 at the ELRC Nairobi seeking for orders of *certiorari* and prohibition against the Respondent's decision to suspend him without any valid reason and cogent evidence as to his involvement in the purported malpractices and examination leakages in the country. The Claimant submitted that he was granted orders on 7th April 2017 which orders were to act as stay of the Respondent's decision dated 29th March 2016 pending the hearing and determination of the Claimant's substantive notice of motion. The Claimant submitted that in the Judgement of the Court in JR No. 3 of 2016 Nduma J. held that the Respondent acted contrary to section 4(3) of the Fair Administrative Action Act 2015 and violated its own manual and also it failed to follow the law and its own procedures in dealing with the Claimant's case. The Claimant submitted that the Respondent had served a Notice to show cause upon him during the pendency of the Judicial Review matter which was *sub judice* and led to the contempt of court proceedings dated 30th August 2016. The Claimant submitted that out of desperation the Respondent unlawfully, unprocedurally and unfairly decided to retire him in public interest vide its letter dated 25th April 2016 as provided for under clause 14:3:6 of the Respondent's Human Resource Manual. The Claimant submitted that there is no evidence tendered by the Respondent to prove that his case falls within the purview of clause 14:3:6 of the Manual and also no evidence was tendered to prove that the Claimant was involved in any examinations malpractices and leakages as purported by the Respondent or at all. He submitted that according to his job description, his work was to be done in industrial area Nairobi and it did not involve handling examination materials and processing results, thus the suspension and later retirement in the public interest unlawful and unprocedural. The Claimant submitted that there was no evidence that he breached any Code of Conduct or at all. The Claimant submitted that Sections 41(1), 44, and 45(2) of the Employment Act were violated by the Respondent as the termination was unfair and without any valid reason. He submitted that the termination also violated clause 14:3:6 of the Respondent's human resource manual as was found by Nduma J. in ELRC JR No. 3 of 2016. The Claimant submitted that Article 41, 47 and 49 of the Constitution were violated as he was not given a fair hearing, he was condemned unheard against the rules of natural justice and Section 4(3) of the Fair Administrative of Actions Act, Clause 12:20:2 was also violated as it provides that there must be a disciplinary committee in place but in his case that procedure was not adhered to as there was no disciplinary hearing. The Claimant submitted in regards to the newspaper cuttings that the same amount to rumors, mere allegations and mob lynching. The Claimant submitted that there is no mention of the Claimant and/or how he was involved in any leakage of examinations, if any. The Claimant submitted that the newspaper cuttings are of no bearing to this case and the same have no evidential value or at all. The Claimant submitted that he who alleges must prove as required by Section 107 of the Evidence Act. The Claimant submitted that the Respondent's witness testified that the Respondent relied on intelligence from National Intelligence Service reports to link the Claimant to the examination leakage but however, no such report was filed to confirm such allegations. The Claimant submitted that this position should be rejected as it lacks basis and it remains unfounded and mere allegations. The Claimant submitted that the Respondent failed to prove that he had any access to the printing press or that he was in possession of any examination material and/or had sold the same to any person or at all. The Claimant submitted that he proved his case on a balance of probabilities and his case remained un rebutted and hence he is entitled to the reliefs sought in the memorandum of claim.

5. The Respondent submitted that the Claimant being a public servant was retired in the public interest under Rule 14:3:6 of the Respondent's Human Resource Manual. The Respondent submitted that it is a state corporation and by virtue of Article 232 (2) of the Constitution the values and principles of public service applied to the Claimant. The Respondent submitted that at the time of retirement the Claimant was a principal secretary, field of administration and head of section dealing with supervision and invigilation. The Respondent submitted that the title therefore confirms that the Claimant was in charge of supervision and invigilation during examination process and therefore needed to exercise maximum integrity. The Respondent submitted that the Claimant was also responsible for recruitment of supervisors and invigilators and as the head of that section, if as he seems to suggest the people whom he recruited are the ones to be blamed for the leakages and malpractices then the buck stops with him as their manager. The Respondent submitted that a highly confidential report that was prepared by National Intelligence Service revealed that the Claimant was a member of a syndicate comprising senior managers of the Respondent who were involved in examination leakage, extortion and bribe taking. The Respondent submitted that the confidential report could not be released to the court since it would compromise the working of NIS and the secretive manner with which the Respondent goes about ensuring the credibility of examinations. The Respondent submitted that given the secretive manner with which examination papers are set and handled any leakage of such papers would in the absence of any evidence to the contrary be blamed on those involved in examination setting and handling. The Respondent submitted that the Claimant who was a manager directly involved in examination administration chain cannot escape blame and to that end, the public expected the Respondent as their trustee and agent to invoke the application of the rule allowing for the retirement of the Claimant in public interest. The Respondent submitted that the newspaper cuttings were not intended to prove the Claimant's involvement but rather to demonstrate to the court the concerns that were going on with respect to examinations leakages. The Respondent submitted that the Claimant never refuted the fact that the examination papers were leaked and that all that he maintained was that he was not involved. The Respondent submitted that the newspaper cuttings produced in evidence were also meant to demonstrate to the court the public reaction to the leakages which in essence epitomized public interest in the saga. The Respondent submitted that the retirement in public interest is not a punishment but an administrative action taken by Government in the interest of public order, safety and harmony. It submitted that in this case there was a reason for the public to be aggrieved and the retirement was justified. The Respondent relied on the Indian case of **Bal Kishan Garg v The State of Rajasthan and Others RWL 2005B(3) Raj 2005** for the preceding argument. The Respondent urged the Court not to ignore the fact that the grounds for retiring the Claimant were based on confidential reports prepared by the intelligence investigative organs of the Government giving rise to the subjective opinion that it was in public interest that the Claimant be retired. The Respondent submitted commissions and/or the omissions by the Claimant and his managerial colleagues rendered them unsuitable for retention in employment as the public trust in his office had been eroded. The Respondent submitted that deterioration in performance of the Respondent as the body entrusted by the public to administer examinations had reached a level that the Government had to take a proactive step by overhauling the entire management team compromising of the Board and all in line managers. The Respondent submitted that it fully abided by the Constitutional safeguards in favour of the Claimant before retiring him. It submitted that it sent a letter to the Claimant communicating its decision to suspend and investigate him and that alone fulfilled the requirement of Article 47(2) of the Constitution. The Respondent submitted that the notice to show cause dated 15th April 2016 also satisfied due process as envisaged under Article 41, 47(1) and (2) of the Constitution as read together with Section 41 of the Employment Act. The Respondent submitted that it extended the period within which the Claimant was to respond to the show cause notice. The Respondent submitted that the extension manifested a disciplinary process which was expeditious, efficient, lawful and procedurally fair and based on the Claimant's Counsel letters dated 20th and 23rd April 2016 it was obvious that the Claimant was not willing to responded to the show cause letter. The Respondent submitted that considering the circumstances of the case it decided to retire the Claimant in public interest. The Respondent submitted that the observations by the Judge in the Judicial Review case with respect to the retirement of the Claimant in public interest were inadvertently made by the Judge out of context and should be ignored by this Court. The Respondent submitted that this Court

should therefore determine this case on the basis of the evidence and the authorities laid before it. The Respondent submitted that it went out of its way to observe due process before retiring the Claimant and therefore he should not purport that there was no fair hearing since he refused to respond to the notice to show cause. The Respondent cited the case of **Dede Esi Annie Amor –Wilks v Action Aid International [2014] eKLR** where Rika J. held that where a senior employee frustrates the disciplinary process by putting fetters to prevent the disciplinary process from being held the employer would be justified not to invoke the full disciplinary procedure before terminating the services of the employee. The Respondent submitted that the Claimant had the benefit of receiving his Counsel's advice at the time of being issued with a show cause letter and he should have been made aware that the stay order issued to him in respect to suspension did not bar the Respondent from continuing with the disciplinary process. The Respondent submitted that if the Claimant had reasons to show why the disciplinary process should not be taken against him he should have done the same and having failed to do so he cannot turn around and assert that he was not given a fair hearing. The Respondent submitted that in light of the foregoing, the Claimant is not entitled to the reliefs sought or at all as there was no violation of the Claimant's rights and freedoms. The Respondent submitted that there were the rights of children who were being made to sit leaked exams and obtain fraudulent grading which ended up ruining the children's future that constituted much more grave public consequences than the rights of a few members of the Respondent's management team who through their commission or negligent omission perpetuated the vice. The Respondent thus urged the dismissal of the suit against it with costs.

6. The Claimant was retired in the public interest. There is no provision in the Employment Act of this mode of termination of a contract of service. Retirement in public interest is therefore a form of termination of employment which is instigated by the employer and would aptly fit the description of involuntary termination. As seen in this case it does not take the character of or comply with the dictates of a disciplinary process though in some cases it may be the result of a disciplinary case. The Claimant was placed on a course for a disciplinary case but before he was heard a decision to retire him in the public interest was undertaken. He had been asked to show cause and he did not write back denying the slew of allegations made against him or offer any explanation. The decision the Respondent took to retire the Claimant in the public interest of necessity should comply with the requirements of Section 43 of the Employment Act. The Respondent had the onus to show objective and demonstrable grounds warranting the retirement in the public interest. Whereas the disciplinary process that was ongoing was not barred by the decision of the Court in the Judicial Review Application the Claimant's termination in the public interest had to comply with the need to show objective and demonstrable grounds warranting the retirement in the public interest. Before the Court there was an assertion there was a highly confidential report that allegedly inculpates the Claimant. No evidence was adduced that could demonstrate the involvement of the Claimant as one of those responsible for exam leakages by commission or omission. It was held in the Judicial Review Application No. 3 of 2016 by Nduma J. that the Respondent had failed to accord the Claimant a hearing and this was not apparently challenged on appeal. In this case the Claimant has proved that the Respondent violated one of the cardinal rules of natural justice by not giving him a fair hearing before retiring him in the public interest. He is therefore entitled to recover for this unlawful and unfair dismissal. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. A declaration that the dismissal was unlawful and unfair as being contrary to the rules of natural justice
- ii. Compensation of 6 months being Kshs. 1,533,540/-
- iii. Costs of the suit
- iv. Interest on the sum in ii) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 22nd day of January 2020

Nzioki wa Makau

JUDGE