



REPUBLIC OF KENYA



KENYA LAW
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Kibore v Kenya Veterinary Vaccines Production Institute & 2 others (Cause E223 of 2021) [2025] KEELRC 132 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 132 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E223 OF 2021
NJ ABUODHA, J
JANUARY 24, 2025

BETWEEN

DR BENSON KIBORE CLAIMANT

AND

KENYA VETERINARY VACCINES PRODUCTION INSTITUTE 1ST
RESPONDENT

BOARD OF KENYA VETERINARY VACCINES PRODUCTION
INSITUTE 2ND RESPONDENT

DR JANE WACHIRA 3RD RESPONDENT

JUDGMENT

1. The Claimant through his Memorandum of Claim dated 12th March, 2021 pleaded inter alia as follows:
 - a. The Claimant averred that pursuant to letter of appointment and contract Agreement both dated 3rd February, 2014 and the letter of Appointment dated 7th February, 2014 he was employed by the 1st Respondent on contract terms to the position of Research and Development Officer II.
 - b. That he discharged his assigned responsibilities faithfully, diligently and competently on account of which he was named the employee of the year on 22nd December, 2014. That following his exemplary performance he was confirmed as a permanent and pensionable member of the staff on 3rd February, 2015 and promoted to the position of Senior Research and Development Officer.
 - c. The Claimant averred that beyond the letter of appointment his terms of service with the 1st Respondent were regulated by the Employment Act, the Constitution, Public Service



Commission Human Resource Policies and Procedures Manual for the Public Service of May,2016 pertaining to discipline of staff and secondment of pensionable officers.

- d. The Claimant averred that on 7th February,2020 he applied for his annual leave running from 19th February,2020 to 31st March,2020 and for permission to attend to parent's meeting at little Lambs Academy on 18th February,2020. That by a letter dated 28th February,2020 he requested for secondment to serve in the County Government of Elgeyo-Marakwet as a Chief Officer in charge of Livestock, Cooperatives and Fisheries for a period of 3 years at the expiry of his leave 1st April,2020 which letter was forwarded to the 2nd Respondent via email of 8th March,2020. That the letter was copied to the Principal Secretary, State Department of Livestock and the Secretary of Public Service commission.
- e. The Claimant averred that his secondment request was approved by the Public Service Commission as conveyed to him by the Principal Secretary, Ministry of Agriculture, Livestock, Fisheries vide a letter dated 8th September,2020 with effect from 2nd March,2020. That the Respondents were aware of his secondment to the county hence the reason the 2nd Respondent never invoked provisions of Clause K.8(1) of the Manual providing for the stoppage of salary of a public officer who was absent from duty without leave or reasonable cause and could not be traced for a period of 10 days.
- f. The Claimant averred that despite the Respondents being aware of his secondment the 2nd Respondent proceeded to issue a letter of confirmation of employment status dated 29th April,2020, a show cause letter dated 13th August,2020, letter dated 7th September,2020 inviting him to a disciplinary hearing scheduled for 15th September,2020 which were all initially forwarded to him through a non-functional postal address and later through the G4S courier and which letters were received by him on 16th September,2020.
- g. That he immediately raised a preliminary objection through the email of 12th October, 2020 to the purported disciplinary process which had been taken without his knowledge and while he was serving his secondment. He requested to be furnished with investigation report leading to the show cause, why his email of 8th March,2020 requesting for his secondment was never responded to and why his secondment was never acknowledged by the 2nd Respondent, members of disciplinary committee and the hearing of 15th October,2020 to proceed virtually due to Covid-19 active cases in the office of the 1st Respondent and Foot Mouth Disease Laboratories which would endanger his ailing father he was living with.
- h. The Claimant averred that in total disregard of his objections the Respondents proceeded to dismiss him from his employment with the 1st Respondent vide a letter dated 13th January,2021 on the grounds of alleged insubordination and absence from duty from 1st April,2020 being the period he was seconded and which letter was forwarded to him through the G4S Courier and Claimant's personal and official email address.
- i. The Claimant further averred that the 1st and 2nd Respondent acting on the impugned dismissal letter issued him with notice to vacate House No. KVI/LB/5001/13 he was occupying with his family. That the allegations of insubordination and absence from work were not true and were actuated by ill motives to justify and pave way for his summary dismissal by invoking Clause K.8(10) to (5) of the Manual.
- j. The Claimant averred that he has had a clean employment record in the public service which was irreparably injured by the illegal and unlawful actions complained of by reason of which he has suffered loss and damage. That the same occasioned him loss of pension benefits and his



career growth as he could not secure another job in the public service despite having worked for over 7 years after his secondment is over.

2. The Claimant in the upshot prayed this court to declare his dismissal to be unlawful and unprocedural contrary to the Employment Act, the Notice to vacate House No. KVI/LB/500/13 dated 15th February to be illegal, an order lifting the dismissal and notice to vacate, violation of his fair labour practices under articles 40,41 and 50 of the Constitution, reinstatement to his employment with the 1st Respondent without loss of benefits and in alternative compensation for unfair termination, exemplary damages, compensation for violation of his rights, certificate of service together with costs and interests.
3. The Respondents filed their Response to the Memorandum of Claim and counterclaim dated 11th June,2021 and averred inter alia as follows;
 - a. The Respondents averred that the dismissal of the Claimant from service with the 1st Respondent was within the law and that the order of reinstatement sought by the Claimant was not warranted. The Respondents admitted the facts of the Claimant's employment with the 1st Respondent as described in his claim.
 - b. The Respondents averred that the Claimant's appointment to permanent and pensionable terms was informed by the fact that his contract was lapsing and he had demonstrated that he understood his work hence the need to confirm him and not for any other reason. That the Claimant's employment apart the documents listed in his claim was also regulated by the State Corporations Act, Guidelines on Terms and conditions of service for state Corporations' CEOs, Resources Manual,2012, the KEVEVAPI code of conduct, the Public Service Commission Act and the Public Service Commission Regulations.
 - c. The Respondents averred that under Clause B33 of the Public Service Commission Human Resource Manual that approval for secondment was the responsibility of the ministry responsible for Public Service. That the Claimant did not prove that there was approval of his secondment by the ministry responsible for public service. That the procedure for secondment as set out in the Public Service Commission Regulations was not followed by the Claimant most particularly regulation 37 of the 2020 regulations. That a public officer could not proceed on secondment before being notified in writing by the Public Service Commission as it happened in the case of the Claimant.
 - d. The Respondent averred that the Authorized Officer of a state Corporation such as KEVEVAPI was its CEO. That under the regulations the Claimant would have made his request for secondment to the 2nd Respondent and the same would be forwarded to the PSC by the 2nd Respondent upon approval by the 3rd Respondent. That no request was made to them by the Claimant and the fictitious email alleged to have been sent forwarding the Claimant's request for secondment had a time stamp of 8.3.2020 at 11.38.36 PM GMT+ 3 yet the daily email report for 8.3.2020 showed that no email was received by the institution during that time. That the Respondents first learnt of the existence of such request on 16.9.2020 when the disciplinary process was already underway.
 - e. The Respondents averred that the Claimant could not have proceeded on secondment before being notified in writing by the Public Service Commission hence his actions amounted to a clear case of absconding of duty. The Respondents further denied that the Claimant applied for his leave on 7th February,2020 and averred that he applied for the same on 17th February,2020 and further to his application he sought to be off duty on 18th February 2020.



- f. The Respondents averred that the procedure set out under Regulation 37 of the Public Service Commission Regulations did not envision circumstances under which the Public Service Commission could approve a request for secondment received directly by a public officer without the recommendation of the authorized officer of the Public entity which is the employer of the Public Officer seeking secondment.
- g. The Respondents averred that the Claimant refused and /or neglected to disclose his employment status and deliberately continued drawing double salaries from two public entities thereby unjustly enriching himself from taxpayer money which ought to be surcharged from him. That as per PSC Human Resource Policies and Procedure Manual for the Public service at Clause B33(6) the Claimant was only entitled to the salary from the organization where he was deployed but he continued drawing a salary from the 1st Respondent amounting to Kshs 577,820.08(144,455.03 X4) while still earning a salary from the County Government of Elgeyo Marakwet an amount which the Institute prays for recovery orders.
- h. The Respondents averred that the only reason the letter of confirmation of employment status was sent to the Claimant was because he had deserted duty for a long period of time without giving any reasons for so doing and without permission of the Respondents and that his whereabouts were unknown. That the Notice to show cause dated 13th August,2020 was besides being sent to the Claimant's registered post and email address sent via WhatsApp Messenger to the Claimant's phone Number and was duly received. That the Claimant's allegations that he saw the same on 16th September,2020 were false.
- i. The Respondents averred that the 2nd Respondent received an email from the Claimant on 16th September,2020 from his yahoo email informing her that the Public Service Commission had received his request for secondment to Elgeyo Marakwet County. That the same email from the Claimant was forwarding an email sent to the CEO'S and Institute's email on 8th March,2020 where he Claimed to have requested for secondment from the 2nd Respondent.
- j. The Respondents averred that by practice whenever an email for the 2nd Respondent's attention is received in the institute's official email a copy would be printed by her secretary and placed on her desk. That the foregoing necessitated the generation and review of the Institute's daily email report where the audit trail of the emails received by the Institute on 8th March,2020 indicated that there was no email received on 8th March,2020 between 10.00pm and 12.00pm in the Institute's email platform.
- k. The Respondents averred that as a result of the forgoing, the disciplinary hearing meeting was postponed to 1st October,2020 to allow the attendance of representatives of the Inspector of state corporation in the Institute's Board to attend the disciplinary hearing and advice on the process of secondment of staff working in state Corporations. That a letter dated 15th September,2020 was sent to the Claimant informing him of the postponement of the disciplinary hearing to 1st October,2020. That the same was sent to his registered mail and emails which elicited no response from the Claimant.
- l. The Respondents averred that on 30th September,2020 the Committee convened with the aim of conducting a disciplinary hearing following the second invitation of the Claimant to attend the disciplinary hearing. That the Committee noted that the Claimant sent an email to the 2nd Respondent on 30th September,2020 stating that he could not attend the hearing due to sickness yet no evidence of sickness was provided.



- m. The Respondents also observed that the letter from the Ministry of Agriculture Livestock Fisheries and Cooperatives-state Department of Livestock allegedly from the Public Service Commission approving the Claimant's secondment in the very clear failure by the Claimant to follow procedure in attaining the secondment was suspicious and therefore further clarity was required from the Public Service Commission and the County Government of Elgeyo Marakwet.
 - n. The Respondents averred the 2nd Respondent wrote to the PSC Chairman requesting to be furnished with a copy of the letter and the processes that were followed by the Public Service Commission in granting the officer secondment which letter was never supplied. The Respondents averred that the 1st Respondent management on 2nd October,2020 further wrote to County Secretary and Head of Public Service Elgeyo Marakwet County seeking to be furnished with the Claimant's letter of offer of appointment and the appointment letter.
 - o. The Respondents averred that the institute on 14th October,2020 received the reply from the Elgeyo Marakwet County Government indicating that the Claimant was competitively recruited by the County and became successful for the position of Chief Livestock Fisheries and Cooperatives Department and accepted to work as a contractual staff not a staff on secondment for a period of 3 years.
 - p. The Respondents further averred that the Claimant was for the third time invited to attend a disciplinary hearing on 15th October,2020 at 10.00 am through an invitation of 2nd October,2020 where he was directed to bring with him supporting documents on his illness and his letter of offer of the job and appointment letter by the county. That the Claimant never turned up for the hearing as invited.
 - q. The Respondents averred that the committee noted that the Claimant had sent an email to the 2nd Respondent and copied it to various Board Members on the 12th October, 2020 in which it indicated that he could not attend the disciplinary hearing to alleged reported positive cases of Covid-19 at the institute's premises and that he believed the outcome of his disciplinary case was predetermined.
 - r. The Respondents averred that the Claimant with full knowledge of all disciplinary meetings failed to attend to present his case leaving the Respondents with no other option but to terminate his services. That upon terminating his employment the Claimant was supposed to vacate its premises as per section 4 of the Institute's HR Manual.
4. The Respondents also raised their counterclaim after the Claimant failed to vacate its premises to date and continued to sublet the house to strangers without paying any rent to the Respondents since June 2020 when his salary was stopped as well as salary paid to him between February,2020 to May,2020 when he was earning a salary from the county. The Respondents prayed that the Claimant be evicted from the said house.
 5. The Claimant on the other hand filed his reply to the Respondents' reply to claim and defence to counterclaim dated 19th October,2022. The Claimant averred as follows: -
 - a. That Regulation 37(1) of the Public Service Regulations 2020 applies to public officers appointed on contract and requires them to make a request for secondment to the Public Service Commission through authorized officer. That the Claimant forwarded by the letter dated 28th February,2020 his request for secondment to the 2nd Respondent despite the



regulation not applying to permanent and pensionable cadre copied the necessary offices as stated in his claim as a matter of good customary practice.

- b. The Claimant maintained that the letter requesting for secondment was sent to the email belonging to the 2nd Respondent and 1st Respondent on 8th March,2020 at 11.38 pm which were the same email address through which the request for leave and objection to the disciplinary process whose receipt was duly acknowledged was made. That the 2nd Respondent was feigning ignorance of the receipt of communication which was not the first time it was happening.
- c. The Claimant averred that public officers are entitled to annual leave which the authorized officer is bound to approve subject to exigencies of service. That the 2nd Respondent without any reasonable cause declined to approve his leave application and placed unnecessary hinderances to the processing thereof.
- d. The Claimant averred on the issue of double payment of salary that he was not aware of salary paid beyond 8th March,2020 when he proceeded for his secondment until 9th March,2021 when upon discovery of the same he requested the 2nd Respondent to forward a compilation of the payment erroneously forwarded to his account for refund.
- e. The Claimant further averred that under clause K8(5) of the HR Manual in cases of delay of stoppage of salary and an officer is subsequently dismissed on account of desertion the erroneous payment was to be recovered from the officer who occasioned the payment.
- f. The Claimant denied that the Notice to show cause of 13th August, 2020 was sent to his mobile number via WhatsApp and that despite indicating his postal address in his appointment letters as P.O.Box 5050-00200, Nairobi the Respondents opted to dispatch the letters to non-functional postal address P.O Box 15-30128 Kimwarer where he never received the said letters until 16th September,2020. The Claimant insisted that he handed over properly despite not been introduced to the Chief Research and Development who was still under orientation. That he handed over to the research officer Ms. Rebecca Bundotich who subsequently delivered his corrected Performance Contract to the 2nd Respondent.
- g. The Claimant further averred that the emails that the letters were sent did not belong to him and the same letters were never sent to his WhatsApp as alleged. That while he maintained the email address benson.kibore@ kevevapi.or.ke before proceedings on leave his access rights to the said email address were subsequent to his secondment withdrawn and he could not access the same to date. That he did not receive any calls from Legal officer on 15th September,2020 as alleged.
- h. The Claimant maintained that his secondment request and subsequent approval was proper, lawful and in line with the laid down procedure. That the Respondents opted to proceed with disciplinary hearing of 15th October,2020 despite his objections in his email of 12th October,2020 and his request to have the hearing proceed virtually due to Covid-19 cases reported in the institution at that time hence depriving him his chance to be heard.
- i. In response to the Counterclaim the Claimant averred that he has not sublet the Respondents house and that there was no agreement that interest would be charged on any outstanding rent arrears in relation to the house.



Evidence

6. The Claimant's case was heard on 25th July, 2024 and on 8th October, 2024. The Claimant (CW1) herein testified and adopted his witness statement and documents filed in court as his evidence in chief. CW1 testified that his secondment ended on 10th February, 2023 and he was currently working for a farming NGO. That he had been out of employment for a year and he never received any notice to show cause.
7. In cross examination CW1 confirmed that he received a written letter from PSC seconding him. That the message was communicated through State Department which conveyed the decision of PSC. He further stated that he applied for his leave on 7th February, 2020 via email. The document of the email showed he applied on 17th February, 2020 and the Court noted that the claimant was reluctant to answer this question. According to him, due to the urgency of the matter, there was communication that it was subject to some conditions. He proceeded to Elgeyo Marakwet on 10th February, 2020 and his salary was to be paid by the County.
8. CW1 admitted receiving salary from the 1st Respondent from February to May 2020 and stated that there was communication regarding the refund of the salary which was not responded to and that he had not refunded the salary.
9. CW1 contended that he did not receive the show cause letter within the stipulated time as he received it in September, 2020. That he never attended any disciplinary hearing and his last day of work for 1st Respondent was about the time he went on secondment. He further stated that the 1st Respondent allocated him a house and sometime when he was away he was told there was a time it was locked. That he has been away from Nairobi for 4 years. He made communication to 1st and 2nd Respondent about his secondment and never received any confirmation or response but he received response from the Ministry.
10. In re-examination CW1 clarified that he applied for leave and that he handed over the application to the office to his deputy since he had not been introduced to the person he was to hand over before proceeding on leave. Concerning secondment, he stated that the same was communicated through a letter dated 8th September, 2020 which quoted a letter from PSC dated 12th August, 2020. He however did not produce the letter dated 12th August, 2020 as he did not get it.
11. CW1 clarified that he at the time of trial not cleared with the 1st Respondent as his laptop was confiscated and he needed it to clear. That he never received the computation in order to start repayment.
12. The Respondents' case on the other hand was heard on 8th October, 2024 where Leah Kiarie the 1st Respondent Legal Officer (RW1) herein testified and adopted her witness statement and documents filed in court as her evidence in chief. She further stated that the Claimant applied for leave and the 2nd Respondent asked him to submit his performance contract signed and hand over report for the department. That the Claimant did not do this but proceeded on leave which was to lapse in March, 2020.
13. RW1 testified that the Claimant never resumed duties which was taken by the respondent as absconding of duty. That the HR tried to trace his whereabouts to confirm if he was still an employee of the 1st Respondent but he never responded. RW1 further stated that by end of June, 2020 there was no communication from the Claimant which prompted the 1st Respondent to stop his salary and send him a show cause letter in August which he never responded to until he was summoned for disciplinary hearing in September, 2020 and he never responded as well.



14. RW1 stated that communication to the claimant was through his contacts given to the Respondent. That disciplinary hearing was postponed to 29th September, 2020 and communicated to the Claimant. That the Claimant at this point communicated that he had been seconded to Elgeyo Marakwet County and his disciplinary hearing postponed to October, 2020. That the Claimant responded stating that he was unwell and was further invited for a third hearing on 15th October, 2020 and was asked to come with evidence showing he was unwell.
15. RW1 testified that the Claimant did not show up on 15th October, 2020 when the committee convened instead he wrote claiming there were Covid-19 cases at institute yet according to RW1, there were no Covid-19 cases at the institute.
16. RW1 testified that the Claimant did not follow the laid down procedure for secondment as he ought to have notified the CEO who would have tabled the same before the Board for approval and forwarding for concurrence to PSC. That the 1st Respondent paid his salary from February to June 2020 while he was on secondment thereby receiving two salaries which was irregular. That if the 1st Respondent was aware it could have stopped his salary.
17. RW1 stated that Elgeyo Marakwet County Government never remitted the claimant's pension as per requirement. That the 1st Respondent opted to terminate his services when he refused to appear before the committee and asked him to vacate the Respondent's house allocated to him by virtue of his employment which he has never vacated.
18. In cross examination RW1 stated that the email address indicated in the email of 8th March, 2020 was the official CEO's email and they visited the daily mail report for that day to confirm if there was any such email sent on that particular date at 11.58 but none was found in the system log.
19. RW1 confirmed that they wrote to PSC to confirm the secondment and never received a response but they received a letter from County Public Service Board Elgeyo Marakwet. That the letter from the Ministry was addressed to the Claimant through the 1st Respondent CEO. That the letter of appointment had the Claimant's address as that of Nairobi. RW1 further stated that the Claimant was assigned an official email address upon his appointment and that the email sent to the Claimant never bounced.
20. In reexamination RW1 clarified that the Claimant's secondment was not approved as provided and he never handed over as provided. That the Claimant received all the correspondences.

Claimants' Submissions

21. The Claimant had not filed his submissions by the time this judgment was prepared as late as 10th January, 2025 when the same ought to have been filed 21 days after hearing on 8th October, 2024.

Respondents' Submissions

22. The Respondents' Advocates Miller & Company Advocates filed written submissions dated 25th November, 2024. On the issue of whether the dismissal of the Claimant's employment was procedurally fair counsel relied on section 41 of the [Employment Act](#) on the procedure to be adopted before summarily dismissing an employee and further relied on the case of Godfrey Anjere v Unique Suppliers Limited (2015) eKLR.
23. Counsel submitted that the Respondents gave the Claimant proper notices. First, he was issued with a letter of 28th April, 2020 to confirm his employment status and thereafter issued with Notice to Show Cause on 13th August, 2020 together with three invitations to disciplinary hearings in September and



- October 2020. That all the letters were received by the Claimant giving him an opportunity to present his case.
24. Counsel further submitted that the email dated 30th September,2020 was an admission that the Claimant had been receiving the letters through registered mail as he confirmed receipt of a letter sent via G4S courier hence he received all the letters through the same. Counsel further submitted that the Respondent communicated through his official email address which he had access to together with his personal address which he used to respond to email dated 16th September,2020.
 25. Counsel further submitted that the letters were further sent to his mobile phone that he himself filled out in his annual leave form before the court. Counsel relied on section 43(1) of the [Employment Act](#) that the Respondent followed procedure before termination and relied on the case of Kenya Ports Authority v Mary Saru Mwandawiro(2017) eKLR on requirement that an employee should be taken through required procedure under section 41 of the [Employment Act](#).
 26. On the issue of whether the summary dismissal was substantively fair, counsel relied on section 43 and 45(2) of the [Employment Act](#) and contended that the reason for Claimant's dismissal was fair. The reasons being insubordination and absence from duty without leave or reasonable or lawful cause from 19th February 2020 as well as drawing salary from February 2020 to May 2020 from both the Respondents and the County Government of Elgeyo Marakwet.
 27. Counsel relied on the case of Felistas Acheha Ikatwa v Charles Peter Otieno (2018) eKLR on the issue of absconding duties and the efforts employer must make to reach an employee upon deserting duties. Counsel further submitted that clause 10.11.12 of the 1st Respondent's terms of service provided for absenteeism as well as issuance of show cause letter to an employee on serious misconduct as per clause 10.15.2 of the said terms of service. That this was in tandem with section 44(4) of the [Employment Act](#) on matters amounting to summary dismissal of an employee among them absenteeism and insubordination.
 28. Counsel submitted that the Claimant was rightfully dismissed as per the reasons given in his dismissal letter of 13th January,2021 on account of insubordination and absenteeism. That he went on leave despite not fulfilling conditions set out by the 2nd Respondent and extended his leave for over 30 days until 11 months when he was dismissed.
 29. Counsel further submitted that clause 2.23 of the 1st Respondent terms of service stated that any approval of initial and subsequent secondment should be by the Managing Director for employees in the Claimant's job grade. That the same terms provided that the employee would forfeit his salary and annual leave during the period of secondment. Counsel relied on section 42 of the [Public Service Commission Act](#) on procedure for secondment.
 30. Counsel submitted that the Claimant did not provide a letter from the Public Service Commission approving his secondment. That the 2nd and 3rd Respondent never approved his secondment and no evidence was adduced to the contrary as the letter from Elgeyo Marakwet dated 14th October,2020 stated that the Claimant was employed on contract and not on secondment terms. That the County also never remitted the Claimant's pension contribution as per section 37(5) of the Public Service Commission Regulations 2020. That the Claimant fabricated the email requesting for his secondment and hence no request was made to the Respondents.
 31. On the issue of whether the Claimant was entitled to reliefs sought including compensation for unfair termination counsel submitted that the dismissal of the Claimant was both substantively and procedurally justified hence not entitled to reliefs sought. That the Claimant was not entitled to the house allocated to him after he was dismissed hence not an employee of the 1st Respondent and hence



the notice to vacate was lawful. That the Claimant did not illustrate how the Respondents violated his constitutional rights hence not entitled to any compensation for such violations and also not entitled to reinstatement order since his secondment was done unlawfully.

32. Counsel further submitted that the Claimant did not request in writing for certificate of service to be issued to him from the 1st Respondent nor has he cleared with the 1st Respondent as advised by the 2nd Respondent in his dismissal letter of January 2021. That the Claimant was not entitled to exemplary damages as the same were not payable in employment matters while relying on the case of Kenya Revenue Authority v Menginya Salim Murgani(2010) eKLR.
33. On the Respondents' counterclaim counsel submitted that the Claimant should be compelled to pay Kshs 6750/= being the monthly rent from June 2020 to the date of judgment. That he should be compelled to refund the salary paid between February 2020 to May 2020 with interest as well as eviction order of the occupants from the 1st Respondent's house.

Determination

34. The court has reviewed and considered the pleadings, testimonies and submissions by Respondents' counsel in opposition to the case. The court has also considered authorities relied on by Counsel and has come up with three main issues;
 - i. Aa. aa. Whether the Claimant's summary dismissal of employment was unfair and unlawful
 - ii. Whether the Respondents breached the Claimant's Constitutional rights
 - iii. Whether the parties are entitled to the reliefs sought.

Whether the Claimant's summary dismissal of employment was unfair and unlawful

35. For a termination from employment to be considered fair, an employer must demonstrate that it had valid reasons for the termination and that in carrying out the termination, the employer followed a fair procedure in line with section 43 of the Employment Act. This was held in principle, in the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR.
36. In the instant case, the Respondents alleged that they terminated the Claimant on grounds of gross misconduct namely, insubordination and absenteeism. The Claimant on the hand submitted that he applied for leave in February 2020 and handed over as requested to his deputy since he was not introduced to the Chief Research and Development Officer to hand over to. He further contended that he complied with the requirements set by the 2nd Respondent before proceeding on leave. The Claimant further alleged that he was on secondment to Elgeyo Marakwet County Government a fact known to the Respondents since he sent a letter to the 2nd Respondent and 1st Respondent on 8th March,2020.
37. The Respondents denied receiving the request for secondment of the Claimant on 8th March,2020 and produced daily email trail for that day which showed that there was no email sent between 10.00pm to 12.00 pm.
38. The court notes that assuming the Claimant requested for the secondment from the Respondent the same was done on 8th March,2020 when he had already started working for the Elgeyo Marakwet on 10th February, 2020 and while he was still presumed to be working with the 1st Respondent. To the court the Claimant wanted to eat his cake and have it at the same time. To the Court, the only logical conclusion is that the purpose of the leave the claimant purported to apply for was to allow him work for the Elgeyo Marakwet County while still remaining and employee of the respondent drawing a salary



every month. There was no urgent matter to attend to as purported in the leave application. The letter from the Elgeyo Marakwet Public Service dated 14th October,2020 confirmed that the Claimant was competitively hired on a three year fixed term contract.

39. The court notes that under section 43 of the [Employment Act](#), an employer can terminate the service of an employee for reasons it genuinely believes to exist. In addition, absconding duties is gross misconduct under section 44 of the Act and justifies summary dismissal. The Claimant after the lapse of his annual leave on 31st March,2020 did not resume duties or communicate further on the issue of secondment to the County prompting the Respondent to write to him about his employment status on 29th April,2020 which fact the Claimant never denied.
40. Whereas the Claimant denied receiving any letters from the Respondents until 16th September,2020 claiming that the email stated did not belong to his and further that the postal address was nonfunctional and none was sent to his mobile number through WhatsApp, the Court is however to the contrary persuaded that the Claimant received all the communication from the Respondents and chose not to cooperate. The admission is seen in the email of 30th September,2020 where he acknowledges receiving letter of 15th September,2020 on 28th September via G4S courier. In addition, on 16th September,2020 the Respondent sent invitation to disciplinary hearing to the Claimant at 12.27 pm and instead of responding to the same, he sent on the same day the purported secondment letters at 1.20 pm through the yahoo email which was used before he went for his leave and even at this period.
41. The Claimant could not therefore deny receiving the communications even if the Respondent's witness acknowledged that the appointment letter had a postal address for Nairobi. The claimant further stated that he had not been in Nairobi for over 4 years. The Respondent was therefore entitled to send correspondence to his home address which he confirmed receiving.
42. On the issue of secondment, clause 2.23 of the KEVEVAPI terms and conditions of employment provides that an officer could be granted secondment to undertake assignments in projects where the institute has interest, for three years. That the employee would forfeit their salary and leave during period of secondment.
43. Further section 42 of the [Public Service Commission Act](#) provides that the secondment could be carried out on the request of authorized officer or public officer. The PSC HR Manual 2016 at clause B33 provided for secondment of pensionable employees which captured the above requirements as well remitting pension contributions of the employee on secondment which never happened in this case as per Section 37(5) of the PSC Regulations 2020. There being no proof that the Claimant requested for the secondment from the Respondents and in case the same was assumed done it was made in March,2020 when he had already started for the Elgeyo Marakwet County in February 2020. It therefore goes without say that the Claimant never followed the right procedure for secondment. It was also clear that the Claimant was not working on secondment but on a separate contract of 3 years after being competitively recruited by Elgeyo Marakwet County .
44. The issue of secondment was considered in the case of David Barasa v British Peace Support Team & Another [2016] eKLR wheret the Court stated:

A Secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any



contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed.

45. Further in the case of *Rev. John Mugania v Kenya Methodist university & Prof. Mutuma Mugambi*, Cause No.133 of 2013 the court held that: -

secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment."

46. From the above it is clear that secondment can only be done with the agreement and consultation with the principal employer which did not happen in this case hence it was never secondment. To this end this court is of the view that the Respondents had reasonable and valid grounds to terminate the Claimant's employment. The claim for unfair termination of employment therefore fails.
47. Regarding procedural fairness required under section 41 of the *Employment Act*. That is to say whether the respondent reasonably brought to the attention of the claimant the notices and letters requiring him to show cause why disciplinary action should not be taken against him, the Court is persuaded from the evidence presented through correspondence referred to earlier in this judgment that the claimant was duly notified and on more than one occasion requested for the postponement of the disciplinary hearing. The Court is therefore persuaded that a fair procedure was followed in terminating the claimant's service.

Whether the Respondents breached the Claimant's Constitutional rights

48. The Claimant has claimed violation of his constitutional rights under provisions of article 40 41, 50 of *the Constitution*. The court notes and it has been stated in several cases where allegations of violation of the articles of *the Constitution* are alleged that the same violations need not just be pleaded. The Claimant ought to prove the manner of the violation with precision.
49. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR that Court stated that the Petition ought to be pleaded with precision as required in constitutional Petitions and held as follows: -

It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*, 2011. Accordingly, the petition did not meet the standard enunciated in the *Anarita Karimi Njeru* case (supra)

50. This court finds that the Claimant has not illustrated with precision how her rights were violated by the Respondent. In any event this Court has found that the respondent had justifiable reasons to terminate the claimant's service and that the termination was carried out through a fair procedure.



51. Concerning the respondent's counterclaim, it was not in dispute that the Claimant earned two salaries between February 2020 to May 2020 before the 1st Respondent stopped his salary. The Claimant did not deny this fact and he in fact stated that he requested for the computation so that he could start repayment. The Respondents are therefore entitled to the refund of the salary remitted to the Claimant during this period.
52. On the issue of rent from June,2020 to the date of Judgment the Claimant who ceased to be the 1st Respondent's employee ought to have vacated the house which was a benefit for being an employee of the 1st Respondent. This court finds and holds that since the Claimant opted to start working for the County Government of Elgeyo Marakwet in February 2020 he became disentitled to the accommodation offered by the respondent. The respondent claimed a monthly rental of Kshs 6750/- but did not provide evidence how this was arrived at. Being a special damage claim, it ought have been strictly proved. The claim will therefore be rejected for lack of sufficient proof.
53. In conclusion the Court orders as follows:
- i. Claimant's claim is found without merit and is hereby dismissed costs.
 - ii. The Respondents' counterclaim for salary paid (February, 2020 -May, 2020) Kshs 144,455.02 x 4 =577,820.08/- is hereby allowed
 - iii. Claim for rent is hereby dismissed
 - iv. The claimant to vacate immediately, if not done already, the respondent's residential house he occupied by virtue of his employment
 - v. The respondent shall have costs of the Counter-claim
 - vi. The interest on the decretal sum shall accrue at court rates from the date of this judgment until payment in full.
54. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

