



**Odhiambo & another v Kenya Medical Training College & another (Petition  
E080 of 2025) [2025] KEELRC 2100 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2100 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E080 OF 2025**

**B ONGAYA, J  
JULY 17, 2025**

**BETWEEN**

**BENARD ODERO ODHIAMBO ..... 1<sup>ST</sup> PETITIONER**

**SIMION MWAMATI TITO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA MEDICAL TRAINING COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**DR KELLY OLUOCH ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed the petition dated 14.04.2025 made through Tonge Yoya & Associates Advocates. The petitioner prayed for:
  - a. A declaration that surcharge levied on the petitioners' salary are irregular, unprocedural, illegal, unconstitutional hence null and void ab initio.
  - b. An order directing the respondent reimbursement and or payment of monies so deducted and/ or recovered from the petitioners up to the determination of this petition in full together with interest on the accrued amount.
  - c. An order directing the respondents to pay the petitioner salary arrears unlawfully withheld.
  - d. An order for the 1<sup>st</sup> respondent to pay the petitioner damages for failure to accord the petitioner procedural fairness in the process leading to his suspension.
  - e. An order restraining the respondents either by themselves, employees, servants and/or agents from harassing, arresting, intimidating or terminating the employment of the petitioner on the basis of the illegal suspension.
  - f. Costs of this petition be borne by the respondents.



2. The petition was based upon the 1<sup>st</sup> petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioners' case is as follows:
  - a. On 05.06.2024 the parties entered a consent which was adopted by the court on 12.07.2024.
  - b. The parties consented to the reinstatement of the petitioners to the positions held at the respondent college prior to dismissal or position of equal status with immediate effect upon execution of the consent, which consent was executed on 05.06.2024.
  - c. Upon reinstatement, the respondent to surcharge the petitioners for any amount unaccounted for in relation to the subject matter of the petition.
  - d. The petitioners state that they were reinstated to work vide a letter dated 12.07.2024 in violation of the court orders. The reinstatement as per the letter would commence on the date the petitioners report on duty and a surcharge of Kshs 1,431,022.00 was levied on Benard Odhiambo and Kshs 1,476,520.00 on Tito Mwamati.
  - e. The petitioners contend that the respondent did not consider that they had accounted for the alleged amount in full.
  - f. The respondents posted the petitioners vide a circular dated 28.08.2024 and cleared them on 17.09.2024 from all departments.
  - g. The petitioners state that the respondent violated Article 41(1) & (2)A and 47(1) of *the Constitution* 2010 and section 11.23.3 & 4A of the Human Resource and Procedure Manual.
  - h. That the respondent subjected the petitioners to 32% and 62% surcharge of the basic salary, and withheld their salaries from 05.06.2024 to 09.09.2024 and removed their yearly increments for the years 2023 and 2024 as a form of punishment.
  - i. The respondent further withheld all the salary arrears and allowances that accrued from the date of interdiction to the date of reinstatement and the petitioners' case is that the same was contrary to the provisions of *the Constitution* and section 11.17.1 of the Human Resource and Procedure Manual for 1<sup>st</sup> respondent.
  - j. The petitioners appealed against the surcharge and forfeiture of salary vide letters dated 26<sup>th</sup> and 27<sup>th</sup> September, 2024 and sent a demand letter on the 21.01.2025 attaching a circular dated 11.02.2025.
3. The respondents filed the Replying Affidavit of Dr Kelly Oluoch, the Chief Executive Officer of the 1<sup>st</sup> Respondent College sworn on 04.06.2025 and through Caroline Oduor & Associates. She stated and urged as follows:
  - a. The petitioners signed their respective letters of reinstatement dated 12.07.2024 accepting the terms and conditions set out therein. That forfeiture of salary for the time they had been out of duty and specific amounts to be surcharged were some of the express terms the petitioners agreed to.
  - b. Upon dismissal from service, the petitioners were allowed to appeal before the 1<sup>st</sup> respondent's human resource management & advisory committee to account for amounts missing due to financial impropriety. The 1<sup>st</sup> petitioner failed to satisfactorily account for Kshs 1,431,022/- out of the total missing amount being Kshs 3,516,642, whereas the 2<sup>nd</sup> petitioner failed to satisfactorily account for Kshs 1,476,520 out of the total missing amount of Kshs 3,738,220/-.



- c. The petitioners are attempting to re-litigate a subject matter that has been heard between the same parties and settled by a court of competent jurisdiction contravening the provisions of section 7 of the *Civil Procedure Act*.
  - d. The respondents maintain that the petitioners are estopped from denying the terms and conditions of their reinstatement, having voluntarily accepted to be bound by those terms.
  - e. The petitioners have approached the Court prematurely, having failed to exhaust the grievance procedure available to them in the 1<sup>st</sup> respondent's Human Resource Policies & Procedure Manual 2017, which at section 12 provides a specific grievance procedure.
  - f. The petition is made contrary to the doctrine of constitutional avoidance, as it seeks to resolve administrative disputes between employer and employees through constitutional grounds, whereas there exists administrative processes that are yet to be exhausted.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  5. To answer the 1<sup>st</sup> issue, the Court finds that indeed each of the petitioners signed the letter of reinstatement each dated 12.07.2024. Each letter set out the terms of the reinstatement and each petitioner signed in acceptance of the terms and conditions of the reinstatement. The Court finds that as submitted for the respondents the parties are bound accordingly. The terms in the reinstatement letters were express as bidding each petitioner thus:
    - a. The reinstatement to employment on same terms and conditions that existed prior to dismissal from service.
    - b. The reinstatement to commence on the day of reporting for duties and shall be subject to forfeiting all claim for salary or employment benefits for the period each had been out of duty.
    - c. The 1<sup>st</sup> petitioner to be surcharged Kshs.1, 431, 022.00 and the 2<sup>nd</sup> petitioner Kshs. 1, 426, 520 being the total amounts unaccounted for in relation to the subject matter of the Nairobi petition ELRC No. E197 of 2023 between the petitioners and the 1<sup>st</sup> respondent herein.
    - d. Each petitioner agreed to abide by all employee regulations including but not limited to the Code of Conduct or Human Resource Policy.
  6. To answer the 2<sup>nd</sup> issue, as submitted for the respondents, the petition is indeed res-judicata because the consent entered and recorded in Court in the earlier petition conclusively determined the dispute and thereafter parties signed the terms in the reinstatement letter to implement the consent order. The petition is really an abuse of Court process as the alleged grievances herein ought to have been determined in the previous petition such as whether they would be paid withheld salaries. The dispute cannot be reopened in view of the consent order and the reinstatement agreement.
  7. To answer the 3<sup>rd</sup> issue, the Court finds that the submission for the petitioners that the reinstatement agreement was signed and concluded under undue influence is not established by way of evidence. In any event there were no pleaded particulars of undue influence in the petition and then established by evidence. It cannot be that the petitioners signed the reinstatement letters and now wish to go back on the terms therein claiming a reconciliation to establish the surcharge amount.
  8. To answer the 4<sup>th</sup> issue, the respondents have established that there exist a grievance procedure in clause 12.2 of the respondent's 2017 manual and which the petitioners have failed to invoke if indeed they had genuine and valid grievances about the manner of implementation of the reinstatement letters the



parties concluded and signed voluntarily. The failure to invoke the grievance procedure suggest the grievances were not valid and operates as an impetus to dismissal of the petition.

9. To answer the 5<sup>th</sup> issue, it indeed is the case that no constitutional violations have been established in the instant case and the dispute would primarily fall for an ordinary cause of action. The petition is chained by the exhaustion principle as urged for respondents.
10. The parties are in continuing employment relationship and each will bear own costs of the petition.

In conclusion the petition is dismissed and each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 17<sup>TH</sup> JULY, 2025.**

**BYRAM ONGAYA,  
PRINCIPAL JUDGE**

