



Benjamin v County Government of Nakuru & 4 others (Civil Appeal E007 of 2020) [2024] KECA 1440 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1440 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL E007 OF 2020
MA WARSAME, FA OCHIENG & LA ACHODE, JJA
OCTOBER 11, 2024**

BETWEEN

DR. MAGARE GIKENYI J BENJAMIN APPELLANT

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

THE NAKURU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY SECRETARY, NAKURU COUNTY GOVERNMENT
ASSEMBLY 3RD RESPONDENT**

**CHIEF OFFICER OF HEALTH, NAKURU COUNTY GOVERNMENT 4TH
RESPONDENT**

NAKURU COUNTY GOVT 5TH RESPONDENT

(Being an appeal against the judgment and decree of the Employment and Labour Relations Court at Nakuru (Hon. Lady Justice Monica Mbaru) dated 24th July, 2020 in Nakuru ELRC Cause No.22 of 2019)

JUDGMENT

1. The appellant, Dr. Magare Gikenyi J. Benjamin, is a medical practitioner in the employment of the 1st respondent, the County Government of Nakuru following secondment by the National Government in the year 2013 with the advent of county governments. The appellant was based at Elburgon Nyayo Hospital of the 1st respondent. Following his admission to pursue Masters in General Surgery at Moi University in August 2013, the appellant was granted leave to pursue the studies for 4 years alongside two other Doctors, Dr. Humphrey Hinga Mwaura (now deceased) and Dr. Mary Kanini Gathogo. In the course of the studies, the appellant was attached to Moi Teaching and Referral Hospital.



2. During the four-year study period, there were a series industrial actions by way of strikes by the Kenya Medical Practitioners Pharmacist and Dentists Union (KMPDU), the Kenya National Union of Nurses (KNUN) and the Universities Academic Staff Union (UASU) and then KMPDU. The latter strike by KPMDU affected Moi University for almost two months ending on 23rd August 2019 following the intervention by the Salaries and Remuneration Commission through litigation at the Employment and Labour Relations Court, Eldoret. These strikes were interrelated and interrupted the study period for the appellant, as they were beyond the appellant's control.
3. In January, 2018 the appellant successfully challenged, (through Judicial Review proceedings before the High Court at Eldoret), his suspension from his studies by Moi University and by Moi Teaching and Referral Hospital. With the pushed period of study, the appellant wrote to the 1st and 4th respondents in May and October 2018 respectively and received no response.
4. It was in November 2018 during a shopping exercise at Woolmart Central Supermarket in Nakuru together with his family, being sure that his salary had been paid that he swiped his bank's visa card unsuccessfully. It emerged that his account had insufficient funds, forcing him to return the goods to the shelves much to his embarrassment before the public and family including children who were crying. The appellant's attempt to use the card at a petrol station yielded the same result. It is after this incident and further contact by banks due to failure to remit third party deductions to Cooperative Bank of Kenya Limited and Faulu Kenya that it dawned on him that the 1st respondent had stopped his salary alongside those of his two colleagues.
5. It turns out that the salaries for the two colleagues were reinstated and despite his numerous visits and letters, the withholding of the appellant's salary was not rescinded prompting the appellant to institute proceedings before the Employment and Labour Relations Court at Nakuru. The claimant filed the memorandum of claim on 22nd March, 2019. The claim was amended and filed on 4th September, 2019.
6. His grievance was that the actions by the respondents are contrary to the *Employment Act* and *the Constitution* on equality and non-discrimination on the grounds of ethnicity or social origin. He lamented the remuneration of his classmates and work colleagues in similar circumstances were restored and he was treated differently due to his ethnicity; that the respondents failed to promote him as required under the scheme of service for medical practitioners, that there was no response to the numerous letters sent by him; and that his attending to patients at Moi Teaching and Referral Hospital as part of his studies without pay amounted to servitude contrary to the law and *the Constitution*. The appellant was also aggrieved by the failure to remit his statutory deduction to NHIF, NSSF and PAYE. He tabulated what he sought as unpaid salaries and further sought damages for defamation, costs and interest.
7. In essence the appellant characterised his claim on violation of *the Constitution* under Article 28 on the right to be treated with dignity, Article 19 and 22 on the protection of the Bill of Rights and freedoms, Article 41 on fair labour practices, Article 27 on the right against discrimination and equality, Article 30 on the right against servitude and forced labour, Article 47 on the right to fair administrative action, and Article 50 on the right to fair hearing. The appellant also relied on the provisions of the *Employment Act*, *Labour Relations Act*, County Government Act, Fair Administration Act, the ILO conventions, and the revised scheme of service for doctors.
8. The respondents did not file a response and parties proceeded to file submissions. They maintained that the appellant, at the end of the study period failed to report back to work necessitating the salary stoppage. Moreover, the 4th respondent requested a status report with regard to all doctors released by the county and were advised of the appellant's suspension from studies on disciplinary grounds, whose



proceedings were still ongoing as at 29th March 2019 before the University's Senate. The appellant not having taken the initiative to inform the respondents of the disciplinary issues, was deemed absent from duty without leave or lawful cause as provided; for which stoppage of salary and action for dismissal were permitted under the Human Resource Policies and Procedures Manual for the Public Service, 2016 clause K.8(1). The respondents also refuted the allegations of discrimination or termination of the employment as the appellant had since been reinstated.

9. The respondents also submitted that the claimant was promoted to job group N on 30th October, 2013 and his assertion that he ought to have been promoted to job group P is wrong. Under Section 63 (1) of the County Government Act, the Nakuru County Government Public Service Board can promote officers in the public service of the 1st respondent. Moreover, under the Revised Scheme of Service for Medical Officers, Dental Officers and Pharmacists, 2016 there is provision for promotion of various officers. Such scheme of service allows for promotion of officers within the service subject to availability of a vacancy, merit and upon approval of the Public Service Commission.
10. In the judgment rendered on 24th July 2020, the Employment and Labour Relations Court found in favour of the appellant for salary arrears for the period between November 2013 to February 2018 aggregating Shs.4,694,756/=, unpaid salary for the period of 20th January 2020 to April 2020 at Shs.525,196.45, interest on the above at court rates and 50% of the appellant's costs. In arriving at the judgment, the court was not persuaded that a proper case for constructive dismissal had been made as there had been no termination of employment save for stoppage of payment of salary. The Judge found that it was uncontroverted that the appellant reported to work and was allocated duties which was not challenged. The court also rejected the claim for libel and defamation holding that the appellant had a duty to verify that his account was funded before using the visa card and that the rejection of the card transaction for insufficient funds cannot be visited against the respondents.
11. The court also found that the appellant had not accounted for the period between 22nd October 2017 to 5th October 2018 up and until his letter to the respondent dated 20th May, 2018 and faulted the appellant for failure to communicate the extension of his studies after having been released for a fixed term ending 21st October 2017. Without the study release being extended by the employer, the court was of the position that such amounted to absence from his duty station without approval which amounts to gross misconduct under the law and pursuant to the provisions of section 44(3) and (4) (a) of the Employment Act, 2007. Such omission is a fundamental breach of his employment contract with a sanction of summary dismissal. The court applied section 19(1)(c) of the Employment Act, 2007 which allows the employer to make a deduction of the wage/salary due for each day the employee is not at work for no good cause. The court took the position that there was no effort by the appellant to request the respondents to have the study leave extended beyond the period earlier granted even when the industrial actions were ongoing.
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.”

13. With the above finding, there was no merit in the allegations of discrimination or the constitutional or statutory rights violations. On promotion, the court was persuaded that under the scheme of service for public officers employed by the 1st respondent, promotion of employees including the appellant is subject to the provisions of section 63 of the County Government Act. Under such provisions, 2nd respondent, the Nakuru County Public Service Board, is required to put in place modalities and address any employee(s) gaps and recruit and or promote those in the service based on need and availability of resources. Thus, the promotion of the appellant from one job group to the next is the duty of the 2nd respondent based on the set modalities and availability of vacancy and resources. There is no material evidence to demonstrate that the 2nd respondent properly moved, has acted outside the law and the policy guidelines and regulations in place. The court also appreciated that by a letter dated 5th February, 2014 the respondent, through the Ministry of Health promoted the appellant to Senior Medical Officer with effect from 30th October, 2013 and placed him at salary scale job group ‘N’ with a salary increment and future incremental date of 1st October, 2014.
14. This judgment did not satisfy the appellant as it prompted the filing of the appeal. From his submissions dated 8th March 2024, the appellant delineates four issues for determination. These are - whether the ‘abrupt’ salary stoppage conformed with Articles 25, 41, 47 of *the Constitution* as read with Fair Administrative Actions Act; whether the court was justified in stopping respondent from paying the appellant’s withheld salaries when indeed the respondent had realized her mistake and was willing to pay the same amount; whether the appellants rights to equality and freedom from discrimination, dignity, fair labour practices, fair remuneration and promotions, economic and social rights were violated and whether there was constructive termination in October 2018 anchored upon the principle of frustration.
15. Without a doubt, the appellant asserts his arguments as set out before the Employment and Labour Relations Court on the prayers that were not awarded in his favour. Having captured the bulk of the arguments and reasoning before the trial court, we have proceeded to reappraise ourselves with the record. From the foregoing, the appeal centers on our determination of the following pertinent questions
 - a. Whether the appellant was constructively terminated
 - b. Whether the withholding and stopping of salary was in line with the provisions of Articles, 25, 41, 47 of *the Constitution* as read with Fair Administrative Actions Act.
 - c. Whether the appellant’s rights under *the constitution* were violated and if so, which ones and in what manner.
 1. This being a first appeal, section 3(1) of the *Appellate Jurisdiction Act*, flowing from Article 164(3) of *the Constitution* affirms our appellate mandate. Rule 31 of the Court of Appeal Rules obliges us to reappraise the evidence and record and where necessary make our own findings. In a myriad of cases, our mandate at this stage is to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold.



2. On constructive termination, the appellant submits that his inability to complete the studies within four years was due to reasons beyond his control which were fully communicated and acknowledged by the respondents. The appellant adds that the said factors were also within judicial notice and in the public domain amounting to the legal principle of frustration. It is against this backdrop that he urges us to deem constructive dismissal even when the employee has not physically left the respondent. Reliance is placed on *Jones v F. Sir & son (Furnishers) Ltd* [1997] IRLR 493, where it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go.
18. Turning to the case at hand, the appellant is not disputing the principles on constructive dismissal but rather their applicability to him by maintaining that he was constructively dismissed. In doing so, the appellant does not dispute that he is still in employment. However, from the above authority cited, the appellant appears to introduced another perspective, that was not before the trial court. We find this contradictory in the sense that before the trial court, the appellant had under this ground pursued reinstatement together with payment of his salary arrears. In this regard, the trial court observed as follows:

“There was constructive dismissal from employment by the conduct of the respondents as the employer and the claimant is seeking reinstatement back to his employment and payment of his salary arrears.” Emphasis ours
19. In our view, the fact that the appellant wished to be reinstated to employment does not conform with the present argument as cited in *Jones v F. Sir & son (Furnishers) Ltd* (supra) to the effect that the appellant is waiting for another job in order to leave. Even if that were to be the case, such intentions were never pleaded before the trial court and have only arisen in the course of the appellant’s submissions. This in our view is something that required leave to introduce additional evidence which the Court was not approached for.
20. As an appellate court of the first instance, we are guided by the record. The manner in which the appellant chose to proceed in relation to this issue is not only unconventional but rather unprocedural. The Court is therefore mindful to not convert itself into a court of first instance to determine an issue on the basis of additional information that is improperly on record. Consequently, the ground fails.
21. As to whether the withholding and stopping of salary was in line with the provisions of Articles, 25, 41, 47 of *the Constitution* as read with Fair Administrative Actions Act, the applicant raises two sub issues. First he contends that the stoppage was abrupt and secondly that the respondents had already conceded to paying the same but for the Court’s intervention. It is not lost on us that this is the crux of the appellant’s grievance both before the trial court and in this appeal.
22. Starting with the latter sub issue, the same is captured in the appellant’s submissions as follows:

“10. That despite filing the matter, the respondent failed to file a response to the claim which made the court to rule that the matter will proceed via formal proof. During the submissions, the respondents agreed in their submissions to pay the appellant the withheld salaries. However, in the final judgment the court said otherwise. This necessitated the current appeal herein.”

This raises two issues – failure to file a response and the place of submissions. On the failure to file a response and the matter proceeding by formal proof, it is established that the onus



remains on the appellant to prove his case to the court's satisfaction. Failure to respond in itself does not lower the threshold on the appellant's part to prove his assertion.

23. The Court has also perused the submissions by the respondents filed on 3rd July 2020 before the trial court. There is no semblance of concession by the respondents to pay the withheld salary. If anything, the respondents are adamant that the appellant is not entitled to the compensation, the salary stoppage having been justified. As for the replying affidavit by Dr. Ben Osore, the same was in reply to a specific application dated 22nd March 2019 which was in any event dismissed by a ruling made on 14th May 2019. In particular, the deponent is categorical at paragraph 32 that appellant's arrears could not be paid alongside those doctors who had been promoted in December 2018 as his salary had already been stopped at the time of payment. It is also undisputed that the respondent did not file a response to the claim and did not call any witness to testify at the hearing the matter having proceeded by way of formal proof. In our view, the above circumstances render the appellant's submission in this regard superfluous.
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.
26. Having addressed the gravamen of the appellant's case on the stoppage of salary and found against him, we have to agree with the trial court that there were no constitutional violations. Some of the violations such as discrimination on account of ethnicity are very grave and cannot be taken lightly. However, the totality of the evidence proved otherwise in each of the allegations raised and it serves no point to analyse the same further. The trial court having correctly applied itself to the facts, law and evidence, the consequential orders granted do not warrant disturbance by this Court.
27. The upshot of our finding is that the appeal is unmerited and is for dismissal. Accordingly, we make the following orders:
 - a. The appeal is unmerited and is hereby dismissed with costs.
 - b. The judgment and decree of the Employment and Labour Relations Court at Nakuru in Cause No. 22 of 2019 issued on 24th July 2020 be and is hereby affirmed.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF OCTOBER, 2024.

M. WARSAME



..... JUDGE OF APPEAL

F. OCHIENG

..... JUDGE OF APPEAL

L. ACHODE

..... JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed DEPUTY REGISTRAR

