



REPUBLIC OF KENYA



**Abuya v Principal Secretary, Ministry of Health (Cause E565 of 2020)
[2023] KEELRC 3262 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E565 OF 2020
B ONGAYA, J
DECEMBER 7, 2023**

BETWEEN

CALVIN ABUYA CLAIMANT

AND

PRINCIPAL SECRETARY, MINISTRY OF HEALTH RESPONDENT

JUDGMENT

1. The claimant filed the amended statement of claim dated 28.01.2022 through Ochanda Onguru & Co Advocates. The claimant prayed for judgment against the respondent for:
 - a. An order compelling the respondent to immediately pay to the claimant salary arrears amounting to Kshs.10,120,000/= together with interest.
 - b. An order compelling the respondent to release to the claimant clearance certificate and certificate of last payment immediately.
 - c. Any other relief this honourable court shall deem fit to grant
 - d. Costs of this suit.
2. The Respondent's reply to statement of claim was dated 14.12.2021 and filed through the learned Senior Litigation Counsel Ernest Kioko for the Hon. Attorney General. The respondent prayed that the suit be dismissed with costs.
3. The claimant's case was that he was in the respondent's employment until June 2016 when he resigned for lack of payment of his salary.
4. The claimant states that upon resignation, he wrote to the respondent to avail to him the clearance certificate and certificate of last payment but they have refused and/or declined to do so.



5. The claimant was in March 2020 employed by the Embu County Government as a consultant medical oncologist. Prior to his appointment he had engaged the office of the ombudsman with a view to having his issue with the respondent resolved. However, the respondent declined.
6. The claimant states that he cannot be paid his salary by the new employer until the documents requested for are released and given to his new employer.
7. The claimant states that he has communicated his predicament to the respondent through his letter dated 30.04.2020.
8. The claimant is aggrieved and argues that the respondent's actions amounts to unfair treatment contrary to the rules of justice and legitimate expectation, illegal and contravenes the provisions of the Constitution of Kenya, 2010, the Labour Institutions Act and, Fair Labour Practices.
9. On the part of the respondents it is stated that the claimant was appointed to the public service as a medical intern with effect from 28.01.2008 and posted to Nyanza province.
10. That the claimant was promoted to the post of medical officer job group "M" with effect from 12.06.2009 vide letter ref no. 2008043696/26 dated 26.07.2010.
11. The respondent states that by a show cause letter ref: 2008043696 dated 21.09.2012 the claimant was requested to explain the reason for his absence from duty from 14.09.2012.
12. The claimant never responded to the show cause letter prompting his salary to be stopped with effect from 31.08.2012 in line with the Human Resource Policies.
13. Following the transfer of health functions in 2013 there is a letter ref 2008804xxxx dated 15.05.2014 where the claimant was seconded to the county government of Kisumu with effect from 01.01.2014.
14. The respondent maintains that since the claimant has a pending disciplinary matter, the clearance certificate and certificate of last payment could not be issued pending the finalization of the disciplinary matter.
15. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
16. To answer the 1st issue, there is no dispute that the parties were in a contract of service.
17. To answer the 2nd issue, parties are in dispute whether the contract of service terminated or not. The claimant says he resigned in June 2016. The respondent states that the claimant deserted duty, the salary stopped on 31.08.2012, and, a letter for showing cause issued on 21.09. 2012. The claimant has exhibited the letter dated 13.06.2016 resigning with immediate effect because the respondent had failed to pay his salary for two years. The claimant testified that he delivered the letter to the Human Resource Office at the Ministry of Health and a Secretary received the letter but his copy was not stamped. The claimant relied on the letter dated 05.03.2012 to show he was on duty in Nyanza and another letter to show he was in September 2012 on duty in Makueni. He testified in re-examination thus,

" In 2012 I was in Makueni; not Kisumu. See my page C.27 letter dated 08.03.2013. Am being posted from Makueni to KNH. Salary arrears was for 31.08.2012 to 16.06.2016. The suit was filed on 17.09.2020."

The respondent's witness (RW) confirmed that it was alleged the claimant had been absent effective 14.09.2012 presumably while serving in Nyanza but it was clear that as at that time the claimant had been transferred to Nairobi. Further on 15.03.2014 the claimant was seconded to Kisumu County



effective 01.01.2014 and there was no mention of the show-cause letter dated 21.09.2012. Taking the evidence into account, the Court returns that the contract of service lapsed on 13.06.2016 when the claimant resigned.

18. To answer the 2nd issue, the Court returns that as submitted for the respondent the suit was time barred. The claimant is claiming salary arrears for the period 31.08.2012 to 16.06.2016 while the three years of limitation under section 90 of the *Employment Act* lapsed on 16.06.2016 and the 12 months for a continuing injury like the arrears in issue lapsed on 16.06.2017. Further, it appears that the respondent would not be liable to pay the arrears for the period the claimant had been seconded to Kisumu County effective 01.01.2014. The suit will fail as time barred. Looking at parties' margins of success and the circumstances, each party to bear own costs.

In conclusion the suit is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH DECEMBER, 2023.

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

