



**Kesesi v Masinde Muliro University of Science and Technology (Cause 217 of 2018) [2023] KEELRC 604 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 604 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE 217 OF 2018**  
**S RADIDO, J**  
**MARCH 15, 2023**

**BETWEEN**

**MIDDLESTONE S. KESESI ..... CLAIMANT**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... RESPONDENT**

**JUDGMENT**

1. The main question for the Court's adjudication is whether Masinde Muliro University of Science & Technology (the Respondent) unfairly terminated the employment of Middleton S. Kesesi (the Claimant) on 9 March 2017.
2. The Cause was heard on 7 February 2023. The Claimant and an Assistant Registrar with the Respondent testified.
3. The Claimant filed his submissions on 17 February 2023, and the Respondent did not file submissions as directed.
4. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

**Procedure**

5. The Respondent issued a show-cause notice dated 22 December 2016 to the Claimant. The notice outlined the allegations against the Claimant and requested him to respond within 14 days. The show-cause was copied to the Union of which the Claimant was a member.



6. On 10 February 2017, the Respondent invited the Claimant to attend a disciplinary hearing set for 23 February 2017. The invitation indicated that the Claimant had not responded to the show-cause notice. The invitation was copied to the Union.
7. The disciplinary hearing was held as scheduled and among those present were Union officials from Kenya Union of Domestic, Hotels, Educational Institutions and the Kenya Universities Staff Union.
8. The Claimant did not attend the hearing and the Union representatives presented a sick-off for 2 days issued that morning.
9. The hearing was adjourned to 6 March 2017, and on this day, the Committee recommended summary dismissal.
10. In Court, the Claimant asserted that he responded to the show-cause in time, could not attend the first hearing due to ill health and that he was not informed of the second disciplinary hearing.
11. It is not in dispute that the Claimant procured a sick off on the morning of the disciplinary hearing and that it was placed before the Disciplinary Committee by officials of the Claimant's Union.
12. Logic and fairness dictates that the Respondent should have postponed the hearing of the Claimant's case. The record shows that the hearing was adjourned with a fresh date being set.
13. The minutes produced by the Respondent indicate that the Committee resumed on 6 March 2017. Union representatives were not present in the meeting and the Respondent did not disclose whether they or the Claimant had been informed of the particular hearing.
14. The Respondent thus failed the procedural fairness test.
15. On the question whether the Claimant responded to the show-cause, the Claimant produced a copy of his response which was stamped as received by the Respondent on 23 January 2017.
16. The Respondent contended that it did not receive the response and that was why it informed the Claimant as much in the letter inviting him to the disciplinary hearing.
17. The Claimant was aware of the assertion by the Respondent on the receipt of the response well before the hearing. He did not disclose the name of the person he delivered the response to in the filed witness statement nor during oral testimony.
18. It is therefore possible that the Claimant did not respond to the show-cause within time.
19. But since the Court has already concluded that the process did not meet the threshold of procedural fairness, the Court will say no more.

### **Substantive fairness**

20. The reason which led to the summary dismissal of the Claimant was:

That you applied for an imprest and received Kshs 152,725 in August 2016 for purposes of carrying out horticultural activities at Eburngwe Campus. After land preparations, kales were planted on half acre of the land. Since then other activities like gapping and purchase of seedlings for other crops have failed to take place since you have failed to provide the required finances.

21. The Court has perused the imprest warrant which was produced by the Claimant. In the warrant, he undertook to account for the imprest in full on or before 27 July 2016.



22. By the time of the disciplinary action, the Claimant had not surrendered or accounted for the imprest and even during cross-examination, the Claimant admitted that he had not accounted for the imprest.
23. The Court finds that the Respondent had and has proved valid and fair reasons to dismiss the Claimant.

#### **Compensation and salary in lieu of notice**

24. The Claimant admitted during the Court hearing that he had not accounted for the imprest, being public funds. He admitted he did not have records or documents to support his contention that he had purchased seedlings or paid casuals.
25. The Court is, therefore, of the view that the Claimant does not merit an exercise of its discretion to be awarded compensation or salary in lieu of notice from the same public funds he has failed to account for.

#### **Breach of contract**

26. The Claimant prayed to be awarded Kshs 681,464/- on account of service pay.
27. None of the parties produced a copy of the Claimant's letter of appointment or pay slip.
28. The Court is, therefore, unable to determine whether the Claimant qualified for service pay in terms of section 35(5) and (6) of the *Employment Act, 2007*.
29. In other words, it is not known to the Court whether the Claimant was a contributor to the National Social Security Fund or to a pension scheme.
30. This head of the claim was not proved and relief is declined.

#### **Conclusion and Orders**

31. The Court finds that although the respondent proved valid and fair reasons to dismiss the Claimant, the process leading to the dismissal was not fair.
32. For the reasons stated above, the Court declines to award the claimant the reliefs sought.
33. The Cause is dismissed with no order on costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15<sup>TH</sup> DAY OF MARCH 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

#### **Appearances**

For Claimant Bruce Odeny & Co. Advocates

For Respondent Dickens Ouma, Federation of Kenya Employers

Court Assistant Chrispo Aura

