



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 33 OF 2019

DENNIS OTIENO ONDAGO..... CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD, KISUMU COUNTY...2ND RESPONDENT

JUDGMENT

1. Dennis Otieno Ondago (the Claimant) sued the County Government of Kisumu (the Respondent) on 4 April 2019, alleging breach of contract in that the Respondents had withheld his remuneration from July 2016 to 17 August 2017 (Kshs 1,001,400/-).
2. The Claimant contended that the decision had caused him trauma and he therefore sought the withheld remuneration and damages for loss of income amounting to Kshs 1,001,400/-.
3. In a Response filed on 21 April 2021, the Respondents countered that upon being issued with a show-cause notice on 28 June 2016, the Claimant disappeared from work leading to his salary being stopped in August 2016 and that after a disciplinary hearing, the Claimant was allowed to resume work from 17 August 2017.
4. The Cause was heard on 5 October 2021, when the Claimant testified and on 15 November 2021, when the 1st Respondent's Director of Public Health testified.
5. The Claimant filed his submissions on 15 December 2021, while the Respondents filed their submissions on 10 January 2022.
6. The Court has considered the pleadings evidence and submissions.

Background

7. On or around 6 May 2016, the Claimant was posted to Kisumu County Hospital and he reported on 19 May 2016.
8. Shortly thereafter, on 28 June 2016, the Respondents issued a show-cause to the Claimant and the allegation was stated as insubordination.
9. According to the Respondents' witness, the Claimant was issued with a show-cause but he walked out on his immediate supervisor.
10. A new show-cause was issued to the Claimant on 6 July 2016.
11. The allegation was now *abscondment* of duty. On 21 July 2016. A request was also made to the Chief Officer, Health to stop the Claimant's salary.
12. The Claimant was requested to respond to the new notice within 7-days, but because he failed to turn up for work, the notice was not delivered to him.
13. According to the testimony of the Respondents' witness, attempts to reach the Claimant on phone were not successful.
14. The Claimant responded to the show-cause notice of 6 July 2016 on 3 October 2016. He explained that during the material period he had

been attached to a female ward and that from 28 June 2016 to 7 September 2016, he was on annual leave.

15. He also stated in the letter of response that he could not receive the show-cause dated 28 June 2016 because of the way his immediate supervisor had treated him.

16. In another letter written the same day, the Claimant indicated that he had been working in OPD/Casualty from 23 May 2016 to 22 June 2016.

17. The Claimant thereafter attended a disciplinary hearing on 26 October 2016. During the hearing, the minutes captured the Claimant as admitting that he had not reported back to work by that date.

18. Another hearing was held on 9 December 2016. The minutes capture the Claimant as disclosing that his leave application had not been approved because he was still serving under probation.

19. On 19 January 2017, the Commission on Administrative Justice wrote to the Respondents raising concerns on how the Claimant had been treated. The letter indicated that the Claimant had been on leave from 28 July 2016 to 7 September 2016.

20. On 17 August 2017, the Claimant was reinstated and he resumed duty on 27 September 2017. He then requested to be paid salaries during the period it is alleged he had deserted work.

21. The Respondents informed the Claimant through a letter dated 6 February 2018 that the request had been declined as he had not rendered any services during the period.

22. The Claimant then moved the Court.

Breach of contract: Unlawful stoppage of salary

23. Under section 19(1)(c) of the Employment Act, 2007, an employer is allowed to withhold any wages for the period an employee is absent without leave or lawful cause.

24. It was incumbent upon the Claimant to demonstrate that he had permission or other lawful cause to be absent from work from 28 June 2016 up to 17 August 2017 when he was reinstated.

25. The Claimant asserted that he started his leave on 28 June 2016 and was to resume on 7 October 2016. He did not exhibit any records to show that he applied for leave or that the same was granted.

26. The Respondents' witness testified that because the Claimant was still on probation, he was not eligible for leave.

27. Based on the material on record, the Court is satisfied that the Claimant's leave if at all had not been approved and therefore the assertion that he was on leave was not proved.

28. In this regard, the Court notes that the Claimant produced an extract of an attendance register for 20 June 2016 to 27 June 2016, and which register shows that the Claimant was not a work after 24 June 2016.

29. The Claimant did not lay an evidential foundation to show that he had other lawful cause to be absent from work to warrant payment of wages up to 17 August 2017.

30. Considering that the Claimant did not prove that he rendered any services from 24 June 2016 to 17 August 2017, the Court declines to find breach of contract on the part of the Respondents with regard to payment of remuneration.

31. The claim for breach of contract having failed, the Claimant would not be entitled to an award of withheld remuneration or damages for loss of income.

Conclusion and Orders

32. From the foregoing, the Court finds no merit in the Cause and it is dismissed costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF FEBRUARY, 2022

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr Abira instructed by Mauwa & Co. Advocates

For Respondents Ms Awuor, Office of the County Attorney

Court Assistant Chrispo Aura