



Kenduywo v County Government of Uasin Gishu & another (Cause 306 of 2017) [2023] KEELRC 438 (KLR) (20 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 306 OF 2017
NJ ABUODHA, J
FEBRUARY 20, 2023**

BETWEEN

DANIEL KIPKOECH KENDUYWO CLAIMANT

AND

COUNTY GOVERNMENT OF UASIN GISHU 1ST RESPONDENT

UASIN GISHU PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. By an amended memorandum of claim filed on April 15, 2021, the claimant pleaded that at all material times, the Claimant was and is still an employee of the Respondents having been seconded from the national government. Further that:
 - a. The claimant was employed by the Ministry of Health as a Clinical Officer III from 1993 and worked in Kapsabet District Hospital.
 - b. He upgraded his medical qualifications after studying for Bachelor of Medicine and Surgery in 2010 and upon completion he was posted to Moi Teaching and Referral Hospital (MTRH) as a Medical Officer intern (Job Group L)
 - c. On or about the May 15, 2014 vide a letter from the Principal Secretary Ministry of Health; the Claimant was seconded to the County Government of Uasin Gishu with effect from January 1, 2014.
 - d. This was pursuant to the Constitution of Kenya Legal Notice Number 16 of February, 2013, 137-183 dated August 9, 2013 and gazette notice number 825 of January 7, 2013.
 - e. The claimant took numerous steps and follow ups which led up to his pay roll details being eventually transferred to the County Government of Uasin Gishu from County Government of Nandi.



- f. The claimant avers that since secondment of transfer of payroll, the Respondents jointly and or severally failed or ignored their duty to post the claimant to work station he had been seconded and to deposit the Claimants salary for the months of April, to date.
 - g. The respondents subsequently and on diverse occasions jointly and or severally failed and or ignored their duty to deposit and remit the claimants salary forcing the claimant to engage his advocates in those circumstances to demand his unpaid salaries.
 - h. The claimant further avers that he was not given a reason as to why his salary was wrongfully withheld. The withholding of the claimant's salary is unlawful, illegal unprocedural unfair and inhumane.
2. The claimant therefore sought against the respondent orders that:
 - a. A declaration and finding that the Claimant is a public servant seconded to the County Government of Uasin Gishu and the County Public Service Board with effect from January 1, 2014.
 - b. A declaration that the claimant's fundamental rights to fair labour practices, fair administrative action and access to information was transgressed on by the respondents; an order for compensation for general damages for breach of Article 41(1), 47 of the [*Constitution of Kenya 2010*](#).
 - c. An order for award of the sum of Kshs. 18,240,538 as set out in 4.8 above; that the Respondents jointly and severally do take up its mandate to remunerate the claimant as per his pay grade including with effect from April 1, 2015 when his payroll was transferred to the respondents as itemized herein above in 4.8 to the date of judgment herein and does the same to all future payments to retirement age;
 - d. An order that the respondent jointly and severally do issue the claimant with an itemized pay statement from April 1, 2015 to the date of judgment herein showing statutory and non-statutory deductions and does the same to all future pay statements;
 3. The respondents filed an amended response on October 19, 2021 in which they pleaded among others that:
 - a. The respondents deny the averments at paragraph 1.3 of the amended memorandum of claim and further aver that the claimant has never worked for the county government of Uasin Gishu nor the Uasin Gishu County Public Service Board but has rather been working for the County Government of Nandi.
 - b. The respondents deny the averments of paragraph 1.4 of the amended memorandum of claim and aver that the claimant was seconded to the 1st respondent as a Medical Officer Intern but never regularized his position as such during the period of secondment.
 - c. The respondent further aver that because of the claimant's failure to regularize his position with the 1st respondent, no employee-employer relationship was ever formed as at the end of his secondment.
 - d. The respondents denied the averments at paragraph 2.2.,2.3 and 2.4 of the amended memorandum of claim and further aver that the claimant on February 12, 2015 produced a letter purportedly from the Principal Secretary for the Ministry of Health on February 12, 2015 seconding the claimant to the 1st respondent.



- e. The respondents further aver that given that they had not received official communication of the claimant's supposed secondment, they had no reason to believe the authenticity of the letter as produced by the claimant.
 - f. The respondents deny the averments at paragraph 2.4, 2.5 of the amended memorandum of claim and further aver that the claimant has never liaised with the respective departments to sort out the confusion of his employment.
 - g. The respondents denies the averments at paragraph 2.5, 2.6 of the amended memorandum of claim and further aver that the claimant's supported secondment is shrouded with controversy and confusion and in any event the claimant has never presented himself for deployment.
 - h. The respondents further aver that not only was the claimant's purported letter of secondment delivered to them by the claimant and not the ministry of Health, the same letter was purportedly drawn on May 15, 2014 backdating the effect of the claimant's secondment to January 1, 2014.
 - i. The respondents further aver that because of such irregularities and the unprocedural nature of the flow of information, the claimant could not have expected to be transferred to the respondent's payroll without clarity on the same.
 - j. The respondents further aver that the claimant cannot make a claim for unpaid salaries and yet he did not do any work on behalf of the Respondents as the same would amount to mismanagement of the public funds.
 - k. The respondents further aver that it was on their own volition that they wrote to the County Government of Nandi with the impression that he had been seconded to the 1st Respondent from the County Government of Nandi.
 - l. The purpose of the correspondence was to be favoured with the claimant's payroll details. However, upon further analysis, the 1st respondent found that the claimant had erroneously been seconded to it.
 - m. Without prejudice to the foregoing, if the secondment was secured unprocedurally, the letter of secondment provided that his secondment was to last during the transition period.
 - n. Section 2 of the [Transition to Devolved Government Act](#) provides that transition period means the period between commencement of the Act which was 9th March, 2012 and three years after the first elections under the Constitution.
 - o. The first election under the Constitution having been conducted on March 4, 2013 means that the claimant's secondment lapsed on March 4, 2016.
 - p. As at 4th March, 2016, the claimant's secondment was yet to be regularized and as such did not carry out any duties on behalf of the 1st Respondent to be entitled to salary.
4. At the hearing of the claimant testified that he was a clinician and that he recorded a statement and filed the same with the claim. He adopted the same as his evidence in chief. The claimant further stated that he was seconded to the respondent by the National Government. The secondment letter was dated May 15, 2014. According to him the Ministry informed him that he was regularly seconded to the respondent. His details were therefore transferred to Uasin Gishu County. The Ministry confirmed this. It was further his evidence that he was never posted to any station in Uasin Gishu



since his secondment. He wrote several letters enquiring why but never received any response from the County Government. It was further his evidence that he was called by the County Assembly and informed that they could not deal with his matter since he had already gone to Court. He later got an appointment at Kabianga University and asked the respondent to transfer his payroll to Kabianga but they declined saying he was not their employee. He further stated that he never received any salary from the respondent or Nandi County.

5. In cross-examination he stated that he was initially a Clinical Officer III but upgraded after studying Bachelor of Medicine and that he was posted to MTRH. It was his evidence that he did not produce the letter of appointment as a Clinical Officer.
6. The claimant further stated that he was posted to MTRH as an intern between 2012 and 2013. The evidence was before the Court. It was found at page 30 of his bundle of documents. He however stated that he was never retained at MTRH after his internship.
7. It was the claimant's evidence that he was posted to Uasin Gishu by the Ministry of Health. According to him he was seconded by a letter dated May 15, 2014 and that he was never seconded there as an intern.
8. The respondent's witness Anne Koech informed the Court that he worked for the respondent as the Chief Officer in charge of Public Service. At the material time she was the acting Secretary to the County Public Service Board.
9. She recorded a statement on August 5, 2016 which she adopted as her evidence in chief. According to her, during the transition to County Government there were employees from local and national government who were transferred to County Government. She considered the claimant's case strange because at the material time he was in Nandi County hence could not be transferred to Uasin Gishu County. It was her view that the payslips must have been an error during transition. There was no other payslip which showed the claimant served in Uasin Gishu.
10. According to Ms. Koech, the claimant's issue ought to have been handled by the County Public Service Board but in this case, it was handled by the County Secretary which was irregular. She maintained that the claimant was an employee of Nandi County and that he never treated anyone in Uasin Gishu.
11. In cross-examination Ms. Koech stated that the head of the Public Service Board was the Chair and any communication to the secretary ends up before the Board. She could not confirm that the claimant was seconded to Uasin Gishu County by the letter dated May 15, 2014. The letter was addressed to the County Secretary Uasin Gishu. It was her evidence that by the time this letter was received by the respondent, the matter was already in Court and that the claimant wrote to the Board but the Board never responded because the claimant was not part of Uasin Gishu County staff. His details remained in Nandi County. Concerning non-payment, her evidence was that the respondent never paid the claimant because he was not their employee.
12. In re-examination she stated that this was a case of secondment and ought to have been dealt with by the County Public Service Board and not the County Secretary. The Board was in charge of recruitment, transfer discipline and secondment of staff. Ms. Koech further stated that the claimant was erroneously seconded by the Principal Secretary to Uasin Gishu while he had already been seconded to Nandi.
13. The main issue around which this claim revolves is whether the claimant was an employee of the respondent and while as employed, the respondent failed and or ignored to pay the claimant his due salary and emoluments as payable to employees of his cadre. If the Court so finds should an order be made for payments of the sums set out in paragraph 4.8 of the statement of claim.



14. According to the claimant he was seconded by the National Government to Uasin Gishu County through a letter dated May 15, 2014. According to him, the ministry informed him that he was regularly seconded to the respondent. His details were therefore transferred to Uasin Gishu County. The respondent however never posted him to any station after his alleged secondment.
15. The respondent on its part maintained that the claimant was already an employee of Nandi County having been seconded there hence could not again be seconded to Uasin Gishu County. According to the respondent therefore the claimant was an employee of Nandi County and never treated anyone in Uasin Gishu.
16. The letter dated January 12, 2018 attached at page 30 of the claimant's bundle of document may shed better light to the confusion around the claimant's employment.
17. According to the letter, the claimant prior to devolution was working in Nandi County. He upgraded his education qualifications after studying for Bachelor of Medicine and Surgery Degree at Kenyatta University. He started this course in August, 2004 to December, 2010. On completion of the course, he was posted to MTRH in Uasin Gishu County as a Medical Officer- Intern with effect from May 14, 2012. The claimant did not produce any letter of posting to MTRH however he produced payslips for the months of March 2013 through to July, 2013 which showed his pay point as MTRH in Uasin Gishu. The claimant further produced a payslip for January, 2014. The respondent did not seriously dispute these payslips. Its only contention was that the claimant was described therein as Medical Officer- Intern. Stopping here for a moment, for the respondent to pay the claimant as evidenced by the payslips, one of two things must have happened. Either the respondent must have treated the claimant as a new employee and created a new profile for him in the payroll system or they must have been having in their possession, the claimant's payroll details from Nandi County where he worked previously. The second option could not be a possibility since it was shrouded in confusion as the claimant was allegedly seconded to Uasin Gishu on May 15, 2014 with effect from January 1, 2014. This leaves the first option as the most probable possibility.
18. The claimant submitted his secondment letter dated May 15, 2014 to the Secretary County Government of Uasin Gishu on March 11, 2005. This was some ten months later after it had been written. The letter made no reference as to how it was to be transmitted. It bore no postal address hence it could only be reasonably presumed that the claimant personally collected it. The letter was further not copied to the respondent.
19. It was not clear from the pleadings and documents filed where the claimant was and what he was doing during the ten months or so when he had not submitted his secondment letter. The claimant however stated in his statement of claim that pursuant to his secondment he took numerous steps and follow ups which led to his payroll details being eventually transferred to the County Government of Uasin Gishu. From the foregoing it could reasonably be deduced that the claimant may have gone back to Nandi County upon the conclusion of his internship at MTRH. I say so because, the claimant did not make a good account of what happened or what he was doing since he last received his payment as a Medical Officer –Intern in January, 2014.
20. Taking regard to the above, the Court takes the view that the confusion around this matter makes it extremely unsafe to make any order on monetary compensation to the claimant even if the Court were to find justifiable reasons for doing so.
21. Salary is payable for work done. In this particular case the respondent never allocated the claimant any work because they honestly believed the claimant was not their employee. The respondent took the view that the claimant was not properly seconded to it and that he could not possibly be seconded to



it because he was already seconded to Nandi County. They may have been mistaken but this is what the Court can call honest mistake. The claimant on the other hand and as observed earlier, never made a good account of himself. That is to say he never came out clear about where he was and what he was doing prior to receiving his secondment letter which was some ten months later after it was written. If indeed he was posted to MTRH in Uasin Gishu as a Medical Officer- Intern and paid by the respondent as such, under what circumstances did his payroll details revert to Nandi County that he had to follow them up again? Further, the court has noted that from the correspondence filed by the claimant, he raised the issue of his secondment for the first time in May, 2015 and in earnest in 2017 when he wrote several letters about his case to the respondent including the Commission on Administrative Justice.

22. The foregoing reasons and the gaps in evidence makes it unsafe to make any order for payment of any salary arrears to the claimant.
23. In conclusion the most appropriate order that commends itself to me is to declare that the claimant having been seconded to the respondents shall be deemed from the date of this judgment as an employee of the respondent with rights, privileges and benefits that accrue to employees of his caliber as at the date of this judgment. The Court further orders that if still viable and suitable, the respondent executes in favour of the claimant the transfer of service letter from the respondents to University of Kabianga as requested by the claimant.
24. Considering the circumstances of this case, each party shall bear their own costs.
25. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF FEBRUARY, 2023

Abuodha Nelson Jorum

Judge ELRC

