



REPUBLIC OF KENYA



**Eliakim v Kenya Literature Bureau & another (Petition E132 of 2023)  
[2024] KEELRC 211 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 211 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E132 OF 2023  
AN MWAURE, J  
FEBRUARY 9, 2024**

**BETWEEN**

**ESNAS KINUME ELIAKIM ..... CLAIMANT**

**AND**

**KENYA LITERATURE BUREAU ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed a petition dated 4<sup>th</sup> July 2023 seeking the following orders:
  - a. A declaration be and is hereby issued that letter dated 22<sup>nd</sup> February 2023 purporting to surcharge kshs 307,337.34 from Esnas Kinume Eliakim's unutilised leave days and basic monthly salary at the rate of kshs 20,000 per month is illegal, null and void ab initio for being in contravention of articles 10, 20(1) 25(c) 27,28,41, 43(1)(as). 47, 48 and 50 of the constitution of Kenya 2010 as read together with clause 4.15 of the Kenya Literature Bureau Human resource policy and procedures manual and the decision and action thereto are invalid, null and void ab initio.
  - b. An order of certiorari do issue to quash letter dated 22<sup>nd</sup> February 2023, purporting to surcharge kshs 307,337,34 from Esnas Kinume Eliakim's unutilised leave days and basic monthly salary at the rate of Kshs 20,000 per month.
  - c. A permanent injunction be and is hereby issued restraining the 1<sup>st</sup> respondent from making any further deduction from the salary and benefits of Esnas Kinume Eliakim.
  - d. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent to immediately refund the kshs 100,000 being to total amount unlawfully deducted from the salary of Esnas Kinume Aliakim for the months of February, March, April, May and June 2023.



- e. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent to immediately write and issue a letter to the Kenya revenue authority confirming the disability status of Esnas Kinume Eliakim.
  - f. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent to immediately pay kshs 16,667 to Esna Kinume Aliakim being her leave allowance for the year 2023.
  - g. A declaration be an is hereby issued that surcharging the petitioner's month salary for the months of February, March, April, May and June 2023 was unlawful, unprocedural and equates to unfair labor practices.
  - h. A declaration be and is hereby issued that the fundamental rights and freedoms of the petitioner under article 27, 28, 41, 43(1) and 47 of the constitution have been violated by the 1<sup>st</sup> respondent
  - i. Costs for this petition and interest in d, f, i.
2. The petitioner states that she was an employee of Kenya Literature Bureau the 1<sup>st</sup> respondent. She says she suffered from knee osteoarthritis and this occasioned her to use crutches and requires constant medical attention.
  3. She says she has been visiting the hospital since 2021 and at times led to hospitalisation and she says she always informed her supervisor of the hospital visits or rest days as prescribed by the doctor.
  4. Further she says she would send sick sheets to her immediate supervisor which information the respondent vehemently denies.
  5. She says sometime this year the petitioner was informed an audit had been conducted and showed she was absent from duty from 2021/2022 and 2022/2023 totalling 203 days. She was ordered that she would be surcharged kshs 307,337/34 which deductions has been ongoing every month.
  6. She further says she was withheld kshs 16,667/- as leave allowance for the year 2023. She also says she has not received an official letter from Kenya Revenue Authority confirming her disability status and yet was due to retire by 7<sup>th</sup> July 2023 and which is an impediment to her tax exemption.
  7. She says she has been issued a disability card. She further says the respondent issued her with an early retirement letter of 24<sup>th</sup> October 2022 and letter was backdated to 7<sup>th</sup> July 2022 for retire on 23<sup>rd</sup> February 2023 whereas she should have been given one year notice.
  8. The petitioner says she should have been issued with a notice for disciplinary hearing if at all she was guilty of indiscipline.

**Respondent's replying affidavit.**

9. The respondent filed his replying affidavit deponed by one Victoria Lomaria the chief executive officer of the 1<sup>st</sup> respondent. She confirms the petitioner was their subordinate staff.
10. She says that the petitioner absented herself from employment for 203 days as was confirmed by the audit methodology reviewing the staff attendance register maintained at the respondent's main gate and the one maintained at the administration department which was the petitioner's work station.
11. The petitioners allegation that she would be on medical rest was not backed by any sick sheet and the sick sheet provided conflicted with leave days as for example one shows 15 days departmental signature while apparently petitioner had indicated to be on sick leave for 17 days at the same period.



12. The petitioner allegation that she would not sign attendance sheet at the gate due to her condition was flawed as she previously had signed the register even in her state.
13. The respondent witness says the petitioner's allegations that she informed the respondent of her absence is inconsistent and the petitioner was unable to explain herself to inconsistencies of 15 days when she signed attendance at work and 17 days sick leave at the same time.
14. The respondent states upon conclusion of audit the respondent explained to the petitioner of the surcharge of kshs 307,337/34 and in any case the respondent says he is a stranger to the human resource policy relied on by the petitioner.
15. The respondent avers the surcharge of the petitioner is as provided in the 1<sup>st</sup> respondents human resource policy manual 2018 and dictates of section 19(1)C of the *employment act*. Further the respondent states they gave the petitioner opportunity to respond to the audit but was not able to defend herself.
16. The respondent says the petitioner used her husband Mr. Joseph Emojong to influence the process which was against the human resource policy manual of the 1<sup>st</sup> respondent and *leadership and integrity act* 2012 and Public Ethics Act and articles 10 and 232 of the *constitution* of Kenya 2010.
17. The respondent says the petitioner has since retired from the 1<sup>st</sup> respondent's employment on 7<sup>th</sup> July 2023 and the petitioner has been paid her dues devoid of deductions and has no intention of recovering the remaining surcharge balance and further the respondent states this is not a constitutional matter but is a mere case of an employee absenting herself from duty.
18. The respondent further says the petitioner worked for the 1<sup>st</sup> respondent for over 30 years and had no reason to be malicious to her and to retire her prematurely but in fact promoted her even without the requisite certificates.
19. Further the 1<sup>st</sup> respondent avers the petitioner was given a disability certificate and was up to her to avail the certificate to the commissioner and to the other necessary bodies. The petitioner was to be exempted from taxes without reverting to the 1<sup>st</sup> respondent.

### **Submissions**

20. The court considered the petitioner's submissions dated 19<sup>th</sup> October 2023. The 1<sup>st</sup> respondents written submissions dated 14<sup>th</sup> November 2023 were also considered by the court as well as the petitioners submissions

### **Analysis and determination**

21. The petition herein is premised on article 41 of the *constitution* of Kenya 2010. The same provides that every person has a right to fair labour practices.
22. The gist of the petition however and the main issue for determination is on surcharge of the petitioners salary apparently for absenting herself from employment without authority or justification. The petitioner no doubt presented sick sheets but the respondent stated the petitioner never got communication from the respondent to proceed on sick leave.
23. Section 19 (10) (c) of the *employment act* provides that an employer can deduct from the wages of his employee any amount to exceeding one days wages in respect of each working day for the whole of which the employee without leave or other lawful cause absents himself from the premises of the employer or other place proper and appointed by the performance of his work.



24. The respondent's human resource policy and procedures manual 2018 states that one of the major offences is absence from work for a period of more than two days without permissions or acceptable excuse. The manual proceed to state that the penalty for absence from work is surcharge/recovery of costs of any loss or breakage.
25. The court has found that that human resource manual becomes part of the *employment act* (see *Daniel Mutuko Njuguna v Kenya Institute of Mass communication* [2021] eKLR where court states:  
“the provision of human resource manual became part and parcel of the employment contract the promise therein whether procedural or substantive must be adhered to”
26. The court finds if an employee absents himself/herself from employment without authority even if they later produce a sick sheet they must be penalised as provided in the *employment act* and the human resource manual of the employer or other documents between the employer and employee. It would be very chaotic at the place of work for employee to proceed to absent themselves from work without authority of the employer and only produce sick sheets thereafter. That is not acceptable and is not palatable for good order in the labour industry.
27. The court is however disappointed by lack of proper data both from the employer and the employee. The court did not find any records of the audit the respondent claimed to have undertaken that showed the petitioner missed to go to work for 203 days. There is a mere statement of the same but no support document.
28. The petitioner also has produced several sick sheets and letters from the doctor amounting to approximately 60 days over he period of 2021/2023 but there is not a single letter from the employer showing they authorised or acknowledge those sick leaves and letters from the doctors. A few are marked HRM FYI and two have the stamp of Kenya Literature Bureau. There are many lacunas on the evidence produced by both the respective parties as far as the days the petitioner alleged was on sick leave and similarly the day the respondent claimed the petitioner absented herself from work without authority or justification.
29. This leaves the court in dilemma as to how to reach accurate determination on the accuracy of this petition.
30. Indeed the court would agree that the petitioner could have filed a normal claim to enable the parties to give evidence and clarify the issues and their documents accurately.
31. There is no proof of constitutional violation on this petition or discrimination and it is the court's firm view the petitioner should have filed a claim instead of a petition.
32. The petitioner is also praying that the 1<sup>st</sup> respondent should write a letter to Kenya Revenue Authority (KRA) confirming the disability status of the petitioner. The 1<sup>st</sup> respondent wrote to the Public Service Commission on 7<sup>th</sup> June 2023 asking for guidance and public service commissions responded on 2<sup>nd</sup> august 2023 and advised petitioner to make application to the commission to be exempted from paying taxes.
33. By the time this letter was delivered in August 2023 the petitioner had retired on 7<sup>th</sup> July 2023 and so was overtaken by the events. The 1<sup>st</sup> respondent in his replying affidavit states he already paid the petitioner all her retirement benefits devoid of any further deductions. They however state they will utilise other legal means to recover their dues.
34. Having analysed the pleadings in this case critically and the submission the court orders as follows:



- a. The respective parties failed to supply sufficient data to prove the days the petitioner absented herself from work and or her part the petitioner failed to tender evidence of authorised documents to show she was on sick leave for the 203 days.
- b. The parties have also not provided evidence of the amounts surcharged from the petitioner as at the time of her retirement.
- c. In view of lack of this critical evidence the court finds it is fair that the respondent be fully compensated by whatever amounts they have recovered from the petitioner and that the petitioner is not entitled to any refunds from the 1<sup>st</sup> respondent as well because she never provided sufficient documents to prove she had authority to take 203 sick offs.
- d. The court reiterates this is not a case involving constitutional violation of human rights and would have been filed as a simple claim to enable the parties to give their viva voce evidence.
- e. The petitioner's prayer to be supplied with an exemption certificate on the basis of her disability is overtaken by events but she is at liberty to explore other means of getting the exemption after retirement.
- f. The court therefore is unable to grant the petitioners prayers and subject to what the court has stated above the petitioners prayers are dismissed accordingly but she will be paid kshs 16,667/- being her 2023 leave allowance if not already paid with interest from date of judgment till payment.
- g. Under the circumstances each party will meet their respective costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

