



**Aricha v Chief Officer Ministry of Public Health and Sanitation Tukana County & 2 others
(Appeal E001 of 2023) [2023] KEELRC 2371 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2371 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
APPEAL E001 OF 2023
MA ONYANGO, J
SEPTEMBER 28, 2023**

BETWEEN

EVANS OGECHI ARICHA APPELLANT

AND

**THE CHIEF OFFICER MINISTRY OF PUBLIC HEALTH AND SANITATION
TUKANA COUNTY 1ST RESPONDENT**

THE PUBLIC SERVICE BOARD TURKANA COUNTY 2ND RESPONDENT

TURKANA COUNTY GOVERNMENT 3RD RESPONDENT

*(an appeal arising from the Judgment of Hon. C. M. Wekesa
P.M. in Lodwar ELRC 2 of 2022 delivered on 27th July, 2021)*

JUDGMENT

1. The appeal herein arises from the decision of the trial court delivered on 27th July, 2022 in which the Court dismissed the claim of the Appellant who was the Claimant in the suit before the Trial Court.
2. Aggrieved by the dismissal of his suit the Appellant moved to this Court and has set out the following grounds of appeal in his Memorandum of Appeal
 1. That the Honourable Principal Magistrate erred in law and/or fact by holding that the Appellant/Claimant absconding his duties without any justifiable reason.
 2. That the Honourable Principal Magistrate erred in law and/or fact that the process of stopping/withholding the Appellant's salary was procedural and that the Appellant has cut links with the Respondents.



3. That the Honourable Principal Magistrate erred in law and/or fact by failing to address herself to the clear contents of the Statement of Claim dated 20th August 2022, the evidence adduced by the Appellant in his testimony and their written submissions.
 4. That the Honourable Principal Magistrate erred in law and/or fact by holding that the Appellant has failed to prove his claim and thereby dismissing the said claim.
 5. That the Honourable Principal Magistrate erred in law and/or fact to underscore the fact that the employment contract was frustrated by the failure of the Respondent to provide adequate transport facilities from Lodwar town to Lochar-Lomala Dispensary; a remote area where infrastructure is a challenge.
 6. That the Honourable Principal Magistrate erred in law and/or fact that the Disciplinary process conducted by the Respondent was shambolic and that all avenues to confirm service of summons were not exhausted. In essence the Appellant was condemned unheard.
 7. That the Honourable Principal Magistrate erred in law and/or fact by mis-directing herself that the Appellant deliberately absconded duty; so as to arrive at an erroneous finding that the Appellants failed to prove their case.
3. The Appellant seeks the following orders:
- a. That the Appeal herein be allowed and the Judgement dated 27th July 2022 be set aside and dismissed with costs to the Appellants.
 - b. That the Respondents be condemned to pay the costs of this Appeal
4. The appeal was disposed of by way of written submissions. The Appellant filed his submissions which are unsigned and undated on 21st June, 2023. The Respondent's submissions dated 24th July, 2023 were filed on 26th July, 2023.

Background

5. The appeal arises from the Appellant's suit instituted in the Trial Court by way of Statement of Claim dated 20th August 2020 in which he sought the following reliefs.
 - a. Declaration that the Respondent's deliberate withholding of the Claimant's salary was malicious, unlawful, unprocedural and a fundamental violation of rights of the Claimant.
 - b. The Respondent unconditionally pay the Claimant all the Salary and Remuneration due and owing and further remit all outstanding statutory payment due to the Claimant; amounting to Kshs 1,298,454/=.
 - c. The Claimant jointly and severally bear the costs of this suit and interest.
6. In their Memorandum of Response the Respondents herein who were also Respondents in the suit in the trial court stated that the Appellant who was employed as a Kenya Registered Community Nurse by the 3rd Respondent and posted to Lochor-Alomal Dispensary in September 2016 absconded duty from December, 2016 and failed to respond to letters addressed to him to show cause why disciplinary action should not be taken against him.
7. It was Respondent's case that the Appellant's salary was stopped as a result of the desertion of duty and after he had been warned severally.



8. Upon hearing the suit and considering the pleadings and evidence the Trial Court found that the Appellant had failed to prove his claim, hence dismissed the same.

Appellants case

9. In his submission in support of the Appeal the Appellant condensed his grounds of appeal into 3 issues namely.
- i. Whether the Appellant absconded duty as asserted by the Respondents,
 - ii. Whether the disciplinary process conducted against the Appellant was done with due regard to procedure,
 - iii. Whether the Appellant's salary was justifiably withheld by the Respondent.
10. On the first issue the Appellant submits that it is the duty of an employer to prove that an employee has absconded duty. He relied on the decision in *Richard Kiplimo Koech v Yako Supermarket Ltd* [2005] eKLR in which the court held that it is incumbent upon an employer who alleges that an employee has absconded duty to make reasonable attempts or efforts to reach the employee and seek any explanations to excuse itself from application of section 41 of the *Employment Act*.
11. THE Appellant submitted that he was presented with the hurdle of the long distance and transport costs to his work station which the Respondents did not adequately consider. That he was adduced medical reports and forms filled throughout the period he alleged to have absconded. That the assertion that the Appellant abandoned his post was unfounded.
12. On the 2nd issue the Appellant submitted that he was never served with show cause letters dated 13th February, 2017 and 20th February, 2017 which he received on 12th March 2018. That he was therefore condemned unheard in February, 2017, with immediate stoppage of salary.
13. He further submitted that at the disciplinary hearing on 3rd October, 2017 the Sub-County Public Health Nurse informed the meeting that the Appellant had resumed duties at Lobei Health Centre for 25th September, 2017. That the meeting concluded that his salary and benefits would be reinstated as soon as possible.
14. He further submitted that his physical location was known to the Respondents who should have invited him to attend the disciplinary meeting.
15. The Appellant relied on the decision in *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR where the Court quoted *Hulsburry's Laws of England* 5th Edition 2010 Vol. 61 at Para 639 to the effect that:
- “There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.”
16. The Appellant further relied on *Judicial Review Hand Book* by Michael Forham, 4th Edition at page 1007 where it is stated:
- “procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to procedurally



fair. The content of the duty depends on the particular function and circumstances of the individual case.”

17. On issue No. 3 the Appellant submitted that he is entitled to the salary that has been unjustly withheld by the Respondents relying on the decision in *Naftali Mogaka Nyaboga v Kisii County Government & Another* [2022] eKLR where the court held.

“It is also declared that the Respondents, conduct of withholding the petitioner’s salary and dues has infringed on Article 41 and 47 of *the Constitution* of Kenya. There is evidence that he has been service as an employee but without pay, and without being accorded any hearing as to why salary cannot be paid to him even after being issued with an appointment letter and posting order.”

18. The Appellant urged the court to find that:
- i. The disciplinary process conducted against the Appellant was un-procedural and the subsequent stoppage of his salary unmerited.
 - ii. The Appellant is entitled to full reimbursement of his withheld salary amounting to a total of Kshs 1,298,454/=.

Respondents case

19. For the Respondents it is submitted that the Trial Court had justifiable reasons to hold that the Appellant absconded duty. That the Appellant admitted he absconded duty at page 164 line 22-23 of the Record of Appeal.
20. It is submitted that the Appellant further admitted knowing one Aaron Ewoi whom he sub-contracted to carry out his duties.
21. It was submitted that section 44 (4)(a) of the *Employment Act* provides that absconding duty is gross misconduct that renders an employee liable for summary dismissal.
22. The Respondents relied on the decision in *Judith Atieno Awuor v Sameer Agricultural and Livestock Limited* [2020] eKLR and *Justus Kyalo Malonza v Ruth Osolo T/A Evaeva Catering Services* where the Court distinguished between absenteeism and desertion of duty and held that an employee who deserts duty does so with the intention of not returning or having left his or her post subsequently formulates intention not to return.
23. The Respondent submitted that in the Record of Appeal at page 165 the Appellant admitted that he absented himself perenially, that his supervisor Paul Elawan gave him warnings, that he left his place of work and relocated to Kisii and that he refused to attend disciplinary hearings.
24. It is further submitted that the Respondents proved the Appellant was provided with a means of transport being motorbike Registration No. AGK 771 W but abandoned it. That during the hearing, the Appellant informed the court it was not his duty to know how to ride the motorbike.
25. On the disciplinary process against the Appellant, the Respondents submitted that the issue was never raised at the trial and cannot be introduced on appeal relying on the decision in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Other* [2014] eKLR and *Raila Amollo Odinga & Another v Independent Electoral and Boundaries Commission & Another*.
26. The Respondents submitted that the Appellant was notified of the disciplinary hearing They referred to notices at pages 81,83,84,85, and 86 of the Record of Appeal. The Respondents submitted that



the notice at page 83 of the Record of Appeal was received on 12th March 2018 and signed for by the Appellant.

27. On the issue whether the salary of the Appellant was unjustifiably withheld the Respondents submit that the Appellant admitted severally during the trial that he absconded duty and that Respondents were justified in withholding his salary.
28. The Respondents urged the Court to dismiss the Appeal with costs.

Analysis and Determination

29. In a first appeal like the instant appeal, the appellate court is called upon to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.

See *Selle & Another v Associated Motorboat Co. Ltd & Others*.

30. It is instructive that in his Statement of Claim the Appellant prayed for his salary which had been withheld from February, 2017 to April 2018 totalling Ksh. 1,298,454 which he sought to be unconditionally released to him.

31. It is also instructive that in his claim paragraphs 11 to 14 the Appellant pleads as follows:-

11. That faced with difficult infrastructural circumstances the Claimant informed the Respondent his predicament but the Respondent ignored his request and refused to facilitate his transport charges.
12. That as a result thereof the Claimant was practically unable to effectively and adequately carry out his duties at his new station; since he had no salary or source of income.
13. That the Respondent without any colour of right discontinued to pay the Respondent his salary for the month of February 2017 by paying a paltry Ksh.8,400/= only.
14. That the Respondents jointly and severally failed to remit the remuneration of the Claimant from February 2017 till he informally left employment in April 2018

32. In their Memorandum of Response, the Respondents at paragraph 7,8, and 9 denied the averments of the Appellant at paragraph 11 to 14 and contended that the appellant absconded work for more than 3 months without communication to or permission from the Respondents.

33. DW2 Paul Ewalam testified that he was the Appellant's immediate supervisor. That when he asked the Appellant why he absconded duty the Appellant stated he was unwell but was unable to produce proof of sickness.

34. DW2 also testified that the Appellant was provided with a motorbike GK A771W as a means of transport to his workplace so that the Appellant's allegation that he had no means of transport is unfounded.

35. DW2 testified that the Appellant cut links with the office and could not be served with show cause letters and summons to attend disciplinary hearing. That the Appellant also ignored phone calls.

36. I have considered the evidence on record and the Judgment and find that findings of the Trial Magistrate that the Appellant absconded duty without justifiable cause is supported by the evidence on record, including the Appellant's own admissions.



37. The finding that the Appellant cut links with the Respondents and could not be traced to participate in disciplinary hearing is also supported by the evidence on record.

38. For the foregoing reasons I find no merit in the appeal and dismiss the same with costs.

DATED, DELIVERED AND SIGNED AT KITALE

THIS 28TH DAY OF SEPTEMBER, 2023.

M. ONYANGO

JUDGE

