



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

ELRC NO 321 OF 2017

DOMINIC KIPROTICH MELLY.....APPLICANT

VERSUS

ELDORET POLYTECHNIC.....RESPONDENT

J U D G E M E N T

1. The Claimant averred that he was employed by the respondent on 1st August, 2008 as a Library Assistant. On 24th July 2013 he was illegally and unprocedurally suspended from employment for being a member of Kudheia.
2. According to the Claimant, suspending him for participating in union activities was a violation of his constitutional rights to participate in activities and programs of a trade union.
3. He was invited to attend a disciplinary hearing on 26th August, 2015 however, the letter of invitation did not disclose the charge or complaints against him. When he appeared on the appointed date, he was informed the hearing had been postponed.
4. On 14th September, 2015 he was issued with a memo inviting him for a disciplinary hearing on 18th September, 2015 where the principal demand was that he revokes his membership to Kudheia or have his employment terminated. The Claimant refused to revoke his membership and vide a letter dated 26th October, 2015 the Claimant's employment was terminated. The termination letter however did not state the reasons for termination of his employment. The Claimant thus considered the termination of his employment unlawful and unfair.
5. The respondent in its statement of response stated that the suspension of the Claimant had nothing to do with his union membership. The respondent further denied that it demanded that the Claimant revokes his membership to Kudheia or his contract of employment be terminated.
6. According to the respondent the Claimant was guilty of inciting other employees to agitate against the respondent on tribal and ethnic lines. The respondent further averred that it had no room for an inciter and tribalist which the Claimant was. And that he wanted to cause chaos and animosity in the institution.
7. At the oral hearing the Claimant stated that he was adopting his witness statement recorded on 1st December, 2015 as his evidence in chief. According to him he was employed on 1st August, 2008 as a Library Attendant at a monthly salary of Kshs. 5,100/= and worked until 2013 when he was redeployed to the Supplies Department.
8. According to him he had no previous disciplinary issues. On 24th July, 2015 the principal called him to his office where he found him in the company of his Deputy and the Registrar. He was asked if he was a member of Kudheia to which he answered in the affirmative and was asked further if he was now going to fight the respondent because of his union membership. The principal further told him that now that he had taken the institution to Court, he should stay away until the case was determined.
9. According to the Claimant he personally had no case against the respondent in court but the union had a case in Court against the respondent concerning recognition. He was then issued with a suspension letter. The letter said he would remain on suspension until the case was heard and determined. He was put on half pay during the suspension.
10. He later called for a disciplinary hearing on 20th August, 2015. He was with two other colleagues. The case for the other two proceeded but his was postponed to another date. On 14th September, 2013 he was indicted for a disciplinary hearing on 18th September, 2019. It was his evidence that the hearing was limited to one issue which was union membership. He was asked to resign from the union for his suspension to be lifted. He denied he incited any employee along tribal lines. He denied the facebook post was his. It was a pseudo account.

11. In cross-examination he stated that he had never been shown any code of ethics for the respondent. He further stated that the suspension contained other allegations. When shown appendix 6 he stated that he could not confirm if the words in the facebook post were inciteful. It was further his evidence that the names on the facebook account were similar to his but not his.

12. Concerning leave, he stated that leave summary from 2009 -2015 showed that leave balance was nil.

13. The respondent did not call any witness and chose to close its case.

14. Under section 43 of the Employment Act the burden of proof of reason for termination of employment is cast upon the employer. Further the reasons for which an employer terminates the contract of an employee are those reasons which the employer genuinely believed to exist at the time of termination and which caused the employer to terminate the services of an employee.

15. Failure to prove reasons for termination would lead to a finding that a termination of contract was unfair.

16. The Claimant herein was allegedly terminated from employment for inciting other employees along tribal lines. He was taken through a disciplinary hearing and consequently terminated. The respondent however did not file with its documents the minutes of the disciplinary hearing to show the Claimant was confronted with this accusation. Further there was no show cause letter exhibited confronting the Claimant with the allegations against him and requiring his response.

17. The Claimant on the other hand alleged that his dismissal was because of his union membership and that at the disciplinary hearing he was coerced to resign from the Union or have his service terminated. He refused to resign hence his service was terminated.

18. The accusations against the Claimant were serious so are his allegations in rebuttal. It therefore behove the respondent to call witnesses to support the allegations against the Claimant and rebut his claims. Failure on the part of the respondent to call witnesses therefore left the burden of proof cast upon them in law undischarged. The court therefore finds and holds that the termination of the Claimants service was unfair. Regarding violation of his constitutional rights, the Claimants did not sufficiently demonstrate in what way the termination of his service violated his constitutional rights and which provisions of the constitution was violated. No finding will therefore be made on this aspect of the claim.

19. The Claimant served the respondent for 6 years by the time he was terminated. He did not tell the Court his age and prospects of getting another employment. In that regard the Court is of the view that seven months salary would be reasonable compensation for unfair termination. This award will be in addition to terminal benefits stated in the Claimant's termination letter dated 26th October, 2015.

20. That is to say the Claimant is hereby awarded Kshs. 118,125 as compensation for unfair termination of service. This award is in addition to terminal benefits stated in his letter of termination dated 26th October, 2015 if not paid already. The Claimant shall further have costs of the suit. The award shall be subject to taxes and statutory deductions.

21. It is so ordered.

Dated at Eldoret this 12th day of **January**, 2021

Abuodha Jorum Nelson

Judge

Delivered this 12th day of **January** 2021

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge