



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**County Government of Kwale v Kiptalam (Civil Appeal  
E118 of 2022) [2025] KECA 1310 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1310 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E118 OF 2022  
KI LAIBUTA, SG KAIRU & GWN MACHARIA, JJA  
JULY 18, 2025**

**BETWEEN**

**COUNTY GOVERNMENT OF KWALE ..... APPELLANT**

**AND**

**SAMUEL KIPYATOR KIPTALUM ..... RESPONDENT**

*(Being an appeal from the Judgement/Decree of the Employment and Labour Relations  
Court of Kenya at Mombasa (Byram Ongaya, J.) delivered on 29th July 2022 in  
ELRC Cause No. 95 of 2019 consolidated with ELRC Cause No. E006 OF 2021)*

**JUDGMENT**

1. This is a first appeal by the County Government of Kwale (the appellant) from the Judgement of the Employment and Labour Relations Court (the ELRC) sitting in Mombasa delivered on 29<sup>th</sup> July 2022 by Byram Ongaya, J.. Samuel Kipyator Kiptalam is the respondent.
2. The history of the litigation between the parties can be traced to two separate Memoranda of Claim filed by the respondent against the appellant. In Mombasa ELRC Cause No. 95 of 2019, the respondent filed a Memorandum of Claim dated 5<sup>th</sup> December 2019 while, in Mombasa ELRC Cause No. E006 of 2021, he filed a Memorandum of Claim dated 15<sup>th</sup> January 2020. The trial court consolidated the two causes. The learned Judge noted that the facts and history giving rise to Cause No 95 of 2019 were restated in Cause No. E006 of 2021, which fact we concur with, but which we shall briefly summarise as hereunder.
3. The respondent was employed by the National Government as a Registered Clinical Officer-anaesthetist under the Ministry of Health and posted to the Coast Province, Kwale District, effective as of 28<sup>th</sup> June 2001. His workstation was Kwale sub- County Hospital. The respondent's employment was later confirmed on a permanent and pensionable basis as from 24<sup>th</sup> July 2001 with a monthly salary of Kshs.152,900. On 22<sup>nd</sup> May 2019, there was an alleged theft of a patients' monitor which took place



- at the Hospital's theatre. The respondent, together with others, were summoned by the appellant's Chief Executive Officer for Health and, according to the respondent, he was threatened with a transfer on account of the theft. Later, after investigations by the Directorate of Criminal Investigation (DCI), he was exonerated.
4. On 10<sup>th</sup> June 2019, the appellant posted the respondent to Samburu sub-County Hospital, which the respondent strenuously opposed on the grounds that he had to have his name cleared prior to taking up the transfer. Following the posting order, the respondent was released from Kwale sub-County Hospital on 1<sup>st</sup> July 2019. By a letter dated 24<sup>th</sup> July 2019, the appellant wrote to its Director, Human Resource Services, to stop the appellant's salary on account of failure to report to Samburu Hospital.
  5. Further, the appellant summoned the respondent to appear before the Departmental Human Resources Advisory Committee on 18<sup>th</sup> September 2019 to explain his absence from work. According to the respondent, the meeting did not materialise and was deferred to 23<sup>rd</sup> September 2019. The respondent contended that he only met the County Chief Executive Officer for Health who allegedly apologised for the turn of events, but that the transfer and stoppage of salary was not lifted.
  6. The respondent's grievance was that the actions by the appellant were contrary to the provisions of Sections 10, 11, 12 and 18 (4) and (5) of the *Employment Act*. The respondent characterised his claim of violation of *the Constitution* under Article 28 on the right to human dignity, Article 41 on labour relations, Article 47 on fair administrative action, and Article 50 on the right to fair hearing. He also relied on the provisions of the International Labour Organization (ILO) Conventions.
  7. From the foregoing, in Cause No 95 of 2019, the respondent prayed for the following reliefs:
    - a) An award of the salary withheld from 31<sup>st</sup> July 2019 - Kshs.152,900 per month until payment in full;
    - b. Maximum compensation for such unlawful withholding;
    - c. Interest on prayers (a) and (b) above from the date of filing suit until payment in full;
    - d. That the appellant do forthwith reinstate the respondent to the station, destination and remuneration assigned to him prior to the illegal/unprocedural transfer and stoppage of salary;
    - e. That the appellant do forthwith remit to the respondent the entirety of his dues illegally withheld from him with effect from 31<sup>st</sup> July 2019 to date; and
    - f. That the appellant do forthwith cease and desist from any further harassment and intimidation of the respondent through illegal transfer, stoppage of salary, illegal/unlawful proceedings disguised as disciplinary proceedings."
  8. Whereas the facts arising from the second cause in ELRC Cause No. E006 of 2021 are similar to those raised in ELRC Cause No. 95 of 2019, the respondent justified his absence from work as due to an Executive Order issued on diverse circulars dated 17<sup>th</sup> March 2020, 26<sup>th</sup> March 2020, 23<sup>rd</sup> April 2020 and 29<sup>th</sup> April 2020 on the compliance with workplace guidelines during the COVID-19 pandemic; that the guidelines and measures on the circulars required State and Public Officers with certain pre-existing medical conditions and/or persons aged above 58 years and serving in Job Group S and below or their equivalent, should work from home.



9. The respondent stated that, vide a letter dated 8<sup>th</sup> September 2020, he notified the appellant of his pre-existing condition and sought leave to work from home while waiting to report to his designated station; that the Senior Physician, Msambweni County Referral Hospital acknowledged his letter on 10<sup>th</sup> September 2020; and that, however, by a letter dated 23<sup>rd</sup> November 2020, the Chief Officer Health Services indicated that he absented himself from duty without permission and served him with a notice to show cause within 21 days on why disciplinary action should not be taken against him and his salary stopped with immediate effect.
10. The respondent contended that the stoppage of his salary was malicious, wrongful, unfair, unprocedural, unlawful, abrupt, irregular and in contravention of all the relevant labour laws; that there was no plausible reason for the stoppage of his salary; and that he was never afforded an opportunity to defend himself in an open, fair, transparent and democratic forum, and nor was he granted concise information of the charges levelled against him and/or relevant material to enable him to mount his defence.
11. Accordingly, he prayed for judgement against the appellant as follows:
- a) A declaration that the stoppage of the respondent's lawful wages/salary by the appellant was and remains wrongful, unlawful, illegal, unprocedural, unfair and/or irregular;
  - b. Maximum compensation for wrongful stoppage of wages/salary and unfair/irregular interruption of the employment contract at the rate of the respondent's annual salary (Kshs. 152, 900 x 12 months) - of Kshs.1,834,800;
  - c. Stopped two months wages as of 8<sup>th</sup> January 2021 - Kshs.305,800;
  - d. Any further withheld wages at the rate of Kshs, 152,900/= per month until payment in full;
  - e. Overtime of Kshs.43,353,611.60;
  - f. Any other further entitlements and/or orders as the court may deem fit and just to award/grant in the circumstances;
  - g. Costs of the cause; and
  - h. Interest on prayers (b), (c), (d) and (e) from the date of filing his cause until payment in full."
12. In response to the two Memoranda of Claim, the appellant filed Statements of Response dated 2<sup>nd</sup> December 2021 and 29<sup>th</sup> April 2021 respectively, and which are essentially similar. The appellant averred that the respondent was deployed vide a letter dated 10<sup>th</sup> June 2019 to Samburu sub-County Hospital due to service needs and was required to report on 21<sup>st</sup> June 2019; that, instead, the respondent reported to work on 11<sup>th</sup> February 2020, but that he would occasionally abscond and/or absent himself from work without leave; and that this prompted the Medical Superintendent to report the issue to the Chief Officer of Health vide a letter dated 10<sup>th</sup> November 2020, who in turn issued a Notice to Show Cause letter dated 23<sup>rd</sup> November 2020 on why disciplinary action should not be taken against the respondent.
13. The appellant justified the stoppage of the respondent's salary to be in line with Clause 4.4 of the Public Service Commission Discipline Manual for Public Service; that the salary was stopped as a disciplinary



measure because of the respondent absenting himself from work without leave; and that it is not a requirement that the respondent be issued with a notice of stoppage or a warning letter.

14. It was averred that the respondent never requested for permission to be away from work, and that he never filled a duty roster on the days he absconded and/or absented himself from work without proper leave; that the respondent was yet to respond to the Notice to Show Cause in line with the Public Service Commission Discipline Manual, and to the decision communicated thereafter; that the respondent would have an opportunity to apply for review of the outcome of the decision made in line with Clause 4.4 of the Public Service Commission Discipline Manual for Public Service; that, at the time, disciplinary process was underway and no final decision had yet been made; and that the claim ought to be dismissed.
15. The suit proceeded by way of viva voce evidence.
16. The respondent testified as CW1. He restated his case as set out above. He confirmed that he was given a letter of transfer from Kwale sub-County Hospital Theatre to Samburu Hospital on account of service need, and that he reported on 14<sup>th</sup> February 2020; that the letter dated 10<sup>th</sup> September 2020 from Dr. Ndegwa Wajuki, the County Physician, confirmed that he had diabetes mellitus, and that he should work from home; and that the theatre operations at Samburu County was operationalised on 9<sup>th</sup> October 2020 well after he had reported about his condition on 8<sup>th</sup> September 2020; and that, when the theatre became operational, there was no communication that he should not work from home.
17. The respondent faulted the appellant for failing to comply with the order of 19<sup>th</sup> December 2019 (Rika, J.) that he be paid the withheld salary. He contended that he was reinstated on 3<sup>rd</sup> March 2020, but that his salary was again stopped towards the end of December 2020 until the time of filing suit; and that he was not involved in the alleged theft levelled against him by the appellant.
18. On behalf of the appellant, Dr. Samuel Mungai (RW1) testified as the Medical Superintendent of Samburu sub-County Hospital. He stated that, prior to July 2019, the hospital did not have a theatre; that, thereafter, a theatre was put up which needed equipment, drugs and staff; that the respondent, being an anaesthetist, his services were needed at the hospital; that he was deployed on 10<sup>th</sup> June 2019, and that he was to report by 24<sup>th</sup> June 2019; that prior to 2020, the respondent did not tell him why he absented himself from work; that the respondent reported to him about his medical situation in 2020; and that the respondent's name was missing from the duty roster for anaesthetists of the months of August, September and October 2020.
19. Dr. Juma Salim Mbete (RW2), the County Chief Officer Health Services, testified that, at the material time, he was the head of Medical Superintendent, Kwale Hospital. He recounted the events that led to the respondent's transfer to Samburu sub- County Hospital; that the theft also led to the transfer of a nurse to Msambweni; that the respondent failed to report to his new station, which necessitated the commencement of the disciplinary proceedings, but he (the respondent) filed court proceedings which halted the disciplinary process; and that the staff who had co-morbidities were assigned other duties and given protective gears.
20. Upon considering the evidence before him, Ongaya, J. held that, at the material time, COVID-19 pandemic was at its peak; that the appellant did not demonstrate the measures taken to facilitate the respondent's attendance at work on a necessary basis as advised in the physician's letter dated 10<sup>th</sup> September 2020; that the physician's letter amounted to sufficient notice of the respondent's medical status as envisaged in Section 30 of the *Employment Act*; that there was therefore no reason to impose a punishment, such as stoppage of salary, as was done pursuant to Section 46(h) of the *Employment Act*;



and that the stoppage of salary and the proposed disciplinary action as per the Notice to Show Cause letter dated 23<sup>rd</sup> November 2020 were unfair.

21. The learned Judge considered the circular dated 20<sup>th</sup> July 2020, which required that persons with pre-existing conditions work from home and held that there was no evidence that a scenario arose where it was necessary for the respondent to report at work; that, accordingly, the Medical Superintendent was required to instruct the respondent to report to work when necessary, but did not do so; that, whilst it was true that the respondent ought to have appealed to the Public Service Commission as per Article 234(2) of *the Constitution*, Sections 85(c) and 87(2) of the Public Commission Act, Cap 185 as read with Section 77 of the County Government Act, Cap 265, the respondent moved the court only for interim measures; that, in any case, the appellant's contention that there existed an alternative dispute resolution mechanism was raised belatedly, the same not having been pleaded; that the belated plea by the appellant would prejudice the respondent as he would not be heard in that regard; that, for this reason, the appellant was deemed to have waived the right to the appellate procedure before the Public Service Commission.
22. In the end, the learned Judge found that the proceedings were in the nature of an interlocutory suit and relief as the respondent had not yet made decisions that would properly be subject of appeal to the Commission; and that the respondent had succeeded in his claim.
23. Judgement was accordingly entered in favour of the respondent in the following terms:
  - i. the appellant to pay the respondent withheld salaries in the sum of Kshs.4, 536,170 less PAYE by 1<sup>st</sup> October 2022 failing which interest to be payable thereon at court rates from the date of the judgement till payment in full;
  - ii. the respondent is entitled to lifting of the stoppage of the salary by setting aside of the letter dated 23<sup>rd</sup> November 2020 and to continue in service within the protective measures against COVID - 19 pandemic as instituted by the government and to be specifically agreed between the respondent and his supervisor and the respondent to report to the Medical Superintended at Samburu Sub - County Hospital not later than 8<sup>th</sup> August 2022 for assignment of duty and continued full payment of remuneration and other benefits without break in service accordingly;
  - iii. a declaration that the deployment of the respondent to Samburu Sub County Hospital was regular and on service need basis and the deployment did not in any manner bar the respondent from raising a grievance about the alleged theft as at the material time of deployment; and
  - iv. the appellant to pay 50% of the respondent's costs of the suit.
24. Dissatisfied with the Judgement, the respondent filed this appeal. In its Memorandum of appeal dated 15<sup>th</sup> November 2022, it faults the learned Judge for erring in law and in fact:
  - i. in ignoring and wrongly interfering with the internal disciplinary process of the appellant regarding the respondent's conduct contrary to the salient provisions of the *Employment Act*, Cap 226;
  - ii. by failing to consider that the claim had been prematurely instituted by the respondent before the exhaustion and/or completion of all internal disciplinary mechanism and remedies within the appellant's structures;
  - iii. by failing to appreciate the provisions of Section 44 of the *Employment Act*, Cap 226 and the appellant's right to terminate the respondent's employment under those provisions;



- iv. by failing to appreciate the respondent's misconduct in his employment with the appellant;
  - v. by failing to appreciate the facts laid down before the court by the appellant but instead proceeded to write his own version of facts in complete departure of the pleadings before him;
  - vi. in failing to consider and appreciate the submissions and the cited authorities of the appellant's advocates; and
  - vii. in failing to consider all the evidence tendered before it by the appellant in rendering its judgement.
25. The appellant asked this Court to allow the appeal with costs; set aside the judgement delivered on 29<sup>th</sup> July 2022 (Ongaya, J.); that the appellant be allowed to proceed with and conclude the disciplinary proceedings against the respondent; and that costs of the appeal be borne by the respondent.
26. We heard this appeal on 18<sup>th</sup> February 2025. Learned counsel Ms. Kinuva appeared for the appellant while learned counsel Mr. Ngoze appeared for the respondent. Both counsel relied on their respective parties' written submissions, which they highlighted. Those of the appellant are dated 31<sup>st</sup> January 2025 while those of the respondent are dated 4<sup>th</sup> February 2025.
27. According to Ms. Kinuva, there was no dispute that the respondent was transferred to Samburu sub-County Hospital on 10<sup>th</sup> June 2019; that he confirmed that he reported to the hospital on 14<sup>th</sup> February 2020, 250 days from the date of the transfer; that, even after reporting to the new station on various days cumulating to a total of 56 days, the respondent absented himself from work without leave; and that this prompted the appellant to invoke disciplinary measures by stopping his salary until he reported to work.
28. It was contended that, when the respondent failed to report to his new station, the appellant asked him to explain his absence in writing, which he failed to do; that the respondent was invited to a disciplinary hearing before the decision to stop his salary was made; that the appellant did its best to comply with the law, but that the respondent failed to adhere to the law; and that, instead, he moved the court in two separate claims seeking to halt the stoppage of his salary.
29. It was submitted that there was no justification by the respondent for absconding work in 2019 and 2020; that the learned Judge failed to consider the constitutional and statutory mandates of the appellant to deal with disciplinary issues relating to its staff as provided for under Section 55 of the County Government Act and Article 25 of *the Constitution*; that, if the trial court had properly taken into consideration all the facts before it, it would have reached a different conclusion that the respondent was frustrating the disciplinary process already commenced by the appellant; and that the appeal is merited and should be allowed.
30. On his part, Mr. Gonze submitted that there were no disciplinary proceedings against the respondent, and nor were there any court orders stopping such proceedings; that, although the respondent was transferred vide a letter dated 10<sup>th</sup> June 2019, it did not indicate the timeline within which he was to report to the new station; that there was no evidence that the posting order was delivered to the respondent, and neither was there a release order from Kwale sub-County Hospital; that the appellant failed to comply with the trial court order of 19<sup>th</sup> December 2019 to the effect that it (the appellant) remits all the respondent's withheld dues; and that that order had never been challenged.
31. It was further submitted that the respondent faithfully reported to work until when COVID-19 hit; that, due to his medical condition which was confirmed by a medical report dated 10<sup>th</sup> September 2020, he started working from home; that this accorded with a circular issued on 20<sup>th</sup> July 2020, which



mandated public servants, and particularly those with secondary medical conditions, to avoid physical attendance at their respective work stations and only appear when it was necessary; and that it is for this reason that the respondent worked intermittently.

32. While referring to Clause 4.4 of the Public Service Commission Discipline Manual for Public Service, it was submitted that, in so far as absence from duty without leave is concerned, a public officer should be traced through his personal contacts within 10 days; that his/her salary is then stopped and a report of a missing person is made to the nearest police station which procedure the appellant did not demonstrate was observed; that the respondent was not summoned to show cause why his salary should not be stopped; and that the stoppage of salary was a draconian decision which could only be done with the authority of the Public Service Commission, the respondent's employer.
33. We were accordingly urged to uphold the decision of the ELRC, find the appeal without merit and dismiss it accordingly.
34. We have considered the record of appeal, the respective rival oral and written submissions and the law. This being a first appeal from a court of first instance, is by way of a retrial. We are obligated to re-evaluate and re-analyse the evidence on record afresh and arrive at our own conclusions. In *Paramount Bank Limited vs. First National Bank Limited & 2 others (2023) KECA 1424 (KLR)*, this Court held:

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, Cap 22, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

35. Furthermore, we must appreciate that, while undertaking our said obligation and as was held in *Alfarus Muli vs. Lucy M Lavuta & Another (1997) 302 KLR*, we can interfere with the findings of the first trial court:

“only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence.”

36. In our view, the sole issue that falls for our determination is whether the appellant rightly withheld the respondent's salary for the days which he failed to report to work.
37. The respondent admitted in his evidence that he was required to report to the Samburu sub-County Hospital following a posting order dated 10<sup>th</sup> June 2019. According to the appellant, the respondent was expected to have reported to work on or before 21<sup>st</sup> June 2019. It was submitted by Mr. Gonze that there was no clear path given by the appellant as to the timelines within which the respondent ought to have reported to work, and that neither was there a release letter issued to him. Counsel referred us to the procedure which the appellant should have followed under Clause 4.4 of the Public Service Commission Discipline Manual for Public Service before stopping the respondent's salary.
38. With profound respect to the counsel, our perusal and reading of the evidence on record points to a different set of facts. The letter dated 10<sup>th</sup> June 2019 indicated that the respondent was required to report to Samburu sub-County Hospital by 21<sup>st</sup> June 2019. The respondent testified that the reason for his refusal to report to the new station was because of the pending investigations on the theft of the patient's monitor. Interestingly, the respondent did not demonstrate which law or regulation allowed



a Public Servant to decline reporting in their new workstation on account of pending investigations. The uncontroverted evidence was that the respondent eventually reported to work on 14<sup>th</sup> February 2020. A computation of the days from 21<sup>st</sup> June 2019 to 14<sup>th</sup> February 2020 is a total of 240 days or thereabouts which the respondent did not account for.

39. The respondent's further argument that Clause 4.4 of the Public Service Commission Discipline Manual for Public Service was not complied with flies in the face of the evidence the appellant tendered before the trial court. It provides as follows:

Where an officer is absent from duty without leave, reasonable or lawful cause, the following steps shall apply:

- a. Establish the exact dates the officer was absent from duty. If not traced through personal contacts and next of kin within a period of ten (10) days from the commencement of such absence, the salary and other remunerative allowances shall be stopped with effect from the date of absence, and a report of the missing officer be made to the nearest police station and the Commission for appropriate action.
  - b. The officer shall be addressed a registered 'show cause letter' through his/her last known address, giving a reasonable period within which to respond but not less than ten (10) days. The nature of the offence and the contemplated action shall be stated clearly in the letter. A scanned copy of the show cause letter may be sent to the officer through electronic mail. (Sample letter is provided as Appendix VI.
  - c. If the officer does not respond, the case shall be submitted to the relevant Human Resource Management Advisory Committee which shall make a recommendation to the relevant authority empowered under the regulations for decision.
  - d. If the officer has responded, the representations shall be analyzed alongside the charges and the findings submitted to the relevant committee for recommendation to the Authorized Officer.
  - e. The decision of the Commission or Authorized Officer and the right of appeal or application for review shall promptly be communicated to the officer.
  - f. Such decisions will also be communicated to the relevant professional body, where applicable.
40. By his own testimony, the respondent stated that he was summoned by the appellant on 18<sup>th</sup> September 2019 to appear before it, but that when the meeting did not materialise, he met the County Chief Executive Officer for Health on 23<sup>rd</sup> September 2019. It is therefore not factual that the appellant did not employ its resources to seek after the respondent.
41. In any event, the appellant wrote to its Director of Human Resource on 24<sup>th</sup> July 2019 to stop the respondent's salary, which was days beyond the 10 days required for salary to be stopped after a public servant absconds duty in terms of Clause 4.4 of the Public Service Commission Discipline Manual for Public Service.
42. In addition to the foregoing, the minutes dated 7<sup>th</sup> October 2019 of the meeting held on 18<sup>th</sup> September 2019 confirms that, under MIN/4/09/2019 on disciplinary cases, the respondent's failure to report



to Samburu sub-County Hospital was discussed and an olive branch was extended to him once more where his salary was to be reinstated but only after compliance. There was also another meeting held on 9<sup>th</sup> October 2019 at which the respondent's issue was further discussed.

43. The respondent also hinged his failure to report to Samburu sub-County Hospital on grounds that there was no theatre.

This excuse is to be taken with a pinch of salt. We say so because it was not the respondent's prerogative to dictate where he would have been designated to work. Even if there was no theatre, it should have been information that came from his supervisor(s). All that the respondent needed to do was to report to his new workstation and, if he finds that there was no theatre, he simply stays in the office until suitable work or a facility was found for him. It is our considered view from these circumstances that the appellant sufficiently accommodated the respondent by giving him ample time to report to his workstation.

44. As to the findings of the trial court in regard to the failure of the respondent to report to his new workstation, the learned Judge rightly rendered himself thus:

“...the claimant testified that he resisted the transfer because he had a grievance being to clear his name in view of the alleged theft. Nothing on record shows that the claimant could not pursue his grievance in that regard even if he had proceeded on transfer. The court finds that existence of the grievance has not been established to have been a bar to pursuing the grievance as the claimant would have desired to pursue...Further, it was the respondent's prerogative to decide where best to deploy the claimant.”

45. In a complete departure from the above well-reasoned observation, the learned Judge went on to find that the respondent was entitled to the withheld salaries of July, August, September, October, November to 19<sup>th</sup> December 2019 on the basis that the deployment letter did not state when the respondent was to report to Samburu sub-County Hospital, and that neither was it clear when he was released to report.

46. With outmost respect to the learned Judge, having found that the pending investigations and/or grievances were not a bar to the respondent reporting to his new workplace, in our view, the correct finding ought to have been that the respondent unjustifiably absconded from work without proper permission. Furthermore, and as we have appraised ourselves, the deployment letter stated succinctly that the respondent should have reported to the new station by 21<sup>st</sup> June 2019. We therefore find that this holding by the learned Judge was in error and was based on a misapprehension of the facts on record.

47. The respondent also hinged his failure to report to work in the months of August, September and October 2020 as due to the Executive Order to work from home of certain State and Public Officers at the height of COVID-19 pandemic. He produced a letter dated 10<sup>th</sup> September 2020 from Dr. Ndegwa Wajuki, the County Physician, who confirmed that he suffered from diabetes mellitus, which necessitated him to work from home.

48. We have indeed seen the letter dated 10<sup>th</sup> September 2020 from Dr. Ndegwa Wajuki which states that the respondent suffers from Type 2 Diabetes Mellitus, and that he was at a high risk of contracting COVID-19. The respondent, in a letter dated 8<sup>th</sup> September 2020, wrote to the Medical Superintendent asking for permission to be away from work.



We have considered the inscription on top of the letter of 10<sup>th</sup> September 2020 by which the author thereof advised the Medical Superintendent:

“Kindly involve the staff (the respondent) to be on duty when really necessary due to his condition until when the situation returns to normal.”

49. Our reading and understanding of the above extract is that it is not equivalent to express permission being given to the respondent to stay away from work during the COVID-19 pandemic period. The inscription only recommended an exemption from work when it was necessary. This means that the respondent was in turn required to get permission from his employer to stay away from work on such terms as would be advised. Furthermore, the respondent did not plead that he was not given protective gears necessary to cushion him from easily contracting the COVID-19 virus.
50. We also take judicial notice of the fact that, during this dark period of the COVID-19 pandemic, not only in Kenya but world over, medical personnel of all fronts were required to be true to their calling so as to save lives that were lost by second and minute. Absconding work during this critical period without any justifiable cause was totally uncalled for.
51. Was the appellant therefore justified to withhold the respondent’s salaries? Our answer is in the affirmative. The relationship between the appellant and the respondent was governed by a contract of employment. The respondent was to render services and the appellant was, in turn, obligated to reward him for the work done by way of a monthly salary. An employee is in law required to be at work and render services under his contract of employment in exchange for payment of a monthly salary or wage. Where an employee deliberately absents himself from work and fails to submit the relevant leave forms or express permission to be away from work in accordance with the governing policy, the employer is entitled to withhold payments, and in instances where payments were effected, there is also the leeway for the employer to recover the paid monies without the employee’s consent.
52. This Court in Benjamin vs. County Government of Nakuru & 4 others (2024) KECA 1440 (KLR) observed as follows on the right to stop salary where an employee has absconded work:

“24. What about abruptness? The appellant submitted that the salary stoppage was abrupt. On its part the 1st respondent avers that it was prompted by a response from the University that the appellant’s studies had been suspended on account of indiscipline. From our appraisal of the record, we are satisfied with the learned Judge’s finding that it was incumbent upon the appellant to not only apply for extension of the study leave period, but to also inform them that he was suspended in his studies, for indiscipline. This is notwithstanding that the appellant had instituted Judicial Review proceedings to challenge the same before the Employment and Labour Relations Court. In this case, it took the initiative of the respondents to write directly to the University to get the accurate information.”

“25. We state so in contradistinction with the appellant’s justification for the delayed study period as a result of industrial actions which were beyond the appellant’s control. As rightly observed by the trial court, the appellant was in breach of his duty to ensure the employer was informed of the delay and reasons for not resuming duty as stipulated in the study leave documents that was not due, making the employer to correctly terminate the services of the appellant. The justification for termination was squarely on the shoulders of



the appellant. In our view, there is no fault attributable to the respondents. The respondents were therefore vindicated in stopping the appellant's salary for absconding duty as permitted in the applicable Human Resource Policy. The appellant has not rebutted these findings and we see no reason to disturb the same."

53. Earlier in the Judgment, the Court had affirmed the trial court's finding as follows:

" 12. The court's position on these issues is well captured in the following words by the learned Judge:

"Effectively, by his own inaction, the claimant was absent from his duty station without permission and approval by the employer from the end of his study release ending 21st October, 2017. He also failed to disclose material facts that he was facing disciplinary action initiated by the study institution, Moi University. Whether justified or without justification, this having compromised his study period and release by the employer, the claimant had a duty to full disclosure to the employer. Despite filing Judicial Review proceedings before the high Court, Eldoret, where such proceedings affected the completion of the study period, the burden was on the claimant to disclose these facts to his employer. Such formed a material basis for his continued absence from duty so as to be able to complete his studies and the basis for his release by the employer, the respondents. It was not sufficient that the respondents learnt of the disciplinary proceedings against the claimant upon enquiry about his study status. His other colleagues, Dr. Gathogo and Dr. Mwaura had no such disciplinary matters pending."

54. We therefore find that the appellant cannot be faulted for stopping the respondent's salary. Salary stoppage is a disciplinary measure which is expressly provided for under Clause 4.4 of the Public Service Commission Discipline Manual for Public Service. We thus differ with the trial court that there were any violations either of *the Constitution* or the *Employment Act* by the appellant for undertaking this disciplinary measure.

55. The upshot of our findings is that the appeal is merited and is hereby allowed in the following terms:

- a. The judgement and decree of the Mombasa Employment and Labour Relations Court (Ongaya, J.) in ELRC Cause No. 95 of 2019 as consolidated with Cause No. E006 OF 2021 dated and delivered on 29th July 2022 be and is hereby set aside.
- b. Consequently, we hereby uphold the withholding of the respondent's salary as tabulated by the appellant.
- c. The respondent shall bear the costs of the appeal.

56. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY, 2025.**



**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCIArb.**

.....

**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

*I certify that this is the true copy of the original  
signed*

Deputy Registrar

