



**Kenya National Union of Nurses v Kisumu County Public Service Board & another
(Cause E031 of 2022) [2023] KEELRC 1551 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E031 OF 2022
CN BAARI, J
JUNE 22, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES CLAIMANT

AND

KISUMU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

KISUMU COUNTY GOVERNMENT 2ND RESPONDENT

JUDGMENT

1. The Claimant in a Memorandum of Claim dated 13th July, 2022, and filed in Court on 29th July, 2022, seeks a declaration that the Respondents violated the grievant's right to salary payment for work done from April, 2022 to June, 2022, a declaration that withholding of salary and emoluments of Mr. Maurice Opetu is an unfair labour practices, hence unlawful, an order of specific performance against the 1st and 2nd Respondents to pay the grievant salaries from the month of April, 2021, to June, 2022 amounting to Kshs.1,701,791.00, damages for lost earnings, and special damages for breach of his right to fair labour practices.
2. The Respondents filed a Response to the claim through the Kisumu County Attorney on 11th October, 2022.
3. Both the Claimant's and the Respondents' cases were heard to conclusion on 1st February, 2023, paving way for filing of the parties' submissions. The Claimant presented a Mr. Maurice Odhiambo Opetu, the grievant in the matter to testify in support of its case, while the Respondents' evidence was produced by a Mr. Clement Wadegu, their Human Resources Officer.
4. Both parties filed submissions in the matter.



The Claimant's Case

5. The Claimant's case is that her member and grievant herein, Mr. Maurice Opetu P/No. 1997012682 is a Kenya Registered Community Health Nurse employed by the Kisumu County Public Service Board, and currently stationed at Kisumu County Referral Hospital, Psychiatric Unit, earning a gross salary of Kshs.130,970.00 per month.
6. It is the Claimant's case that the grievant is her member and their official, having been elected to the position of Deputy General Secretary.
7. It is the Claimant's position that between April, 2021 to June, 2022, the Respondents stopped and withheld the salaries and emoluments of the grievant without any justifiable reasons, which monies have since accumulated to the tune of Kshs.1,701,791.00
8. The Claimant states that to date, despite all efforts to engage the Respondents on the grievant's issue, they have willfully refused, failed, declined and neglected to pay salaries and emoluments to the grievant.
9. The grievant in his testimony told the court that he proceeded on training between September, 2020 and September, 2021. It is his further testimony that he resumed duty on 4th September, 2021, and was not paid salary from the time he resumed duty to April, 2022.
10. It is the grievant's position that upon resuming duty, he was assigned duties at the Kisumu County Referral Hospital, and which according to him, is evidenced by the duty roster produced before Court.
11. The grievant testified that he was never at any one time suspended from duty, yet his salary was stopped without reason. He further told the Court that his medical cover was equally suspended and has not been reinstated with the reinstatement of his salary.
12. It is the grievant's testimony that he submitted his certificate to the Respondents, indicating completion of his training.
13. The grievant further testified that he was released to attend the training verbally due to the difficulty to hold meetings owing to the Covid-19 pandemic at the time.
14. On cross-examination, the grievant told the Court that he proceeded on training on 15th September, 2020, while the meeting that approved his release to proceed for the training was held on 16th September, 2022. It is his further position that the Respondents' human resources manager released him for the training verbally.
15. It is his testimony that he was taken through a disciplinary process which resulted in his recall to duty. He further states that he did not receive the email recalling him to duty five months' into his training, having been involved in a road accident and hospitalized the same day the email was sent.
16. He finally told the Court that he was reinstated back to the payroll in May, 2022.
17. The Claimant prays that the grievant be awarded the prayers listed in its statement of claim.

The Respondents' Case

18. The Respondents' case is that the grievant, Mr. Maurice Odhiambo Opetu, is a Senior Registered Nurse who was seconded to the County Government of Kisumu by the Ministry of Health with effect from 1st January, 2014.



19. It is the Respondents' further case that on 3rd September, 2020, the grievant applied to be released to pursue a one year course in Higher Diploma in Psychiatric Nursing at Mathare campus commencing on 15th September, 2020.
20. It is the Respondents' case that the grievant's application for release was first deliberated at the institutional level by the Kisumu County Referral Training Committee on 4th September, 2020, and that the Committee's recommendations were forwarded for consideration at the departmental level by the Departmental Human Resource Advisory Committee (DHRAC).
21. It is the Respondents' position that the Departmental Human Resource Advisory Committee (DHRAC) considered the grievant's application together with the recommendations of the Kisumu County Referral Training Committee on the subject on 16th November, 2020, and approved the application.
22. The Respondents states that upon both committees approving the grievant's application together with those of other employees, the Chief Officer for Health and Sanitation made a request vide a letter dated 19th January, 2021, to the County Secretary to process release letters for those whose trainings had been approved, including the grievant.
23. The Respondents states that upon discovery that the grievant had irregularly proceeded for training without the requisite release letter from the County Secretary, the Chief Officer for Health recalled him back to duty via letter dated 28th January, 2021.
24. It is the Respondents' further case that on 4th February, 2021, the grievant sent a letter addressed to the Chief Officer Health, reporting that he had been involved in a road accident while on training as he was a full time student at the Mathare Campus.
25. The Respondents state that the grievant was issued with a show cause letter dated 31st March, 2021, on account of absence from duty without leave or reasonable or lawful cause, and why he should not be summarily dismissed.
26. The Respondents further state that the County Secretary was requested to process the stoppage of the grievant's salary with effect from 6th April, 2021, as disciplinary process began. The Respondents state that on 15th April, 2021, communication was made to the grievant by the Chief Officer Health informing him that his request for training was not approved by the County Human Resource Management Advisory Committee Meeting held on 31st March, 2021.
27. The Respondents aver that on 22nd April, 2021, the grievant made his response to the show cause letter, wherein, he admitted proceeding on training without the requisite approval and release, and which he attributed to the scaling down of services during the covid.19 pandemic.
28. It is the Respondents' case that on 31st May, 2022, the County Human Resource Management Advisory Committee (CHRMAC) held its final meeting on the issue of Mr. Maurice Opetu, where a final recommendation was reached to the effect that he be reinstated effective May, 2022, and that the withheld salaries for the period of absence be forfeited.
29. The Respondents' sole witness RW1 on cross-examination, confirmed that the grievant's application for study leave was approved, but that he did not adhere to the release procedure having left without a release letter. It is his testimony that the letter of release could only be issued by the County Secretary.



30. RW1's further testimony is that other employees whose applications for study leave were approved together with the grievant's, were issued with release letters to proceed on their trainings, but copies of the release letters were not placed before court.
31. It is RW1's position that the grievant did not present his certificate for purposes of deployment, and nor did the College he attended write to certify that he had completed his studies.
32. RW1 confirmed on cross-examination that there was no complaint that the grievant had absconded duty.
33. RW1 proceeded to state that the resolution to stop the grievant's salary was arrived at, though the minutes were not produced in evidence.
34. The Respondents pray that this suit be dismissed with costs.

The Claimant's Submissions

35. It is the Claimant's submission that the actions of the Respondents of selectivity singling out the grievant for punishment out of the six employees who had applied for training and who had all proceeded for training without release letters, violated his rights under Article 21 of *the Constitution* of Kenya 2010.
36. It is submitted that the punishment meted on the grievant in being denied salary while the rest of the applicant trainees were paid, was in contravention of Section 5(2) (3) of the *Employment Act*.
37. It is the Claimant's submission that the Respondents have not discharged their burden of proving that denying the grievant his salary was not discriminatory in accordance with Section 5 of the *Employment Act*. The Claimant had reliance in Petition No. 36 of 2019, Simon Gitau Gichuru and Package Insurance Brokers to buttress this position.
38. The Claimant submits that by stopping the salary of the grievant without prior communication, the Respondents acted in violation of his rights under Article 47 of *the Constitution*.
39. It is the Claimant's submission that the grievant's absence from duty was reasonable and lawful as his application for training had been discussed and approved, and that the Respondents' Management's failure to promptly issue the grievant with a release letter should not be used against the grievant having applied for the leave.
40. It is submitted that the Claimant's claim of a total sum of Kshs.1,701,791.00 as unpaid salaries has not been controverted. It is the Claimant's further submission that it has proved that grievant's fundamental rights to fair Labour practice were denied and infringed upon, and prays that the Honourable Court be pleased to award damages as it may deem just.

The Respondents' Submissions.

41. It is submitted for the Respondents that by dint of both national and county legislation, only authorized officers can grant a course approval and that any officer dissatisfied with the decision of the authorized officer has recourse through an appeal to the Public Service Commission, which mechanism the Claimant did not give a chance.
42. The Respondents submit that the Claimant's refusal to return to work upon being recalled, was an act of insubordination and hence their decision to stop his salary was lawfully made. It is the Respondents' further submission that their decision herein was made in accordance with Section K.8 of the Public



Service Commission Human Resources Policy and Manual and Section D.20 of the County Public Service Human Resources Manual.

43. The Respondents submit that the Claimant's actions of absconding duty without reasonable cause, amounted to gross misconduct justifying his summary dismissal, but was instead, reinstated and his salary withheld for the period he was not on duty.
44. It is submitted that the Claimant yielded to the conditions of his reinstatement including the decision to withhold his salary, and was thereafter deployed to the unit where he currently serves at.
45. The Respondents submit that the Claimant is not entitled to the reliefs sought as to award him, would amount to an unjust enrichment.

Analysis and Determination

46. Upon careful consideration of the parties' pleadings, the witnesses' oral testimonies and the submissions by the Claimant, the issues that fall for determination are:
 - i. Whether the grievant was authorized to proceed on study leave;
 - ii. Whether the grievant's salary was stopped within the law, and if not, whether he is entitled to the withheld salary;
 - iii. Whether the grievant was discriminated upon;
 - iv. Whether the grievant is entitled to the other reliefs sought under the claim.

Whether the grievant was authorized to proceed on study leave

47. It is not disputed that the grievant applied for leave to proceed on a one year of training to pursue a Higher Diploma in Psychiatric Nursing at Mathare campus, which was to commence on 15th September, 2020. Parties were also in concurrence that his application together with those of other employees, was deliberated upon on various dates going through the different levels of approvals, with the final approval being made on 16th November, 2020.
48. The Respondents' witness confirmed to this Court that upon approval of the grievant's training leave, a letter was written to the County Secretary to issue release letters to all the applicants.
49. It is thus not in dispute that the grievant's application was allowed and the only issue is that the grievant proceeded for training before receiving a letter releasing him for the training.
50. Minutes of the Kisumu County Referral Training Committee meeting held on 4th September, 2020, and produced in evidence by the Respondents states thus: -

“Min.3/9/2020 Course Approval

one officer had applied for course approval to pursue further training:

Maurice Opetu- P/N.1997012682- the officer requested for course approval to pursue a Higher Diploma in Psychiatric Nursing at Mathare Campus for a period of one year.

The respective heads of department had cleared the above officer after thorough deliberations, the committee cleared him and approval granted.”

51. In yet another meeting held on 16th November, 2020, Minute No. 7 indicated that the grievant herein, Mr. Maurice O.Opetu had applied to attend a one year Higher Diploma Course in Psychiatry with



- effect from 15th September, 2020. The minute proceeds to state that the request be approved as the course was relevant. In the same meeting, study leave approval was granted for another two employees of the Respondents, namely; Sharon Liz Mito and Lilian Atieno Oduodo.
52. Further, in a memo dated 19th January, 2021, to the County Secretary, requested that release letters be issued to employees whose study leave was approved, the list included the grievant and the approval was for a period of one year with effect from 15th September, 2020.
 53. The grievant was issued a show cause letter requiring him to explain why he proceeded for his studies without course approval from the authorized officer. His response was that he submitted his application and which was received and marked as approved, and that he further proceeded to execute a bond to allow him attend the studies, and which bond was executed by the nursing director. He further states that he was released verbally as it took long for the Respondents to convene meetings owing to the Covid-19 situation in the country at the time that resulted in scaling down of services.
 54. The grievant was later sent a letter dated 15th April, 2021, indicating that his application for study leave was not approved. The question for this Court is whether the grievant's absence from duty on account of study leave was procedural.
 55. To start with, there is every indication that the grievant's application for study leave was approved by the relevant departments/authorities and hence the letter of 15th April, 2021, communicating to the grievant that his leave application was not approved is a show of dishonesty on the part of the Respondents.
 56. Further, the minutes of the meeting held on 4th September, 2020, state "the committee cleared him and approval granted." This Court would have no other interpretation of this minutes other than that the grievant was cleared to proceed for his studies.
 57. In my view, the minutes placed before this Court are prove that the grievant's application was approved and the failure by the County Secretary to issue a release letter did not in any way invalidate the approval, for reason that the approval clearly indicated when the grievant's studies to commence as well as the date when the approval was to take effect.
 58. That the Respondents only came to realize at the end of January, 2021 that the grievant had left for his studies, and secondly that they had not issued a release letter since November, 2020, when the approval was given, is indication that they mismanaged their dockets.
 59. It is also worth noting that no complaint had been made on the grievant's absence from duty by his supervisor. If indeed the grievant left without the knowledge of the employer, and his docket falling in what is called an essential service, his absence should have been immediately noticeable.
 60. In Industrial Court at Nairobi Cause Number 1073 of 2012 between Abraham Gumba v. KEMSA, it was held that although employees have a duty to obey the lawful command of their Employers under Section 44(4)(e) of the *Employment Act* 2007, the commands by the Respondent to the Claimant to show cause, and to return to Kenya without completing her study, do not fit the description of lawful and proper orders.
 61. In the same breath, the Respondents' decision to recall the grievant half-way through his studies, was unreasonable and did not fit within the ambit of what constitutes proper orders.
 62. In the premise, I conclude by holding that the grievant's study leave was approved, and further find the subsequent disciplinary procedure and the stoppage of salary malicious, unwarranted and unfair.



Whether the grievant’s salary was stopped within the law, and if not, whether he is entitled to the withheld salary

63. The Respondents’ admit having stopped the grievant’s salary and emoluments on the basis that disciplinary action was taken against him for absconding duty, which resulted in a decision to reinstate him to the service with loss of salaries for the period he was away from duty.
64. The grievant’s position, and which is confirmed by the evidence before Court, is that the Respondents were fully aware of his whereabouts having approved his study leave.
65. Other than the notice to the County Secretary dated 6th April, 2021, to stop the grievant’s salary, there is no evidence that the Respondents informed the grievant of the decision to stop his salary. This by all standards is an unfair labour practice and I so hold.
66. Finally, having found that the grievant’s application for study leave was indeed approved by the relevant authorities, and his absence being the basis for the disciplinary action that resulted in non-payment of salary, I find and hold that he is entitled to the full salary withheld from the time he resumed duty (4/9/2021).
67. It was not clear to his court whether the grievant’s salary was paid or was payable during his study leave. For this reason, and the grievant having been cleared to study between September, 2020 to September, 2021, I proceed to make an award for unpaid salary for the period between September, 2021 to April, 2022.

Whether the grievant was discriminated upon

68. The Claimant avers that the grievant was discriminated upon for having been disciplined for proceeding for studies without a release letter, yet other employees whose approvals were granted together with his, were neither disciplined nor recalled back to work on similar ground.
69. Minutes of a meeting held on 16th November, 2020, indicates that approval for study leave was made both for the grievant and for another two employees of the Respondents, namely; Sharon Liz Mito and Lilian Atieno Oduodo.
70. Section 5 of the [Employment Act](#), 2007 Act provides that:
 - “(1) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
 - (2)
 - (3) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”
71. Although the [Employment Act](#) does not define discrimination, Article 1 of the Convention number 111- on discrimination in employment defines discrimination as: -
 - “ Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect



of nullifying or impairing equality of opportunity or treatment in employment or occupation.”

72. In Petition No. 36 of 2019, Simon Gitau Gichuru and Package Insurance Brokers it was held:
- “The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds.”
73. An allegation of discrimination at the work place, places the burden to prove that the discrimination did not occur, and that the discriminatory act or omission is not based on any of the grounds specified in this section, on the employer’s door step.
74. Although RW1 told the Court that the other employees who had together with the grievant applied for study leave had been issued with release letters, none of these letters was produced to confirm this position. The witness also admitted that the rest of the applicants went for their various trainings and did not say that they too had been disciplined or penalized in any manner.
75. This confirms that the grievant was discriminated against, for having been treated differently from those he was in similar circumstances with.
76. I find that the grievant has on a balance of probability proved a case of discrimination, and is hereby awarded Kshs. 500,000/- for discrimination.

Whether the grievant is entitled to the other reliefs sought under the claim.

77. The Claimant has additionally sought an award of damages for lost earnings, and special damages for breach of his right to fair labour practices.
78. The twin claims emanate from the issue of discrimination and the non-payment of salaries which have both been addressed and awards made in the foregone paragraphs. The claims are thus not merited and are hereby dismissed.
79. In conclusion, judgment is entered for the Claimant and against the Respondents jointly as follows: -
- i. Payment of 8 months salary at Kshs. 1,047,760/-
 - ii. Kshs. 500,000/- for discrimination.
 - iii. The Claimant is awarded the costs of the suit and interests until payment in full.
80. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF JUNE, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ruteere h/b for Mr. Omulama for the Claimant



Ms. Awuor present for the Respondents

Christine Omolo- C/A

