



**Ogenya v Nairobi County Government (Petition E196 of 2023)
[2024] KEELRC 816 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 816 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E196 OF 2023**

B ONGAYA, J

APRIL 8, 2024

IN THE MATTER OF ARTICLES 22(1) & 258 OF THE CONSTITUTION

AND

**IN THE MATTER OF THREATENED VIOLATION OF THE RIGHTS
CONFERRED BY THE PROVISIONS OF ARTICLES 10, 27, 28, 41, 47 & 232 AND
FUNDAMENTAL FREEDOMS UNDER ARTICLE 27 OF THE CONSTITUTION**

AND

**IN THE MATTER OF PUBLIC SERVICE (VALUES AND
PRINCIPLES) ACT NO. 1A OF 2015, LAWS OF KENYA**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTION ACT, ACT NO. 4 OF 2015, LAWS OF KENYA**

BETWEEN

BRIAN ODHIAMBO OGENYA PETITIONER

AND

NAIROBI COUNTY GOVERNMENT RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 09.10.2023 through Austine Arnold & Associates Advocates seeking the following orders:
 - a. A declaration that the respondent had no right or reason to effect unilateral salary deduction from the petitioner without his knowledge or involvement.



- b. A declaration that the purported deductions are unconstitutional and a violation of Articles 10, 27, 28, 47 and 232 of the Constitution.
 - c. A prerogative order of prohibition barring the respondent from considering or purporting to deduct the said sums of money from the Petitioner without subjecting the process to an investigative process.
 - d. Costs of the Petition.
 2. The petition was based upon the supporting affidavit of the petitioner and annexures thereto filed together with the petition and sworn on 09.10.2023. The petitioner's case is as follows:
 - a. The Respondent employed the petitioner sometimes in the year 2021 as a Senior Medical Officer. He was deployed to Marurui Health Centre and thereafter transferred to Mama Lucy Kibaki Hospital. He exhibited his letter of appointment.
 - b. The petitioner worked diligently and in accordance with the law and with great respect to appointing authority.
 - c. That it was until when he received his August 2023 payslip that he was surprised to see an alien deduction listed as Overpayment Recovery amounting to Kshs 909,508. He exhibited the payslip.
 - d. That this has caused his take away pay to reduce from Kshs. 250,000 to Kshs. 35,000 making the overpayment deduction amount to Kshs. 181,902 which also applied to the month of September.
 - e. That upon inquiry, the respondent told him that it was a deduction for overpayment of salary for a certain period unknown to the petitioner and which had not brought to the petitioner's attention.
 - f. That he has tried to ask for documentation and information that led to the said deduction but which has not been provided despite even sending a demand letter through his counsel on record.
 - g. That the said actions by the Respondent are meant to deprive him of his dues. It is illegal, irregular and unconstitutional and violates the legitimate expectations that arise from employment in the public sector.
 3. The Respondent filed its replying affidavit sworn by its County Chief Officer, Public Service of Nairobi City County, Janet Opiata sworn on 11th December 2023 and filed through A.K Gitonga Advocate for the County Attorney. It was stated and urged for the respondent as follows:
 - a. That the petitioner was employed by the then defunct Nairobi Metropolitan Services with effect from 30th March 2021 on a three-year contract on Local Agreement Terms. He was appointed to the position of Medical Officer Job Group N (CSG 8) salary structure Kshs. 49,000 x 2,170 - 51,170 x 2,550 - 53 x 2,650 - 56, 370-2,750 - 59,120 x 2,920 - 62,040 x 3, 080 - 65,120 with a minimum basic pay of Kshs. 49,000.
 - b. That the Claimant was entitled to House allowance, Commuter allowance, Health Risk Allowance, Non-Practising allowance, Emergency Call Allowance, Health Workers Allowance and Leave Allowance.



- c. That the Claimant's payroll data was then transferred from Nairobi Metropolitan services to the Nairobi County in December 2022 upon the expiry of the Deed of Transfer in November 2022 where the Claimant was earning a gross salary of Kshs. 307,290.
 - d. That upon payroll verification conducted in July 2023, it emerged that the claimant had been overpaid a basic salary of Kshs. 1,574,270. The schedules were exhibited.
 - e. That the respondent acted within the provisions of section 19(1)(e) of the Employment Act on overpayment recovery which they intended to do within the remaining contract period and remaining amount be recovered from the petitioner's service gratuity.
 - f. That the petitioner was aware of the said deductions as presented in payslips from the month of July 2023 as it was indicated in various payslips as 'special salary'.
 - g. That the petitioner did not deny receiving the amounts of overpayment and that the Local Agreement Terms that form part of the contract also provide for recovery of any overpayments in clause 7(2). Sample of the agreement was exhibited.
 - h. That the Respondent strictly expends public monies as directed in the Public Finance Management Act, the County Governments Act and no public officers should unjustly enrich themselves.
 - i. The Court to strike out the petition with costs.
4. The Petitioner filed his affidavit in response to the replying affidavit of the respondent herein and stated as follows:
- a. That even if he owed the respondent, its computation as per the respondent's bundle of documents would amount to Kshs. 1,091,140 and not the amount of Kshs. 1,574,270 as stated by the deponent in the Replying affidavit.
 - b. That the petitioner still had a long period to work in the public service which is his long term intention being that he is a Medical Doctor and that the County Government would be able to make appropriate recoveries post judgement if so ordered by the Court.
 - c. That the act of effecting the deduction was retrogressive and not in the best interest of employer-employee relations as per international HR guidelines.
5. Both Parties filed final submissions. The Court has considered all the material on record and returns as follows:
- a. The petitioner has admitted owing the respondent at least up to Kshs. 1,091,140. To that extent the respondent has established that the recoveries are not irregular or unlawful. As submitted for the respondent, the respondent is entitled to deduct from the petitioner's salary any amount paid to the petitioner in error in excess of due salaries and as envisaged in section 19(1) (c) of the Employment Act, 2007.
 - b. In the circumstances and owing to the likely lapsing of the fixed term contract, the Court returns that the respondent was entitled to recover the owed liability as was done,
 - c. The petitioner has failed to establish the alleged violation or threatened violation of rights. As parties were in a contract of service and the errors in overpayment while due to recovery have not been explained, each party to bear own costs of the petition.



In conclusion, judgment is hereby entered for the respondent against the petitioner for dismissal of the petition with orders each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8TH APRIL 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

