**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. E007 OF 2025**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**IN THE MATTER OF VIOLATION OF THE PETITIONER'S RIGHT TO FAIR ADMINISTRATIVE ACTION, FAIR LABOUR PRACTICES AND AGAINST DISCRIMINATION**

**AND**

**IN THE MATTER OF ARTICLES 23, 27, 41 AND 47 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**DR. BERNARD OMWENGA MOMANYI……PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL……1ST RESPONDENT**

**THE MINISTRY OF EDUCATION……..2ND RESPONDENT**

**THE PUBLIC SERVICE COMMISSION……3RD RESPONDENT**



# JUDGMENT

The Petitioner filed the instant Petition on 16th April 2025 alleging violation of his right to fair labour practices by being surcharged in the sum of Kshs.854,973.75 for extending his study leave without authority form January

2010 to July 2012 when he graduated, that he was not heard prior to the surcharge and was discriminated because his letters were not responded to and his transfer of service was withheld.

The Petitioner prayed for:

1. *A declaration that 2nd Respondent's decision to convert his study leave with pay to a study leave without pay mid-way of his studies violated his right to fair administrative action and fair labour practice and was thus null and void.*
2. *A writ of certiorari to issue to remove into this Honourable Court the 2nd Respondent's decision vide letters dated 9th January 2014 and 5th May 2022 of surcharging him Kshs.854,973.75 be quashed.*
3. *An Order of mandamus to issue to compel the 2nd respondent to pay the Petitioner his withheld salaries due for the period between 12th July 2012 to 5th November 2013 and to compel the 2nd Respondent to forthwith to transfer his service to Jaramogi Oginga Odinga University of Science and Technology with 30 days from the date of judgment.*
4. *The 2nd respondent be condemned to pay the costs to the Petitioner.*

## 2nd Respondent's case

The 2nd respondent's case was that the Petitioner was granted study leve to pursue PHD Studies at the University of Nottingham effective 1st January 2027 for 3 years but had not resumed duty by 31st September 2011, was required to show cause, responded and the Ministerial Human Resource Advisory Committee recommend that he be reinstated and the period of absence be treated as leave without pay and was thus surcharged Kshs.854,973.75 paid from 8th January 2010 to 1st September 2011 as he had extended his study leave without authority.

Both the Public Service Commission and the Ministerial Human Resource Management Advisory Committee (hereinafter MHRMAC) were in agreement that the sum of Kshs.854,973.75 be paid before the Petitioners transfer of services was considered.

The 2nd respondent sought the dismissal of the Petition.

**3rd respondent's case**

By a Replying Affidavit sworn by John Kimani Njorio on 15th October 2025, the affiant deponed that although the Ministerial Training Committee of the Ministry of Education granted the Petitioner approval to study Phd in

the UK on 5th May 2006 for 3 years effective 1st January 2007, the Petitioner's study leave was not approved by the Directorate of Personnel Management for purposes of clearance to travel out of the County but left the country.

The affiant deponed that the Petitioner was issued with a notice to show cause dated 12th October 2022 and responded vide letter dated 12th November 2011 but was subsequently reinstated vide letter dated 5th November 2013 and extension of study leave had not been approved.

That the Petitioners request for transfer of service could not be processed because he had an outstanding government liability of Kshs.854,973.75 owing to the unauthorised absence from duty and had already accepted the offer on 12th August 2013 and deadline for reporting had already passed when he sought transfer and the 3rd respondent declined his appeal on transfer of service.

The affiant further deposed that the Petition was an afterthought and he had not demonstrated how his fundamental freedoms or rights were violated or threatened with violation and had unclean hands.

**Petitioner's submissions**

On the Ministry's failure to respond to the Petitioner's extension of study leave, counsel submitted that the ministry penalized the Petitioner instead and violated his right to fair administrative action and was treated unfairly and the refusal to transfer his services to JOOUST was unreasonable.

As to whether the Petitioner acted rationally in continuing with his programmed counsel submitted that it was in the circumstances as he was denied information by the Ministry of Education which would have facilitated decision making on how to proceed.

On conversation of the Petitioners study leave to leave of without pay counsel submitted that the decision was not communicated promptly and was thus unreasonable and unfair as a benefit accruing to an employee ought not be taken away without fair hearing.

On continued payment of salary to the Petitioner after he exhausted his study leve and pending application for extension, the Petitioner had a legitimate expectation

that extension of study leave had been allowed and the Ministry could not act otherwise.

On the conduct of the 3rd respondent in ratifying the Ministry's decision, counsel submitted that it did not interrogate the entire process to appreciate the Petitioner's circumstances or demand the Ministry's response to his requests for extension and treated him as a defaulter by ratifying the surcharge.

On transfer of service to the JOOUST, counsel submitted that the Ministry of Education was unjustified in withholding the same as it was an entity in the same Ministry and only required a commitment from JOOUST that the surcharge would be paid from the Petitioner's salary.

According to counsel, the respondent's admitted the Petition and it ought to be granted as prayed.

**2nd respondent's submissions**

On the surcharge of Kshs.854,973.75, counsel submitted that it was lawful citing the decisions in **Republic V National Treasury and Economic Planning & another: Law Society of Kenya** [2025] KEHC 8955

(KLR), **Judicial Service Commission & another V Mbalu Mutava** [2019] KECA 11681 (KLR) to urge that the administrative action against the Petitioner was lawful reasonable and procedurally fair.

On legitimate expectation, counsel submitted that the 2nd respondent's silence was not a representation citing the sentiments of the court in **Communications Commission of Kenya & 5 others V Royal Media Services Ltd & 5 others** [2014] KESC 53 (KLR) and **Teresa Carlo Omondi V Transparency International Kenya** [2017] eKLR among others.

On refusal to transfer services to JOOUST counsel submitted that the 2nd respondent acted lawfully and in accord with Public Service rules because the Petitioner had an outstanding surcharge to discharge.

**3rd Respondent's submissions**

On breach of the Petitioner's constitutional rights, counsel for the 3rd respondent submitted that the Petition did not meet the threshold in **Mumo Matemu V Trusted Society of Human Rights and Anarita Karimi cases**.

Reliance was further placed on the sentiments of the court in **Nothern Nomadic Disabled Persons Organization V The Governor Garissa & another, Brian Makori V Kenya National Examination Council, Kiambu County Tenants Welfare association V Attorney Genral** [2017] eKLR and **East Africa Portland Cement Co. Ltd V Attorney General & another** [2013] eKLR to submit that the instant Petition lacked particulars of the alleged violations and did not meet the constitutional threshold.

As to whether the Petitioner was granted paid up leave counsel submitted that documents on record showed that his application for sponsorship was declined vide letter dated 5th May 2006 and the surcharge related to the duration after the three (3) years granted by the Ministerial Training Committee as he was outside the Country without permission. Counsel submitted that the surcharge was lawful.

As to whether the Petitioner was heard, counsel submitted that the Petitioner received the notice to show cause contrary to his averments responded vide letter dated 12th November 2011 was reinstated and was thus heard as by law required.

On transfer of service to JOOUST, it was submitted that the 2nd respondent could not process the transfer on account of the government liability of Kshs.854,973.75 and informed the Petitioner as much. Counsel further submitted that the Petitioner slept on his rights by seeking the transfer of services vide letter 2nd December 2013 and reporting deadline was 11th November 2013. That the request was time barred as there was no vacancy at the time.

Counsel submitted that the request made over 12 years ago was statute barred and impracticable.

On reliefs counsel submitted that none was merited and the Petition ought to be dismissed.

**Analysis and determination**

It is common ground that the Petitioner was employed by the 2nd respondent at all material times before he joined Jaramogi Oginga Odinga University of Science & Technology (herein after JOOUST) as a Lecturer in late 2013.

It is equally not in contest that the Petitioner's application to pursue Phd in Educational Leadership at the University

of Nottingham UK was approved by the Ministerial Training Committee in May 2006 on self-sponsored basis and was notified by letter dated 18th July 2006. The Permanent Secretary Ministry of Education requested the Petitioner to furnish the office with proof to facilitate approval by the Directorate of Personnel Management (herein after DPM) for formal approval. The request was not approved.

The Petitioner availed no letter of approval from the (DPM) or clearance to travel to the UK. He travelled and commenced the course on 8th February 2007.

Clearly, the Petitioner left the county and embarked on his studies without a formal approval and clearance.

It is equally not in dispute that the Petitioner did not complete his studies within 3 years and did not graduate until 12th July 2012.
By letters dated 5th August 2009 and a reminder dated 10th May 2011, the Petitioner sought extension of study leave.

In the first letter, the Petitioner gave no explanation as to why he wanted study leave extended and in particular

what had contributed to his inability to proceed as envisaged. In the 2nd letter, the reason was that he needed time to make corrections to the thesis after the oral defence in February 2011.

Strangely, and without any iota of supportive evidence, the Petitioner alleged that the delay in completion of his studies was occasioned by the post-election violence in 2007/2008.

Regrettably, none of his letters seeking extension of study leve nor any other communication to his employer adverted to the post-election violence having affected his studies, in whatever manner and for what duration.

It is common ground that any interruption of an education programme in any University of international repute must be documented because it implicates funding and supervision or teaching schedules and is communicated officially and the adjustment, if any captured.

For unexplained reasons the Petitioner would appear to have acted alone which would explain the absence of any official communication to the Ministry of Education,

Science and Technology or anyone on the alleged interruption.

It is trite that he who alleges must prove that those facts existed as ordained by the provisions of Sections 107, 108 and 109 of the Evidence Act.

Having alleged that the post-election violence affected his studies, it was incumbent upon the petitioner to establish that fact.

See in this regard **Miller V Minister of Pensions** [11947] 2 ALLER 372**, Ignatius Makau Mutisya V Reuben Musyoki Muli** [2015] KECA 42 (KLR) **Januan Gathara Ngunda V Ready Consultancy Ltd** [2022] KECA 577 (KLR) and **Rift Valley Railways (K) Ltd V Kiya Kalakhe Boru** [2015] KECA 900 (KLR).
Having placed no material to demonstrate how and from when the post election violence interrupted his studies in 2007/2008, the Petitioner's assertion remained hollow and thus had no reason why he took an extra year before he defended his research.

Puzzlingly, if the post-election violence interrupted the Petitioner's studies as alleged, it is unclear why the

extension of study leave was sought more than one (1) year and 8 months later, and even then the letters made no reference to the post-election violence.

The court finds the Petitioner untruthful in this respect.

Intriguingly, the 2nd respondent did not respond to the Petitioner's letters requesting for extension of study leave and according to him, the 2nd respondent's conduct was discriminatory as he could not abandon his studies midway.

As to whether the instant Petition meets the threshold of a constitutional Petition the rendition of the court in **Anarita Karimi Njeru V Republic** [1979] KLR 154 are worth rehashing.

*"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed"*

See also in this regard **Trusted Society of Human Rights Alliance V Attorney Genral & 2 others** [2012] eKLR and **Kiambu County Tenants Welfare Association V Attorney General & another** [2017] eKLR among others.

Strangely, the Petitioner did not comply with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2013, which set out the format of a Constitutional Petition.

Thus, the Petition had no grounding in the Constitution of Kenya.

The instant Petition does not meet the threshold of a constitutional Petition and ought to have been filed as an ordinary cause or claim.

Similarly, from the facts of the case, it is clear this was a plain vanilla employment dispute between an employee and the employer.

As to whether the Petitioner was discriminated the court proceeds as follows:

In **Peter K. Waweru V Republic** [2006] eKLR the court stated:

*"...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all person equally where no reasonable distinction can be found between those favoured and those not favoured".*

*"Discrimination therefore entails the unjust and prejudicial treatment of different categories of people in the same circumstances..."*

Lastly, in **Nyarangi & others V Attorney General** [2008] eKLR held;

*"Direct discrimination involves treating someone less favourably because of their possession of an attribute such as sex, race, religion compared to someone without that attribute in the same circumstances..."*

However, in **Mohammed Abduba Dida V Debate Media Ltd & another** [2018] eKLR the Supreme Court of Appeal cited the **Supreme Court of India in Nath V Stato WB** [1953] SCR 835 (843) thus

*"Mere differentia or inequality does not perse amount to discrimination, within the inhibition of equal protection clause. To attract the operation of the cause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest in any rational basis having regard to the object which the legislation has in view".*

The common thread in the foregoing sentiments of different courts is that for discrimination to arise there ought to have been the treating of similarly circumstanced persons differently on the basis of an attribute prohibited by law, such as race, sex, religion, health status or ethnicity, disability, colour, age, culture or pregnancy.

Both Article 27 of the Constitution of Kenya and Section 5 of the Employment Act prohibit direct and indirect discrimination of an employee.

The Petitioner was bound to establish a *prima facie* case of discrimination for the burden of proof to shift to the 2nd respondent.

Applying the foregoing principles to the circumstances of this case, it is clear to the court that the Petitioner has failed to demonstrate that he was discriminated and this is why.

Under paragraph 30 of the Supporting Affidavit sworn on 16th May 2025, the Petitioner deponed that similar requests by other colleagues were acted promptly and they were not surcharged.

Unfortunately, the Petitioner did not attach any material to show that the alleged other colleagues or anyone else similarly circumstanced was treated more favourably.

In the court's view, nothing turns on this issue.

On the issue of resumption of duty, documentary evidence on record reveals that the Petitioner graduated, was awarded the degree of Doctor of Philosophy on 12th July 2012, about $5^{1}/_{2}$ years after commencement of the program in February 2007.

By an undated letter, the Petitioner stated that he reported to the office on 1st August 2012 and a further letter dated 20th November 2012 the Petitioner complained that his undated letter had not been responded to perhaps because by letter dated 12th October 2011, the 2nd respondent required the Petitioner to show cause why he should not be dismissed from service for absence from duty without authority.

The Petitioner did not deny having responded to the letter.

However, the 2nd respondent did not avail documentary evidence of the decision taken on the matter and when but the Petitioner's salary was discontinued.
Be that as it may, vide letter dated 5th September 2013, the 2nd respondent informed the Petitioner that he had been reinstated as recommended by the MHRMAC meeting held on 30th April 2013, which would appear to suggest that the Petitioner's employment had been terminated although he did not so allege.

The MHRMAC also recommended that the unauthorised extension of study leave be treated as leave without pay which led to the surcharge of the salary already paid.

By reinstating the Petitioner and even considering backdated approval of extension of study leave, the 2nd respondent had admitted that it failed its employee although he was not free from blame.

Clearly, the 2nd respondent failure to respond to the Petitioner's letters or address the issue timeously frustrated the Petitioner and culminated in the search for alternative employment at JOOUST and was appointed on 21st August 2013 which heralded the last issue of transfer of service, a normal practice in the public service, which must be approved by the employer.

By letter dated 2nd December 2013, the Petitioner sought the transfer of services to JOOUST.
He also disclosed his appointment as a lecturer but did not indicate the date of appointment and also sought the processing of salary arrears after the stoppage in August 2011.

By letter dated 9th January 2014 the 2nd respondent notified the Petitioner that it could not consider his request owing to the surcharge of Kshs.854,973.75 for the unauthorised extended study leave.

From the documents on record, it is clear that the Petitioner appealed to the Public Service Commission and by letter dated 5th May 2022, the Public Service Commission upheld the decision that the Petitioner be surcharged.

None of the parties provided evidence of any communication after the decision of the Public Service Commission in May 2022.

From the evidence adduced by the parties, it is discernible that the Petitioner, as adverted to elsewhere in this judgment travelled out of the county and commenced doctoral studies without formal approval and clearance and it was not given at any time thereafter. He was officially not on study leave as the Directorate of Personnel Management had neither approved nor cleared him to leave his post.

This is because the approval by the Ministerial Training Committee in May 2006 required formal course approval by the Directorate of Personnel Management.

The Petitioner's letter to the Permanent Secretary dated 22nd January 2007 forwarded on even date by the District Education Office Vihiga does not appear to have been responded to, thus no study leave was formally granted but the Petitioner took the risk and proceeded to the UK.

This was the genesis of the Petitioner's challenges perhaps because there was no official record of approval of the study leave otherwise by the Ministerial Committee.

Consequently, the letters seeking extension of study leave dated 5th August 2009 and 10th May 2011 lacked a firm foundation to facilitate expeditious decision making and response.

Arguably, the Petitioner was largely the author of the challenges that befell him.

Indeed the 2nd respondent decision to surcharge him had a legal basis, the absence of course approval by the DPM and release.

Relatedly, the petitioner was less than candid as to why he was seeking extension of study leave in August 2009, barely 5 months before the three (3) period of studies had lapsed.

The letter lacked particulars and was silent on the duration of extension, the letter from the Graduate school, which the Petitioner did not avail as evidence notwithstanding.

As adverted to elsewhere in this judgment, it is unclear why the Petitioner cited the post-election 2007/2008 as having interrupted his studies but the official letters on record were silent on the post-election violence.

From the documents on record, it is deducible that the reference to the post-election was perfunctory intended to bolster the Petitioner's case.

Similarly, the 2nd respondent was not free from blame either. Having approved the Petitioner's application for

final approval by the DPM, it behooved it to follow up the matter to its logical conclusion and update the Petitioner on the outcome.

In addition, the 2nd respondent ought to have responded to the Petitioner's letters within a reasonable time. The absence of responses to two letters in 2009 and 2011 respectively created the impression of a non-caring employer and blatant dereliction of duty by the 2nd respondent.

Having approached his employer using an official channel, a response was imperative. The 2nd respondent failed the Petitioner, his embarking on a program without formal approval notwithstanding.

Such communication would have placed the Petitioner on a better platform for purposes of decision making on how to proceed. In its absence, the Petitioner had to make the decision in the manner he considered best in the circumstances.

As to whether stoppage of salary was merited, none of the parties availed evidence as to when the Petitioner's salary was stopped. The Petitioner's letter on transfer of

service mentions August 2011, yet the 2nd respondent's minutes of the MHRMAC held on 6th May 2021 reveals that salary was stopped from 1st September 2011 more than $1^1/_2$ years after the initial three (3) year study leave lapsed.

In the court's view, while a one (1) year extension of study leave would be reasonable in light of unforeseen circumstances that may interpose, an $2^1/_2$ years extension is exceedingly long bearing in mind that the employee was not rendering services.

Notably, of the $5^1/_2$ years the Petitioner was at the University of Nottingham undertaking Phd studies, he only missed his monthly salary for about $10^1/_2$ months, which in the court's view, is the cost he had to shoulder for having extended his study leave by more than $2^1/_2$ years without explanation as the alleged interruption by the post election violence 2007/2008 lacked particulars and supportive evidence.

In the circumstances, recovery of salary arrears is in the court's view unjustifiable.

As regards withheld salary dues after graduation, in July 2012 and November 2013, the Petitioner failed to provide particulars of what he was doing and the follow ups he made to the Ministry for regularization of his employment.

Having not rendered any services, and did not allege that his services had been terminated, no salary was due and payable to him under the provisions of Section 17(1) of the Employment Act which provides:

**(1) Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya—**

**(a) in cash;**

**(b) into an account at a bank, or building society, designated by the employee;**

**(c) by cheque, postal order or money order in favour of the employee; or**

**(d) in the absence of an employee, to a person other than the employee, if the person is duly authorised by**

**the employee in writing to receive the wages on the employee's behalf.**

Finally, on transfer of service, Regulations of the Public Service Commission Regulations provide that:

**(1) Where a public officer has been appointed in another public body with a separate retirement benefits scheme, the public officer may apply in writing to the commission, through the authorised officer from which the officer is coming for a transfer of service.**

**(2) Applications for transfer of service shall be considered by the Commission for approval subject to any relevant written law in force relating to retirement benefits.**

In light of this decision, the Petitioner shall re-submit the application for transfer of service to the Public Service Commission through the authorised officer for approval in accord with the Public Service Commission Regulations, effective the date he was appointed a Lecturer at JOOUST.

**Appropriate reliefs**

(a) Having found that although the 2nd respondent had a basis to act in the manner it did, did so without responding to the Petitioner's letters requesting for extension of study leave and the Petitioner completed the course in July 2012, the decision to surcharge the Petitioner was unfair in the circumstances.

Consequently, the writ of *certiorari* do and is hereby issued to remove into this court the 2nd respondents decisions vide letters dated 9th January 2014 and 5th May 2022 for quashing.

(b) Having noted that the Petitioner rendered no services to the 2nd respondent after he returned from the United Kingdom, no salary was earned and none was payable.

The prayer is declined.

(c) The prayer for *mandamus* to compel the 2nd respondent to transfer the Petitioners service to the JOOUST within 30 days from the date of this judgment is unmerited because the power to approve transfer of service in the Public Service is vested in the Public Service Commission.

The prayer is declined.

In light of the foregoing, it is decipherable that none of the parties is blameless for the circumstances proceeding the filing of the instant suit.

Consequently, parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF FEBRUARY 2026.**

**DR. JACOB GAKERI**
**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew

undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**