



REPUBLIC OF KENYA



KENYA LAW
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**Mito v Kisumu National Polytechnic (Cause 171 of 2018)
[2023] KEELRC 2974 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2974 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 171 OF 2018
S RADIDO, J
NOVEMBER 22, 2023**

BETWEEN

GEORGE OLILO MITO CLAIMANT

AND

KISUMU NATIONAL POLYTECHNIC RESPONDENT

JUDGMENT

1. The Kisumu National Polytechnic (the Respondent) informed George Olilo Mito (the Claimant) of his summary dismissal through a letter dated 16 June 2017.
2. The Claimant was aggrieved and he sued the Respondent on 25 April 2018, alleging unfair termination of employment.
3. The Respondent filed a Response on 27 June 2018 and on 18 May 2020, the Claimant filed an Amended Memorandum of Claim (after securing leave) introducing causes of action for breach of contract and a prayer for compensation.
4. The Cause was heard on 20 June 2023 when the Claimant testified and on 26 September 2023, when the Principal of the Respondent testified.
5. The Claimant filed his submissions on 18 October 2023, and the Respondent on 15 November 2023.
6. The Court has considered the pleadings, evidence and submissions.



Unfair Termination of Employment

Procedural Fairness

7. The Claimant challenged the procedural fairness of the termination of his employment on the grounds that he was not allowed to produce evidence during the disciplinary hearing and that he was not allowed to be accompanied by an official from his trade union.
8. The Respondent issued a show-cause dated 30 March 2017 calling on the Claimant to explain absence from duty without permission from 23 March 2017 to 30 March 2017. The show-cause was copied to the Claimant's trade union shop steward.
9. The Claimant responded on 31 March 2017 and on 3 April 2017, he was suspended pending a disciplinary hearing. The suspension letter was copied to the shop steward.
10. On 10 May 2017, the Respondent invited the Claimant to attend a disciplinary hearing set for 15 May 2017.
11. The invitation letter was not copied to the trade union or any of its officials.
12. However, the minutes of the hearing indicate that the chairperson of the Staff Union was present.
13. On 16 May 2017, the Respondent interdicted the Claimant for 3-months pending finalisation of the case and on 16 June 2017, the Claimant was dismissed.
14. The Claimant was made aware of the allegations to confront, he was requested to respond in writing which he did and he was invited to a disciplinary hearing which he attended. The minutes show a union official was present and that the Claimant made representations.
15. The Court is satisfied that the Respondent was in compliance with the statutory requirements of procedural fairness as demanded by sections 35(1)(c) and 41 of the *Employment Act*, 2007.

Substantive fairness

16. Sections 43 and 45 of the *Employment Act*, 2007 imposes a burden on the employer to prove the validity and fairness of a termination of an employment contract.
17. The reasons given by the Respondent for dismissing the Claimant were willful neglect of duty, insubordination and absence from duty.
18. Willful neglect of duty was not part of the reasons given in the show cause letter but it was part of an allegation in an earlier memo dated 21 March 2017 from the Claimant's head of department and it was also mentioned in the letter inviting the Claimant to the disciplinary hearing.
19. Apart from the letter dated 21 March 2017, the Respondent did not produce any corroborative evidence that the Claimant idled away during working hours or that he willfully neglected his duties. The Respondent did not prove the validity or fairness of this ground.
20. The second and primary allegation was absence from duty. This allegation is intimately linked with the third allegation of insubordination (failing to report to the fish farm).
21. The Court will now address its mind to the allegation of absence from duty from 23 March 2017 to 30 March 2017.



22. The Claimant produced a copy of a Bond to Attend Court before the Chief Magistrates Court, Maseno.
23. The copy of the Bond indicates that the Claimant was required in Court on 23 January 2017, 27 February 2017 and 27 March 2017.
24. The Claimant also produced a medical attendance sheet to show that he was attended to at a public medical facility on 28 March 2017 and given 3 days off duty.
25. The Court finds that the Bond and medical sick-off constituted lawful cause for Claimant to be away from work on 27 March 2017 to end of March 2017.
26. With regard to the whereabouts from 23 March 2017 to 26 March 2017, the Claimant explained that he was on normal off in accordance with the shift schedule in the library department and that despite the off, he reported on 24 March 2017, a Friday when he was served with the deployment letter to the fish farm and that he went to the library for handing over and after which he got permission from the Human Resources Officer to attend Court but fell ill thereafter and got medical attention.
27. The Respondent did not deny that the Claimant received the letter dated 22 March 2017, deploying him to the fish farm on 24 March 2017. That date was a Friday.
28. The Court has already concluded that the Claimant had lawful cause to be away from 27 March 2017. He has explained his whereabouts from 23 March 2017.
29. The Court, therefore finds that insubordination was not proved.
30. The Court finds that absence from work without permission was not a valid or fair reason to dismiss the Claimant.

Compensation

31. The Claimant served the Respondent from 2014 to 2017 and in consideration of the length of service, the Court is of the view that the equivalent of 4 months' gross wages as compensation would be appropriate (gross wage in March 2017 was Kshs 18,382/-).

Pay in lieu of notice

32. With the conclusion that the dismissal was devoid of valid or fair reasons, the Court will also allow the equivalent of 1-month basic salary as pay in lieu of notice (monthly basic wage was Kshs 11,370/-).

Breach of contract

Accrued leave

33. The Respondent did not produce the Claimant's leave records and in light of the provisions of sections 10(3) and 28(4) of the *Employment Act*, 2007, the Court will allow this head of the claim for the last 18 months of the contract in a sum equivalent to one and a half salary

Service pay

34. The Respondent was remitting National Social Security Fund contributions on behalf of the Claimant and by dint of section 35(5) and (6) of the *Employment Act*, 2007, the Claimant is not entitled to service pay.



Overtime

35. The Claimant prayed for Kshs 10,116/- being overtime pay for work during public holidays.
36. The Claimant did not lay an evidential foundation to this head of the claim and relief is declined.

Reinstatement

37. The Claimant sought reinstatement but since 3 years have elapsed after separation, the Court declines to order reinstatement.

Conclusion and Orders

38. The Court finds and declares that the Respondent unfairly terminated the Claimant's employment and awards him:
 - i. Compensation Kshs 73,528/-
 - ii. Pay in lieu of notice Kshs 11,370/-
 - iii. Accrued leave Kshs 17,055/-Total Kshs 101,953/-
39. The award to attract interest at court rates if not paid within 30 days.
40. Claimant to have costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN MIGORI ON THIS 22ND DAY OF NOVEMBER 2023.

**RADIDO STEPHEN, MCIARB
JUDGE**

