



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 371 OF 2013**

**WILLIAM METTO**

**CLAIMANT**

v

**KERIO VALLEY DEVELOPMENT AUTHORITY RESPONDENT**

**JUDGMENT**

1. William Metto (Claimant) commenced legal proceedings against Kerio Valley Development Authority (Respondent) on 28 October 2013 and the issue in dispute was stated as *withheld salaries and allowances* (this is one of a series of Causes by employees of the Respondent dismissed on allegation of absenteeism filed on the same day).
2. In a Response filed on 11 February 2014, the Respondent however stated the issue in dispute as *alleged unfair termination of the Claimant William Metto*.
3. The Claimant must have realised that he had misstated the issue in dispute, for on 9 October 2014, he filed an *Amended Memorandum of Claim* after getting leave of Court, and in which he stated the issue in dispute as *unfair/wrongful termination of the Claimant* (amended Memorandum of Claim was filed outside the agreed timeline of 14 July 2014 but was admitted by the Court on 10 October 2014).
4. The Respondent filed a *Response to Amended Memorandum of Claim* on 15 March 2015.
5. The Claimant filed a *Further Amended Memorandum of Claim* on 17 December 2015 after getting leave of Court
6. On 10 February 2016 when the Cause came up for hearing, the parties agreed that it be determined on the basis of the record and submissions to be filed pursuant to rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2010 and with reference to the evidence tendered in a related matter, Nakuru Cause No. 368 of 2013, *Barnabas Kiprono v Kerio Valley Development Authority* (the Court is of the view that parties ought to be cautious when agreeing to this mode of determination when there are disputes of facts or facts which require proof through evidence/documents).
7. The Court gave directions as to the filing of submissions but only the Claimant's submissions were on record by time of preparation of this judgment.
8. The Court has considered the pleadings, documents filed and the submissions by the Claimant and identify the issues for determination as, *whether the summary dismissal of the Claimant was unfair and if so, appropriate remedies*.
9. But first, some background.

## **Background**

10. The Respondent carried out a mass transfer of staff in April 2013 and the Claimant (among over 100 other employees) was transferred to Turkwel Station through a letter dated 26 April 2013. The transfer was effective from 29 April 2013.

11. On 28 June 2013, the Respondent received a report from its Regional Manager in Turkwel that the Claimant had reported on 17 May 2013 and had been granted 10 days off, but had not reported back by the date of the Memo.

12. On 5 July 2013, the Respondent issued to the Claimant a show cause notice to show cause within 14 days why disciplinary action should not be taken against him on account of absence from duty without leave or lawful cause.

13. The Claimant responded to the show cause through a letter dated 12 July 2013 stating that he had not gone back to work due to logistical problems (transport not provided by Respondent).

14. Thereafter, the Respondent through a summons dated 12 August 2013 invited the Claimant to appear before an Ad Committee on Discipline on 21 August 2013 to answer to a charge of desertion of duty.

15. The Claimant (and others) in a letter dated 16 August 2013 from Mwinamo Lugonzo & Co. Advocates addressed to the Respondent challenged the summons and also objected to the composition and jurisdiction of the Ad Hoc Committee.

16. On 20 August 2013, the Claimant (and 5 other employees) filed Eldoret High Court Petition No. 16 of 2013, *Barnabas Kiprono & 5 Ors v Kerio Valley Development Authority*, challenging the transfers and disciplinary process by the Ad Hoc Committee as constituting unfair labour practices and in violation of their constitutional rights.

17. On 21 August 2013, the Respondent replied to the letter of objection by the Claimant's legal advisers, asserting that it had the authority to take disciplinary action against its employees.

18. In the event, the Claimant failed to appear before the Ad Hoc Committee on Discipline on 21 August 2013.

19. The Respondent therefore, in a letter dated 20 September 2013 informed the Claimant of his suspension and at the same time invited him to appear before an Ad Hoc Committee of the Board on 26 September 2013 to answer to a charge of absenteeism for 134 days.

20. The Claimant failed to appear before the Committee of the Board, and it recommended to the Full Board that he be dismissed summarily.

21. The Full Board met on 18 December 2013 and it approved the recommendation for dismissal.

22. Consequently, the Respondent dismissed the Claimant through a letter dated 6 January 2014 and informed him of a right of appeal within 42 days.

## **Whether dismissal was unfair**

### **Procedural fairness**

23. The Claimant was informed of the allegations to confront through the letter dated 5 July 2013. He was given 14 days to respond and he responded on 12 July 2013.

24. The Respondent then summoned the Claimant through a letter dated 12 August 2013 to appear for an oral hearing slated for 21 August 2013. He did not attend and the reasons were given in the advocate's

letter dated 16 August 2013.

25. The Claimant was again invited to appear before a Committee of the Board on 26 September 2013, but he failed. A recommendation for dismissal was made and later endorsed by the Board.

26. The Claimant challenged the process on the grounds that it was unprocedural, unlawful and null and void because the charges were not adequately stated and the Committee had no jurisdiction.

#### *Adequacy of charges*

27. The show cause letter dated 5 July 2013 informed the Claimant that he had been absent without leave from end of May and he should explain. He responded to the notice.

28. The letter dated 12 August 2013 inviting the Claimant to appear before the Ad Hoc Committee of the Board also stated the charge as desertion of duty.

29. In the Court's view, the Claimant was supplied with adequate particulars as to the charge(s) to confront both before the Ad Hoc Committee on Discipline and the Committee of the Board and even his response show that he was aware of the case to meet.

#### *Jurisdiction of the Disciplinary Committee*

30. It appears that the Claimant was in grade KV 9 (see August 2013 payslip) as of time of disciplinary action.

31. An extract of what appears to be the Respondent's Code of Regulations (Terms and Conditions of Service) was filed in Court.

32. Section 10 of the extract deal with disciplinary provisions.

33. Under section 10.1.1 the Respondent is expected to establish an Advisory Committee to advise the Management on disciplinary matters involving employees in Job Groups K.V 9 and below.

34. Section 10.1.2 mandates the Respondent's Managing Director to appoint the Chairperson of the Advisory Committee from among senior staff not below Job Group KV 12. The Personnel Manager is the automatic Secretary and the Committee is composed of 5 members.

35. In what may appear to be a contradiction, section 10.3.2 provide for a Disciplinary Committee consisting of not less than 3 and not more than 9 members appointed by the Managing Director.

36. Although the parties did not address the apparent contradiction, in the Court's view, the role of the Advisory Committee is to *advise* and or set the policy guidelines while it is the mandate of the Disciplinary Committee envisaged under section 10.3.2 to handle or deal with *live/actual* disciplinary cases.

37. The Claimant by virtue of his Job Group was susceptible to the jurisdiction of the Disciplinary Committee envisaged by section 10.3.2.

38. However, in the instant case, the Claimant was also invited to appear before a Committee of the Board, but he snubbed the opportunity and he cannot now complain. He was afforded an opportunity to make representations at the highest levels of the Respondent's structures.

39. In the Court's considered view, the Disciplinary Committee was validly constituted and it was competent and had jurisdiction over the Claimant.

#### *Role of Board of Directors in disciplinary cases*

40. In terms of section 10.2.2 of the Terms and Conditions of Service, the power to dismiss an employee in Job Group KV 9 and below is vested in the Managing Director without reference to the Board.

41. The Board of Directors get involved only when an employee is in Job Group KV 9 and above.

42. The Claimant's contentions on the mandate of the Managing Director vis a viz the Board are therefore misplaced, in the Court's view, considering his job group.

### **Substantive fairness**

43. The reasons given for the dismissal of the Claimant was that he was absent from work without lawful cause and declining to appear before the Disciplinary Committee.

44. The Claimant's response to the show cause attempts to explain his absence after the expiry of the 10 days off he was given to settle.

45. There is however no explanation as to why the Claimant did not seek for more time to settle down after the 10 days lapsed.

46. As a not too junior employee, more was expected of the Claimant and he should not have waited for a show cause notice to explain his whereabouts.

47. The Court finds that the Respondent had and has proved that the Claimant was absent without permission or lawful cause and that constituted a valid and fair reason to dismiss him.

48. Before addressing the question of remedies, it is apparent to the Court that the Claimant was misadvised by his then legal advisers and further that the mass transfers unsettled quite a number of employees.

49. However, the question of the legality or otherwise of the transfers is pending before the High Court in Eldoret and that would be the proper forum to canvass the issue.

50. The Claimant made much of his transfer to carry out duties he was not suited for. Malice and ill will have been alleged.

51. The Court has been bothered that the Claimant attempted to introduce the transfer question in these proceedings when a similar question is pending litigation before the High Court without making an election as to how to proceed.

52 That dispute is pending before the High Court in Eldoret and this Court will therefore not delve into it.

### **Appropriate remedies**

#### ***Reinstatement***

53. This remedy is not available with the conclusion reached on the fairness of the dismissal and in any case, it is more than 3 years since the dismissal of the Claimant and pursuant to statutory prohibition, and in the circumstances of this case, reinstatement would not be an appropriate remedy to grant.

#### ***Declaration dismissal unlawful***

54. This head of relief is not available considering the conclusion on dismissal.

#### ***General damages***

55. The Court understands this prayer to relate to compensation in terms of section 49(1)(c) of the

Employment Act, 2007.

56. With the conclusion reached, general damages (compensation) become legally untenable as a remedy.

### ***Unpaid wages during suspension***

57. Without a statutory or contractual authority, withholding of wages during suspension is unlawful.

58. Section 10.2.4 allows suspension of staff on half salary or without salary where in the opinion of the Respondent's Managing Director, financial loss may be involved.

59. The Respondent's suspension letter did not suggest any financial loss nor was there any such indication in the course of oral testimony.

60. The Court would therefore find that the Claimant is entitled to wages up to date of dismissal.

61. It is regrettable the Claimant purported to sneak in the computations, and Terms and Conditions of Service through submissions (a practice unknown to law as a basis ought to have been laid through documentation such as contractual documents, pay slips or proof of the unpaid salaries).

### ***Annual leave arrears***

62. Annual leave arrears were not a head of claim or head of relief sought in the pleadings and it is rejected.

### ***Certificate of Service***

63. This is a statutory right and the Respondent is directed to issue one to the Claimant within 14 days.

### **Conclusion and Orders**

64. The Court finds and holds that the summary dismissal of the Claimant was fair, but that he is entitled to unpaid wages up to 6 January 2014.

65. Unfortunately the same were not computed and the Respondent is ordered to compute and pay the Claimant the same.

66. Save for the unpaid wages during suspension, the Cause is dismissed with no order as to costs.

**Delivered, dated and signed in Nakuru on this 12<sup>th</sup> day of July 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant Mr. Angu instructed by Angu Kitigin & Co. Advocates

For Respondent Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon