



**Muriithi v Office of Auditor - General (Cause 1071 of 2018)  
[2023] KEELRC 3283 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3283 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1071 OF 2018  
J RIKA, J  
DECEMBER 15, 2023**

**BETWEEN**

**WILBERFORCE GITHINJI MURIITHI ..... CLAIMANT**

**AND**

**OFFICE OF AUDITOR - GENERAL ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim dated 26<sup>th</sup> June 2018.
2. He states that, he was employed by the Respondent, an Independent Constitutional Office as a Driver, on 18<sup>th</sup> January 2005.
3. He states that, he developed a severe headache on 15<sup>th</sup> February 2015 while on duty. He decided to park the vehicle at a private garage, belonging to a person who was well known to him.
4. He subsequently sought treatment at Nanyuki Referral Hospital on 11<sup>th</sup> February 2015 to 2<sup>nd</sup> March 2015, after he was diagnosed with depressive illness. He could not report back to work, on the advice of his Doctor.
5. He was issued a letter to show cause dated 18<sup>th</sup> February 2015, on allegation of desertion of duty. He was issued a second letter to show cause, dated 25<sup>th</sup> February 2015 on the same allegation.
6. He replied on 24<sup>th</sup> March 2015 after he had recovered. He was not invited for disciplinary hearing.
7. His salary and allowances were suspended from 1<sup>st</sup> February 2015, without notice. He did not receive salary since, despite that he reported back to work. He states that the Respondent acted unlawfully and unfairly, by denying him his salary.
8. His gross monthly salary was Kshs. 50,339. He claims arrears of salary for February 2015 to 30<sup>th</sup> December 2015 at Kshs. 554,389; January 2016 to December 2016 at Kshs. 604,788; January 2017 to



December 2017 at Kshs. 604,788; and January 2018 to 30<sup>th</sup> June 2018 at Kshs. 302, 394 - total Kshs. 2,066,359.

9. He states that the Respondent subjected him to discrimination, servitude and slavery contrary to *the Constitution*.
10. In addition to the claim for arrears of salary above, he seeks declaration that the Respondent violated the Claimant's constitutional, statutory and contractual rights; an order restraining the Respondent from victimizing the Claimant; interest; costs; and any other suitable relief.
11. The Respondent filed its Statement of Response dated 13<sup>th</sup> November 2018. It is conceded that the Claimant was employed by the Respondent as a Driver.
12. He was instructed by the Respondent to deliver the Respondent's motor vehicle registration number GK A560H to D.T. Dobie, and collect service quotation.
13. He instead drove the motor vehicle to a small, un-accredited garage at Umoja Estate, Nairobi. He abandoned the vehicle there, and disappeared to unknown place. He did not notify the Respondent about his whereabouts or in whose custody the vehicle was placed.
14. D.T. Dobie informed the Respondent that the vehicle never reached them, and there was no quotation generated.
15. The Respondent called the Claimant, who insisted that the vehicle was at D.T. Dobie. He changed this explanation subsequently, alleging that he parked the vehicle at a Police Station whose details he did not communicate.
16. The Claimant then switched off his phone. He could not be reached on any of his known contacts.
17. The Respondent reported the disappearance of the vehicle and the Claimant at Central Police Station vide OB40/16/2/15.
18. The Respondent made frantic efforts to trace the Claimant, which included sending its Officer to the Claimant's ancestral home in Nanyuki. He was traced at Nanyuki. He was in possession of the vehicle's ignition keys. Interrogated, he disclosed that the vehicle was at a private garage in Umoja Estate. The Respondent updated the Police on this fresh information.
19. Accompanied by the Respondent's Transport and Logistics Officer, Police found the vehicle at a garage in Umoja Estate.
20. The Respondent concedes that the Claimant's salary was suspended. It was legally suspended. He did not report back to work, and was not on duty throughout, as alleged. He officially reported back on 16<sup>th</sup> August 2018.
21. The Respondent denies owing the Claimant arrears of salary. He engaged in gross misconduct. The Respondent did not violate the Claimant's constitutional, statutory or contractual rights as pleaded. The Respondent urges the Court to dismiss the Claim with costs.
22. On 17<sup>th</sup> September 2018, the Parties appeared before the Court [ Maureen Onyango J] and recorded the following consent orders: -
  - a. The Respondent reinstates the Claimant to the payroll with immediate effect.
  - b. The Respondent to compute the unpaid salary arrears and all payables within 14 days.



c. Mention to confirm compliance on 24<sup>th</sup> October 2018.

23. The Claim was scheduled for hearing on 21<sup>st</sup> June 2022. The Claimant told the Court that the Respondent did not compute and pay arrears of salary as ordered on 17<sup>th</sup> September 2018. He wished to prosecute the Claim on the arrears of salary.
24. The Respondent's Advocate alleged that he was not aware of such consent orders. The Court gave the Respondent's Advocate time to acquaint himself with the record. When Parties appeared for mention on 26<sup>th</sup> July 2022, the Respondent confirmed the presence of the orders made on 17<sup>th</sup> September 2018. He did not confirm that the Respondent did a computation of arrears of salary, and paid the same to the Claimant.
25. Hearing was therefore rescheduled for 6<sup>th</sup> July 2023. The Claimant gave evidence, adopting his Statement of Claim, Witness Statement and Documents on record. He confirmed that his salary was stopped in 2015, and reinstated in 2018.
26. Cross-examined, he confirmed that he parked the Respondent's vehicle at a private garage. He was issued a letter to show cause, dated 18<sup>th</sup> February 2015. He responded on 24<sup>th</sup> March 2015.
27. He confirmed that policy at the workplace, is that if one is absent for 10 days, his salary is stopped. Drivers were supplied work tickets. The Claimant was not assigned work, from February 2015 to 2018. He used to report to the pool. His salary was restored only when he filed the Claim.
28. Transport Manager Fred Nyakundi Makori and Human Resource Manager Vincent Mulwa, both gave evidence for the Respondent on 6<sup>th</sup> July 2023, when the hearing closed.
29. Makori restated the contents of the Statement of Response. He confirmed that the Claimant was not assigned work from 2015 to 2018. Drivers were assigned work through work tickets. The Claimant deserted duty.
30. Cross-examined, Makori told the Court that the Claimant worked under his supervision. The Claimant was not assigned duty 2015 to 2018. He replied to the letter to show cause. The Respondent had already issued the Claimant a desertion letter, by the time he replied to the letter to show cause. Makori was not sure if a disciplinary hearing took place. If an Employee is away for 10 days, his salary is stopped.
31. Mulwa relied on the contents of the Statement of Response, as replicated in his Witness Statement on record, and corroborated the evidence of the Transport Officer. The Respondent's Human Resource Department investigated the Claimant's absence. There was no confirmation that the Claimant was attended to at Nanyuki Referral Hospital. The Human Resource Department recommended that the Claimant is reprimanded, and the days he was away, are treated as unpaid leave. The Respondent adopted this recommendation on humanitarian ground. The Claimant was away for 3 years. He would occasionally pass the workplace informally. This did not mean that he was at work.
32. Cross-examined, Mulwa told the Court that he is the Human Resource Manager. He was not the investigator. Police were not requested to verify the documents from Nanyuki Referral Hospital. There was no disciplinary hearing. The Human Resource Department recommended that the Claimant is reprimanded. He was removed from the payroll in 2015. He was reinstated in 2018. This was not because of the Claim filed in Court. The hospital; documents were received by the Respondent in 2015. The Respondent only verified them, in 2018. The Claimant continued to use his employment medical cover, for the period of 3 years.



33. Mulwa rounded off his evidence-in-chief, with the statement that the Respondent, did not terminate the Claimant's contract of employment.

**The Court Finds: -**

34. It is not clear from the record why the Respondent opted to prolong this dispute, despite having entered into the consent orders dated 17<sup>th</sup> September 2018.
35. It was unfortunate that the Respondent subsequently appeared before the Court, alleging to have no knowledge of orders recorded by consent, in the presence of Parties' Advocates, whose implementation, would have resolved this dispute way back in 2018.
36. The evidence from both Parties confirms that the Claimant was employed by the Respondent as a Driver. His contract was never terminated for any reason by the Respondent, even when he was alleged to have deserted.
37. The Human Resource Manager confirmed this, and also told the Court that, the Claimant was never taken through a disciplinary hearing, and his contract terminated.
38. It is clear from the record that the Claimant remained an Employee of the Respondent throughout. The contract of employment was never terminated. The Human Resource Manager told the Court that the Claimant used to report to work informally, but this did not amount to reporting for duty. What was the Claimant doing informally at the workplace, and why did the Respondent allow him access to idle around? The Human Resource Manager did not elaborate what in his view, would amount to reporting for duty. The Transport Manager told the Court that he did not assign the Claimant any work, through the work-ticketing system, from 2015 to 2018, when the Claimant was suspended from the payroll.
39. The Claimant was available, and if he was not assigned duty, the Respondent can only blame itself. His contract was alive. He was available for any disciplinary proceedings, and that he was not taken through a disciplinary hearing, and his contract terminated for alleged desertion, and disobedience of instructions, boggles the mind. The Respondent can only blame itself, for not terminating the Claimant's contract, and for not assigning him duty, while it is acknowledged that he was available. Mutual obligations remained unperturbed.
40. The dispute on salary arrears was resolved through the consent filed by the Parties, and should not have been re-litigated in the main claim. The Respondent was required to compute the arrears of salary and other payables. It was never in dispute at the time of recording the consent, whether arrears of salary were payable. It was never established by the Respondent that the Claimant was away without the leave of the Respondent, or without other lawful cause. His contract was never terminated.
41. The Respondent did not make the computation as ordered, and has not filed an alternative computation of arrears of salary, to those pleaded by the Claimant.
42. The Court has no reason to doubt or decline the computation done by the Claimant. The prayer for arrears of salary is granted as pleaded by the Claimant at Kshs. 2,066,359.
43. It is declared that withholding of the Claimant's salary for 3 years, while his contract remained in place, was illegal and unfair.
44. There is no evidence to support the restraining order sought against the Respondent by the Claimant. He was reinstated by the Respondent, and there is no evidence that the Respondent has engaged in



any act subsequently, which would suggest any form of discrimination or victimisation against the Claimant.

45. The prayer for interest is allowed, but on the standard court rate, not commercial rate. The date from when interest accrues is 17<sup>th</sup> September 2018, when Parties consented on payment of the arrears of salary.
46. No order on the costs.

In Sum, It Is Ordered: -

- a. It is declared that withholding of the Claimant's salary by the Respondent for 3 years, during the subsistence of his contract of employment was illegal and unfair.
- b. The Respondent shall pay to the Claimant arrears of salary at Kshs. 2,066,359.
- c. Interest allowed at court rate, from 17<sup>th</sup> September 2018.
- d. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, THIS 15<sup>TH</sup> DAY OF DECEMBER 2023.**

**JAMES RIKA**  
**JUDGE**

