



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 235 OF 2016**

(Before Hon. Lady Justice Maureen Onyango)

**ALBERT NYABUTO NYAUNTU.....CLAIMANT**

*VERSUS*

**KENYA ACCOUNTANTS AND SECRETARIES NATIONAL  
EXAMINATION BOARD (KASNEB)..... RESPONDENT**

**JUDGMENT**

Vide a Memorandum of Claim filed on 19<sup>th</sup> February 2016, the Claimant alleges that he was unfairly terminated. He avers that the Respondent levelled several allegations against him with a view of finding a reason to terminate his employment and that he was taken through a disciplinary hearing that offended principles of natural justice. He seeks the following reliefs:

1. Reinstatement.
2. Compensation as follows:
  - a. 3 months' salary in lieu of notice
  - b. Payment of untaken leave – 27 days
  - c. Pension
  - d. Maximum compensation
3. Costs of the suit.
4. Any other remedy the Court deems fit to grant.

The Respondent filed a Statement of Response on 18<sup>th</sup> March 2016. It avers that the Claimant was reported to have been involved in a serious examination irregularity involving unauthorised change of marks for some candidates during the marking of the May 2015 professional examinations at Starehe Boys Centre where he had been deployed to participate in the marking of the examinations.

It avers that the Claimant was subjected to a disciplinary process as required under law and under the Respondent's Human Resource and Administration Policy Manual and was found guilty of contravening the policy on account of fraud, falsification and dishonesty. It further avers that the claimant was paid his terminal dues amounting to Kshs.113,088.

**Claimant's Case**

The Claimant testified that he was employed by the Respondent as a Human Resource Officer on 2<sup>nd</sup> May 2011. He testified that in June/July 2015, they were taken to Starehe boys Centre to supervise the examination process. He testified that his role was to supervise checkers.

He testified that on 21<sup>st</sup> October 2015, he was served with a show cause letter and was required to respond to an accusation that he had changed some marks for students. He testified that he responded to the show cause letter on 23<sup>rd</sup> October 2015 denying the allegations. He testified that he received another letter informing him that his response was not acceptable and was invited to a disciplinary hearing on 30<sup>th</sup> October 2015. He testified that he acknowledged receipt of the letter and requested for time and an opportunity to appear with a person of his choice.

He testified that he reported to work on 20<sup>th</sup> November 2015 from leave and on the same day he was required to appear before the disciplinary committee. He testified that the letter inviting him to the disciplinary hearing dated 18<sup>th</sup> November 2015 was written when he was on leave. He testified that he appeared before the disciplinary committee alone and it is at the hearing that he was shown the notebooks/mark sheets/booklets.

He testified that all the witnesses did not appear at the hearing. That he advised the disciplinary committee that there were no investigations. He testified that there was no compliance with procedure. That he was not supplied with the documents that he was said to have altered. He testified that he reported to the examinations centre before 8 am and that his supervisor Christabel used to authorise every person. That they had been allocated duties of opening and closing the centre.

He testified that he was paid 1 month's salary in lieu of notice yet his contract provided for 3 months' salary hence he seeks 2 months' compensation. He further testified that he was given 21 days leave.

Upon cross-examination, he testified that he was abandoning the prayers on leave pay for 27 days and that he was now praying for 2 months' notice being the balance.

He testified that marking happened in the month of July 2015 and it was not until October when he was summoned to answer some allegations. He testified that, in the 3 months, he did not know what was happening regarding the allegations. He testified at the first instance when he was summoned, he was not aware of the allegations thus he denied them.

He testified that his response to the letter dated 13<sup>th</sup> November 2015 requiring him to appear for the hearing on 20<sup>th</sup> November 2015, he did not ask for more time to appear before the Committee. He testified that he was not aware that investigations were carried out between June and October. He testified that he requested for documents but none was provided. That he was provided with information but no documents to verify the information.

He testified that suspension was mandatory under Section 8.4 of the Human Resource Manual yet he was not suspended. He confirmed that he was paid Kshs.113,000.

### **Respondent's case**

VALERIE NJOKI THIONG'O the Respondent's employee testified as RW1. She relied on her Witness Statement dated 13<sup>th</sup> February 2018 as her evidence in chief. She stated that she found a notebook on the front passenger seat of her car where the Claimant had sat the previous day when she gave him a lift. She stated that she kept the notebook and handed it over to the Marking Centre Coordinator on 7<sup>th</sup> July 2015.

Upon cross-examination, she testified that she is an Examinations Officer. She testified that she had given the Claimant a lift home and that he called her early the following morning asking whether he had dropped something in her car.

She testified that she asked the Claimant what he had dropped and he said nothing. She testified that she later looked at the notebook and it had student registration numbers and marking centres. She testified that the Claimant supervised checkers but he was not marking as none of the Staff of the Respondent mark papers.

She testified that the reason she knew it was the Claimant who dropped the notebook is because it was only him and her who were in the vehicle and that he called to ask if he had dropped anything. She testified that she was not called to give evidence at the Claimant's disciplinary hearing.

TIMOTHY KAMAU the Respondent's Revenue Officer testified as RW2. He relied on his statement dated 13<sup>th</sup> February 2018 as his evidence in chief.

In cross-examination, he testified that his role at the Starehe Boys Centre was to assist markers by issuing scripts to them. He testified that the Claimant was taking care of checkers and also worked with markers. That the Claimant was not involved in marking.

He testified that he noticed the Claimant was perusing marks which was unusual because he was alone with no other member of staff. That he noticed this on several occasions.

He testified that on 6<sup>th</sup> July 2015 he arrived at 7.10 am and found the Claimant in the room yet he was not supposed to be in the room alone. He testified that the Claimant was expected to wait for the others so that they open the room together. He testified that he did not ask the claimant about it. He testified that he reported the incident to the Centre Coordinator. He testified that he was called to the disciplinary hearing and the Claimant did not interrogate him. He testified that he only wrote a statement.

In re-examination, he testified that he found the Claimant in the room where staff operated from and where the mark sheets and everything else was kept. He testified that the room was locked at the end of the day, the key was kept by one person and when opening three persons

had to be present.

CATHERINE MARIGA the Respondent's Deputy Director Human Capital Development testified as RW3. She testified that she was the Claimant's supervisor. She relied on her Witness Statement dated 11<sup>th</sup> October 2017.

In cross-examination, she testified that the person in charge of opening the centre appoints someone to open the centre when he or she is not in a position to. She testified that she participated in the disciplinary hearing of the Claimant and that the Claimant was paid salary in lieu of notice and overtime amounting to Kshs.113,088. She testified that Clause 10 of the Claimant's contract of employment provided that he was entitled to three months' salary in lieu of notice, upon termination.

She testified that investigations were carried out internally by the Centre Manager and members of staff. She further testified that the Centre Manager submitted a report and another report was prepared by RW1 and RW2. She testified that persons who were at the marking centre were not invited to the disciplinary hearing but they presented their report. She testified that these persons were not called because the Claimant refused to participate in the hearing and walked out. She testified that the investigations were carried out between the time of the event and the time the claimant was called for the disciplinary hearing.

She confirmed that the Claimant was invited for a disciplinary hearing on 20<sup>th</sup> November 2015 which was the same day he resumed duty. She testified that not all numbers in the note book were altered but she could not remember which numbers were altered. She testified that they relied on the marks altered in the notebook and compared them with those in the scripts.

She testified that the Claimant was accorded a fair hearing because he was called for a disciplinary hearing and the committee explained to him why it did so.

In re-examination, she testified that the letter asking the Claimant to appear for the disciplinary hearing was dated 2<sup>nd</sup> November 2015 and that this was adequate time for him to prepare for the hearing. She testified that the Claimant applied for leave on 9<sup>th</sup> November 2015. She testified that the Claimant did not request for the presence of specific staff at the hearing and he did not ask for postponement of the hearing.

CHRISTABEL LUKALE OSANGO the Respondent's Deputy Director Examinations Processing testified as RW4. She testified that as at July 2015, she was a Centre Coordinator, Marking Centre.

She testified that the suspicious alterations of marks were different as some were done on the mark sheets but booklets were not altered. She testified that the Claimant had access to both the mark sheets and booklets.

She testified that the notebook collected from RW1 tallied with the alterations and that the notebook had the altered scores in the mark sheets. She testified that when this occurred, she went through all the mark sheets such that when she reported to her supervisor she had all the facts.

In cross-examination, she testified that she produced a daily register attendance but not all days are included. She testified that she was not part of the Disciplinary Committee. She testified that when the notebook was brought to her attention, she addressed the issue with the Claimant. She testified that the Claimant altered marks for students who had scored below the pass mark. She testified that she did not know if the Claimant was involved in investigations between July and October.

### **Parties' Submissions**

The Claimant submitted that the alleged note book bearing the students registration number did not belong to him and did not bear his name. He submitted that the respondent did not provide any documentary evidence that the purported notebook belonged to the Claimant. He submitted that he was never given an investigations report. He submitted that the allegation of changing marks is criminal in nature thus the respondent should have involved a handwriting expert to carry out proper investigations.

He submitted that the hearing was neither fair nor just as he never got a chance to cross-examine RW2 during the hearing. He submitted that the reason and process of terminating his employment were unfair, unlawful and did not meet the threshold set out under sections 41, 43(1) and 45 of the Employment Act.

The Respondent submitted that it complied with section 41 of the Employment Act having found the claimant guilty of gross misconduct and that it was justified in summarily dismissing him under section 44(4) of the Employment Act.

### **Analysis and Determination**

The issues for determination are –

- a. Whether the termination of the Claimant's employment was unfair.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Unfair Termination**

The Claimant's termination letter 25<sup>th</sup> November 2015 stated:

“Reference Number: ANN/212/A/13

Date: 25 November 2015

Albert N. Nyauntu

P. O. Box 2451-20100

NAKURU

Dear Sir,

TERMINATION OF EMPLOYMENT CONTRACT ON ACCOUNT OF MAJOR MISCONDUCT

“This is to inform you that following due disciplinary process, you were found guilty of the offence of changing marks on the mark sheets and/or answer scripts for some candidates of the May 2015 KASNEB professional examinations without authorisation during the marking process at the Starehe Boys Centre and School Nairobi in June/July 2015.

The Disciplinary Committee appointed to hear your presentations on 20 November 2015 found you guilty of contravening the Human Resources and Administration Policy Manual Section 8.4(b) on account of fraud, falsification and dishonesty and Section 8 4(0) on account of committing actions which may result in or create a situation detrimental to the reputation of KASNEB.

In view of the foregoing, your employment contract with KASNEB has been terminated with effect from 25 November 2015 on account of major misconduct in accordance with Section 8 6 5(g) of the Human Resources and Administration Policy Manual.

Please note that

1. You are entitled to the following benefits:

- a. Salary for the period worked up to and including 25 November 2015.
- b. Payment in lieu of the twenty seven (27) leave days outstanding.
- c. Pension contributions in accordance with the provisions of the Trust Deed and Rules of the KASNEB Staff Retirement Benefits and Life Assurance Scheme, 2011.
- d. Payment of one month's gross salary in lieu of notice.

2. You are required to complete and return the following enclosed forms

- a. Clearance form.
- b. Declaration of Income, Assets and Liabilities Form

3. You are also required to hand over your employment identity card, office keys and official documents in your possession to Felistas M. Kyuli, Senior Officer, Staff Records and Welfare.

Enclosed please find your certificate of service with KASNEB.

Yours Faithfully

SIGNED

Catherine W. Maringa

For: *SECRETARY AND CHIEF EXECUTIVE*”

It is the Claimant's case that the allegations resulting to his termination was aimed at finding a reason to terminate him. The Respondent avers that the Claimant was involved in a serious examination irregularity involving unauthorised change of marks. RW1 testified that she had given the Claimant a lift in her car and that the following morning, the Claimant called and asked her if he had left anything in the car. RW1 further stated that she indeed found a notebook where the Claimant had sat and that she reported the matter to RW4. RW4 in her testimony stated that after receiving information on the matter, she raised the issue with the Claimant. RW2 also testified that he found the Claimant alone in the room which was not the norm.

RW3 stated that there were two reports from RW1, RW2 and RW4. RW4 confirmed that she did prepared her own report. The Respondent

produced the Summary of issues authored by RW4 and a summary of the findings in the notebook in addition to the altered notebooks and mark sheets. The Claimant testified that the Respondent ought to have involved a handwriting expert as the allegations against him were criminal in nature.

I do not find that it was necessary for the Respondent to involve handwriting experts as the Claimant was only facing a disciplinary hearing and not criminal charges. In **Regent Management Limited v Wilberforce Ojiambo Oundo [2018] eKLR** the Court of Appeal held:

“To begin with there is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. his distinction was appreciated by Okwengu, J.A in the case of **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR.**”

At page 3 paragraph (d) of the Report of the Disciplinary Committee Meeting held on 20<sup>th</sup> November 2015, the Committee stated that out of all the mark sheets presented to the Claimant, he identified the mark sheet of centre 127 and indicated that he had signed against registration number NAC/181221. According to the Respondent’s witnesses, although he had access to both mark sheets, the Claimant’s role was not marking the examination scripts.

The Claimant stated that the notebook did not belong to him. While it did not bear his name, the undisputed fact is that there were alterations to the notebooks and mark sheets. I find that from the testimony of RW1, RW2 and RW3 the alterations were linked to the Claimant. I therefore find that the Respondent has proved that there was sufficient reason to terminate the Claimant’s employment hence it has discharged its burden under section 43 and 45 (2) of the Employment Act. I further find that the alterations constituted major misconduct under section 8.4 (o) of the KASNEB Human Resource and Administration Policy Manual as it had the potential of negatively affecting the reputation of the Respondent.

### **Procedure**

The Claimant avers that he was not afforded a fair opportunity to be heard and that the Respondent did not make any efforts to investigate the allegations against him. The Claimant was initially invited to a disciplinary hearing on 3<sup>rd</sup> November 2015 vide the Show Cause letter dated 28<sup>th</sup> October 2015. In his response dated 30<sup>th</sup> October 2015, he stated:

“Albert N. Nyauntu

KASNEB

P. O. Box 41362 – 00100

NAIROBI

30 October 2015

Secretary and Chief Executive

KASNEB

P. O. Box 41362 – 00100

NAIROBI

Dear Sir,

SHOW CAUSE ON ACCOUNT OF UNAUTHORISED CHANGE OF MARKS FOR SOME CANDIDATES OF KASNEB EXAMINATIONS

I acknowledge receipt of your letter dated 28 October 2015 and wish to raise the following concerns:

1. I have not been served with any specific charges in this case. It is my humble request that I be given the specific allegations levelled against me to enable me prepare my defense, if any.
2. I feel that the time I have been given is not adequate to prepare. I therefore also kindly request that I be granted adequate time to prepare.
3. I further request that I be allowed to appear before the disciplinary hearing with a person of my choice and not be limited to a member of staff. This is because I am not aware who is involved and who is not in this matter that I am being accused of. I find it wise to choose a person I am comfortable and confident with that they will have my interest as a prerogative.

It is for the above reasons that I ask for a reschedule of the disciplinary hearing. It is also my humble prayer that I will be accorded all

the necessary support to end this matter since as earlier stated, I have never been involved in any incidence that is contrary to my duties and I hope to be heard with fairness.

I am always ready and willing to attend a disciplinary hearing as I am a law abiding citizen. Kindly understand and reschedule the meeting as requested.

Thank you.

Yours faithfully

SINGED

Albert N. Nyauntu

ANN/212”

The Respondent in its letter dated 2<sup>nd</sup> November 2015 rescheduled the disciplinary hearing to 20<sup>th</sup> November 2015, stated that specific charges against the Claimant and provided a detailed summary finding of the investigations. The Claimant responded to this letter on 13<sup>th</sup> November 2015, 11 days later, and further sought to have the disciplinary committee hearing rescheduled again. He proceeded on leave on 16<sup>th</sup> November 2015. On 18<sup>th</sup> November 2015, the Respondent informed him that the hearing was still to take place on 20<sup>th</sup> November 2015. He testified that he was served with the letter dated 18<sup>th</sup> November 2015 on 20<sup>th</sup> November 2015 when he reported to work and was expected to attend the disciplinary hearing the very day.

Clause 8.6.3 of the KASNEB Human Resources and Administration Policy Manual provides:

“In all instances of disciplinary cases, that is minor misconduct, major misconduct and/or gross misconduct the following procedure will be used:

- a. When a disciplinary case has been reported, investigations into the charges are instituted and if appropriate a notice suspending the employee from attendance for a specified period while the investigations take place be issued.
- b. The formal disciplinary procedure starts with a show cause letter. The employee will be informed by the appropriate supervisor, in writing, of the nature of the complaint or allegation and thereby asked to write back within forty eight (48) hours to show cause why appropriate disciplinary action should not be instituted against him or her given the alleged offence or circumstance.
- c. The employee shall within two (2) working days from the date of the show cause letter, state his/her defence or state in writing that he/she reserves his defence in personal hearing.
- d. Depending on the nature of the offence and if the request is made, the period of two (2) working days can be formally extended to five (5) working days to enable the employee complete his/her explanation.
- e. An interview will be arranged no later than three (3) working days after receipt of the written statement, and the date of interview will be set by mutual agreement.”

Though the parties herein did not mutually agree on a date, the Claimant seems to have had intentions to delay the disciplinary hearing. I find that despite receiving the letter dated 18<sup>th</sup> November 2015 on the date he reported to work, the letter was sufficient notice for reason that no further date had been agreed by the parties and it took the Claimant 11 days before asking for the 2<sup>nd</sup> rescheduling of his hearing. Further, the Claimant had not received any letter rescheduling the hearing date. He did not enquire if there were any plans of rescheduling the hearing on account of him having sought a further rescheduling of the hearing date. Further, the Claimant proceeded on leave after receipt of the letter informing him of the disciplinary hearing.

The Claimant submitted that he was not given a fair hearing since he did not get an opportunity to cross-examine RW2. Neither the Employment Act nor Clause 8.6.4 of the Respondent’s Human Resources and Administration Policy Manual provides for cross-examination of witnesses during a disciplinary hearing. Further, the minutes of the disciplinary hearing do not indicate that the claimant requested to cross examine any witness.

Section 41 of the Employment Act provides:

- 1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**
- 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

In the letter dated 2<sup>nd</sup> November 2015, the Respondent stated that the Claimant's request to have a representation other than a member of staff was not accepted. The Claimant was accorded an opportunity to appear before the Disciplinary Committee and during the hearing he stated that he was not afforded enough time to choose his witness and also the members of staff he would have called as witnesses had been allocated duties outside Nairobi to participate in the supervision. However, the Report states that at the time the hearing was rescheduled the members of staff had not travelled to Nairobi. He had further not disclosed the names of the staff he wished to call to enable the respondent summon them to the disciplinary hearing.

I note that from the Report of the Disciplinary Committee, the Claimant seemed to have been irrational during the disciplinary hearing as it is reported that he denied the notebook was his and threw it to the Chairman. In its deliberations on the Claimant's representation, the Committee stated that the Claimant at one time walked out of the room without requesting permission from the Committee and had to be told to go back to the room.

It is my finding that the Claimant was afforded adequate opportunity to be heard as provided under section 41 of the Employment Act.

### **Reliefs**

In cross-examination, the Claimant stated that he was seeking 2 months' notice balance and that he was abandoning the claim for leave. The claim for leave therefore fails as it was abandoned.

Clause 10.1 of the Claimant's Offer of Employment dated 30<sup>th</sup> March 2011 provided that the Claimant was entitled to 3 months' written notice or payment of 3 months' salary in lieu of notice. In the letter dated 25<sup>th</sup> November 2015, the Respondent stated that the Claimant was entitled to one month's gross salary in lieu of notice. This was contrary to the parties' terms of employment. Consequently, the Claimant is entitled to the balance of two months' salary in lieu of notice.

The Claimant testified that his pension was still unavailable. Pension issues are not within the jurisdiction of this court. He should therefore liaise with the relevant institution with respect to this claim and any other claim in respect of his pension should be pursued as provided under the Retirement Benefits Act.

The claim for reinstatement fails as the Claimant testified that he already secured employment as a Human Resource Manager at the Kenya Meat Commission and most importantly the Court cannot grant an order for reinstatement more than 3 years after termination as provided under Section 12(3)(vii) of the Employment and Labour Relations Court Act, or where there is no proof of unfair termination and exceptional circumstances warranting reinstatement.

Having found that the Claimant's termination was fair, the claim for compensation fails.

Judgment is therefore entered for the Claimant against the Respondent **in the sum of KES 290,000/=** being two months' salary, which is the balance of pay in lieu of notice entitlement. The same shall attract interest at Court rates from the date of Judgment until payment in full.

Each party should bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JULY 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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**