



**Kenya Tertiary & School Workers Union “KETASWU” v Board of Management, Kabarnet High School (Cause E018 of 2022) [2023] KEELRC 830 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 830 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E018 OF 2022  
HS WASILWA, J  
APRIL 13, 2023**

**BETWEEN  
KENYA TERTIARY & SCHOOL WORKERS UNION “KETASWU” CLAIMANT  
AND  
BOARD OF MANAGEMENT, KABARNET HIGH SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The claimant Union instituted this claim vide a memorandum of claim dated May 17, 2022, claiming that one of its member, Mr Elijah Kibogong (herein after referred to as the grievant) was indefinitely suspended then retired on alleged public interest contrary to the law. The Union prayed for the following reliefs;
  - a. A declaration that the grievant was terminated unlawfully, unfairly, illegal and amount to constructive dismissal.
  - b. Payment of the sum of money claimed under paragraph 7 of the claim above as damages for loss of employment amounting to Kshs 4,354,891.75.
  - c. Issuance of certificate of service under section 51 of the *Employment Act*.
  - d. Cost and interest of this claim.
  - e. Any other or further relief this Honourable Court may deem fit and or just to grant.

**Claimant’s case.**

2. The Claimant union stated that the grievant, Mr Elijah Kibogong, was employed by the Respondent as a laboratory assistant/ Technician on March 1, 1995 at a salary scale of pounds 1254 x 39-1239 x 42-1419 x 51-1476 x 60-1950 per month as appearing in the appointment letter.



3. On January 1, 2011, the grievant was awarded, 13% salary increase. That he worked diligently for the Respondent until 10<sup>th</sup> November, 2022 when he was suspended from duty by the principal, Kabarnet Boys High School.
4. It is contended that the grievant was not given any opportunity to explain himself on the allegation that earned him a suspension. That he asked his Union, the claimant herein, to write to the Respondent by the letter of 16<sup>th</sup> November, 2020 which however did not elicit any response.
5. It is stated that the claimant and the grievant waited for the grievant to be placed on disciplinary hearing which never came forth, forcing the claimant to report a trade dispute to the ministry of labour by their letter of June 11, 2021.
6. Mr. Stanley Kemboi, was appointed by the labour officer to conciliate on the issue raise. A meeting was convened by the conciliator vide its letter of October 21, 2021 which the Respondent ignored.
7. On January 18, 2022, the grievant was served with an early retirement letter by the Respondent on allegation of public interest. At the time of the said retirement, the grievant was earning a basic salary of Kshs 17,971.
8. Faced with this turn of events, the conciliator made his recommendation and or report dated February 22, 2022, recommending the immediate reinstatement of the grievant and for the payment of the outstanding half salary arrears for the period he was on suspension.
9. The claimant maintained that the suspension and subsequent early retirement was done without according the grievant an opportunity to be heard, contrary to the dictates of sections 41 and 43 of the *Employment Act*.
10. It is averred that the suspension was marred with malice because the grievant was suspended without any pay, when the law dictates for payment of half salary during suspension. This action of suspending the grievant without pay amounts to unfair labour practices.
11. The claimant also stated that the grievant was underpaid throughout his employment and sought for the said underpayments. In addition, the claimant sought for the following damages; one month salary in lieu of notice, compensation for unlawful termination, annual leave pay in arrears, salary underpayments as tabulated in the claim paragraph 7(d), commuter allowances in arrears, underpayment of house allowance and gratuity pay all adding up to Kshs 4,354,891.75.
12. During hearing the claimant summoned the grievant as its witness who testified as *CW-1* and adopted his statement of May 17, 2022 which reiterates the contents of the claim. Upon cross examination, he testified that he is a members of the claimant union from 2017 but did not have any record of the same, neither did he have a copy of the CBA allegedly breached. He testified that he was informed of the reason for suspension and eventual retirement on public interest. That he was paid half salary during the time of suspension until his retirement which was done when he was 52 years old. He maintained that no investigations were carried out before the said termination was effected. He stated that he was earning gross salary of Kshs 23,746 at the time of termination, together with some house allowance but his commuter allowance which was of Kshs 4200 was not paid to him and that he was underpaid throughout his employment. He also admitted that he was a member of NSSF.
13. The second Claimant's witness was Michael Chepkwimo, who testified as *CW-2* and stated that he is the co-ordinator of the claimant union in Kabarnet, He adopted his statement of May 13, 2022 and confirmed that the grievant was a members of their Union. He stated that the grievant was never subjected to any disciplinary hearing but suspended then retired on purported public interest.



14. Upon cross examination, he testified that initially the grievant was a member of KUDHEIHA but joined the claimant Union. On re-examination, he testified that he participated in the conciliation of the matter at the labour office and that the Respondent did not object to the claimant being a members of the Union.

### **Respondent's Case.**

15. The Respondent entered appearance through the firm of Boiwo and Company Advocates on the June 15, 2022 and filed a defence to claim on even date denying all the averment of the claim and putting the claimant to strict proof.
16. The Respondent avers that the grievant was lawfully suspended for insubordination, incitement, misrepresentation, impersonation and fraud among other offenses after being given a fair hearing. That instead of terminating his services the normal way, they opted to a less harsh method of retiring the grievant on public interest even when the offenses had been proved.
17. The Respondent admitted to employing the grievant in the year 1995 as a laboratory technician. That in the year 2020, the Respondent received an anonymous letter dated October 27, 2022, purporting to emanate from the non-teaching staff which upon investigation it was discovered that the grievant was the author of the said letter.
18. A meeting was convened for all non-teaching staff on the October 13, 2020 for resumption of duty of all staff. However, two days later, on the October 15, 2020, the grievant locked the laboratory and left with the keys making teaching of practical physics lessons impossible.
19. The next day of the October 16, 2020, another practical physics lesson was scheduled to be undertaken at the lab but the said grievant was absent without any permission from the school. The principal made a decision for the door to the laboratory to be broken in order to allow students undertake the practical lesson.
20. Due to this insubordination and incitement, the grievant was suspended from duty with effect from November 10, 2022, for Three months on half pay. Therefore, that the suspension was not indefinite as pleaded by the claimant.
21. The Respondent summoned, Julius Ndirangu, the Chief principal, Kabarnet High School as its RW-1. He adopted his statement of June 14, 2022 and stated that the grievant was one of the workers at his school. He produced the list of documents as respondent's Exhibit 1-6 respectively. He testified that he was not aware whether the grievant was a member of the claimant union, because initially his dues were paid through KUDHEIHA then later his dues were paid directly to him. He testified that the grievant was retired on public interest because of inciting other non-teaching staff on issues touching on their salaries brought about by effect of Covid-19 aftermath, which was duly discussed and communicated to the said staff. He maintained that the said retirement cannot amount to unfair termination. Also that the grievant did not appeal the retirement after it was communicated to him, when he had that option.
22. Upon cross examination, he testified that the school does not have any recognition agreement with the claimant Union. He testified that he followed due procedure of retiring staff on public interest as provided for under secondary school accounting policies. He also stated that he received the recommendation from the labour office and tabled it before the Board, but the board disagreed with the labour officer's recommendation and decided to retire the grievant instead.



### **Claimant's Submissions.**

23. The claimant submitted that the grievant was terminated through retirement on purported public interest which is not provided for under statutes of Kenya or the Human Resource Policies and Procedures Manual for the public service which govern basic education as contemplated under regulation 18 of the Basic Education Regulations, 2015.
24. It was submitted that the suspension was reported to the ministry of labour office and after hearing the parties, the conciliator made recommendation for immediate reinstatement of the grievant with back pay of half salary not paid for the duration the grievant was suspended. Consequently, that this suit was only filed after the Respondent failed to adhere by the recommendation for the Conciliator.
25. The claimant submitted that the allegation that the grievant was the author of the unanimous letter addressed to the County director of education, Baringo County is without any basis, because there was no evidence that indeed the grievant was the author of the said letter and the allegation that the grievant admitted to writing the letter was not substantiated in this claim. Furthermore, that while the issue surrounding the said letter and claim that caused the suspension of the grievant, were pending determination by the conciliator, the Respondent, terminated the services of the grievants without following due process of termination provided for under the *Employment Act*.
26. On locus standi, the claimant submitted that the Union has members at Kabarnet High School, whose membership fees at all material times were submitted by the school to the Union as evidence by the cheques attached. Thus the claim that the Union is not recognized by the Respondent is far from the truth.
27. On underpayment, the claimant submitted that the title of the grievant being a laboratory technician is under Job Group j of the Civil Servants whose pay is as captured under the salary structure of civil servants and the Human Resource policies and procedures manual for the Public Service and to the related salaries of Public service and the Ministry of Education, Secondary School Accounting Policies are supposed to be Kshs 27,552 + 4200 X 1 = 31,752.
28. The claimant also submitted that the termination of the grievant on public interest amounted to unfair termination within the meaning of sections 41, 43 and 45 of the *Employment Act*. In support of this, they relied on the case of *Joseph Sitati Nato V Kenya Ports Authority* [2010] eklr.
29. In conclusion, the claimant submitted that the termination of the grievant was without substantive and procedural fairness and urged this court to allow the claim as prayed.

### **Respondent's Submissions.**

30. The Respondent submitted on four issues; whether or not retirement by public interest amounts to unfair termination, whether there was unfair termination of employment in the circumstances, whether the remedies sought should issue and who should pay costs of this suit.
31. The Respondent submitted the first issue on the negative and cited the case of *Kenya Revenue Authority V Menginya Salim Murgani* [2010] eklr where the Court of appeal relied on the case of *R vs Immigration Appeal Tribunal ex-parte JONES* [1988] 1 WLR 477, 481 it was held:-

“...There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they



achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.”

32. Accordingly, that since the Board of management of Kabarnet High School is a decision making body with procedures laid out in the statute, it’s decision was arrived at following due procedure and rules governing the employees of the school as such the retirement on public interest cannot be tantamount to unfair termination in the circumstances.in this they relied on Nigerian Supreme Court decision in the case of *BA Imonikhe v Unity Bank plc* SC 68 of 2003, where the court held that;-

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”

33. On whether the termination is unfair on the circumstances, it was submitted that for termination to be considered fair, the employer must demonstrate reasons for termination and subject the employee to disciplinary hearing as was held in *Walter Ogal Anuro V Teacher Service Commission* [2013] eKLR and the case of *Gibson D Mwanjala v Kenya Revenue Authority* [2015] eKLR where the Court held that ;-

“Pursuant to section 43 of the *Employment Act*, 2007, an employer has a duty to prove the reasons for dismissing an employee. But the statute does not leave it at that. Under section 45 of the Act, the employer has the added burden of showing that the reasons were fair and valid. The burden on the employer is an onerous one and it is unlike what obtains under the Civil procedure regime and/ or normal evidential provisions where defendants do not have to do so much. In fact so onerous is the burden, that by dint of section 45(4) of the Act, an employer should demonstrate its action to dismiss an employee was in accord with justice and equity, considering the circumstances of the particular case.”

34. Accordingly, that the grievant was issued with a notice to show cause letter, invited to disciplinary hearing as required under the law, however, that he did not exonerate himself from his misdeeds leading to his early retirement by public interest as per the regulations governing employment at the Respondent’s school, therefore that the termination was done in accordance with the law.
35. On whether the remedies sought should issue, the Respondent submitted that the grievant disobeyed lawful orders by his supervisor in failing to open the physics laboratory without giving any reason as such insubordinating the school principal. Further that he absented himself from duty without any reason or seeking any permission, an act which was also in breach of his employment contract. It was argued that these actions led to his termination after he admitted to the wrongdoings in the query made and in disciplinary hearing.
36. Based on the foregoing, the Respondent submitted that the claimant has not met any of the requirements needed under section 49(4) for the order of reinstatement to issue. Further that the grievant’s action of breaching his employment contract, rendered the contract untenable.
37. On the leave pay sought, the Respondent submitted that all employees utilize their leave days as needed and any unutilized leave days are considered forfeited and cannot be paid for.
38. On compensation for alleged unfair termination and notice pay, it was submitted that the grievant was relieved of his duties after proper procedure was followed, therefore the claim is not due.
39. On the claim for underpayment, the Respondent submitted that particulars for this claim were never shown by the claimant as to the exact figure the grievant received and what the arrears due. He argued



that the Claimant ought to have given evidence under this head in accordance with section 107-109 of the Evidence Act.

40. On gratuity pay, it was submitted that the grievant was employment on permanent and pensionable terms and not on contract to warrant payment of any gratuity. In this they relied on the case of *National Bank of Kenya V Pipeplastic Samsolit(K) Limited and another* [ 2002] EA 503.
41. On costs of suit, the Respondent submitted that since the Claimant has failed to prove its claim for unfair termination, they should be ordered to bear costs of this suit.
42. I have examined all the evidence and submissions filed by both parties herein. It is indeed admitted that the grievant was retired early by the respondent. The respondent avers that the retirement was necessitated by the grievant's action of insubordination and incitement of staff. These reasons for the early retirement were however never tested as the grievant was never given a chance to be heard.
43. The law is clear at Section 41 of the Employment Act that no termination can be effected without a fair hearing process. The law states as follows:-
  - “41. Notification and hearing before termination on grounds of misconduct
    - (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) 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”.
44. Despite the grievant being placed on suspension, the veracity of the reasons leading to suspension and later to early retirement were never tested.
45. The respondents submitted that the grievant was not a member of the claimant's union. The grievant has submitted that indeed he was a member and CW2 substantiated this fact. In any case the issue of union membership is individual and is not dependent on recognition of the union by the respondent.
46. This position is clear as per Article 41 of the Constitution which states as follows;
  - “41. Labour relations
    - (1) Every person has the right to fair labour practices.
    - (2) Every worker has the right—
      - (a) to fair remuneration;
      - (b) to reasonable working conditions;  
to form, join or participate in the activities and programmes of a trade union;  
and
      - (d) to go on strike.
    - (3) Every employer has the right—



- (a) to form and join an employers organisation; and
  - (b) to participate in the activities and programmes of an employers organisation.
- (4) Every trade union and every employers' organisation has the right—
- (a) to determine its own administration, programmes and activities;
  - (b) to organise; and
  - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining”.

47. Having found that the grievant was retired early without any hearing, it is my finding that he was unfairly and unlawfully terminated as per Section 45 (2) of the Employment Act 2007 which states as follows;

“45.

- (1) .....
- (2) A termination of employment is unfair if the employer fails to prove-
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason-
    - (i) related to the employee's conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure”.

48. In view of my finding above, it is indeed true that the grievant is entitled to some remedies which I award as follows;-

1. Given that he cannot be re-employed in another organization at his age, I will award him maximum compensation of 12 months salary for unlawful early retirement/termination =  $12 \times 23,746 = 284,952/=$
  2. Unpaid salary while on suspension =  $\frac{1}{2} \times 23,746 \times 14 \text{ months} = 166,222/=$
  3. 1 months salary in lieu of notice =  $23,746/=$
  4. Untaken leave for 1 year =  $23,746/=$
  5. Damages fFor unlawful early retirement equivalent to  $500,000/=$
  6. Underpayment of salary not proved or backed by evidence Total Awarded = 998,666/=
- Less statutory deductions plus costs and interest at court rates with effect from the date of this Judgment.



**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13<sup>TH</sup> DAY OF APRIL, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

JUDGE

In the presence of:

Japheth Agura for Claimant Union – present

Respondents – absent

Court Assistant – Fred

