



**Oire v The County Government Of Machakos & another (Cause
379 of 2020) [2022] KEELRC 47 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 47 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 379 OF 2020
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

THOMAS OMBATI OIRE CLAIMANT

AND

THE COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The Claimant instituted this suit vide a Memorandum of Claim dated 17th December 2019 and later filed an Amended Memorandum of Claim dated 10th February 2020 suing the County Government of Machakos and the County Public Service Board. He avers that he was employed by the Respondents as a Dental Technologist on 1st July 2003 and confirmed into permanent and pensionable establishment on 12th July 2007 earning Kshs. 113,680/-. The Claimant avers that in 2012 he applied for paid study leave which the Respondent granted to him on 20th September 2012 for five and half years but that the period of study was prolonged/extended due to factors beyond his control. The Claimant avers that the Respondent stopped his salary in the month of July 2018 without notice and or communication and also refused to communicate its reasons for the same when he inquired from it. The Claimant avers that it instead demanded evidence from him that he was still pursuing his studies and which request he complied with by availing letters from the university that confirmed he was still in school. He further avers that on 7th February 2019 during one of the several visits to the Respondent's offices to follow up on his salary, he was given a show cause letter referencing abscondment of duty which he responded to explaining the reasons for the extended study period. The Claimant avers that he received a text message from the County Human Resource Office on 15th April 2019 inviting him to a disciplinary hearing at the Chief Officer's Boardroom on 17th April 2019, but which was cancelled on the said date due to unavoidable circumstances. The Claimant avers that on 19th July 2019 he was again invited to



- attend a disciplinary hearing on 23rd July 2019 which he attended without being furnished with any reasons to adequately prepare for the hearing.
2. The Claimant avers that the Respondent is yet to reinstate his salary to date and has also not delivered any verdict on his employment status since the hearing of the disciplinary case. The Claimant avers that he had never had a case of misconduct during his employment period with the Respondent who has since also withdrawn, withheld and/or delayed his entitled allowances during the purported disciplinary process. He further avers that the HR Management Advisory Committee lacks the requisite jurisdiction to hear and arbitrate over his matter by dint of the transition to *Devolved Governments Act* as well as the provisions of the *Public Service Commission Act*. Further, that the said Committee was illegally constituted since some of the members present were not of the required job group. The Claimant avers that he was not accorded a fair chance to be heard during the hearing as he was not informed of the charges against him prior to the disciplinary hearing and was also not accorded a chance to be accompanied with a person or expert of his choice. He contends that the illegal withholding of his salary visited financial, physical and mental toll on him and severely impaired his capacity to study and that he was forced to re-take his 5th year. The Claimant avers that he has since been blacklisted by financial institutions owing to non-remittance by the Respondent of his monthly contractual commitments. The Claimant avers that he was also barred from utilizing his medical cover offered by the Respondent. The Claimant therefore prays for declaratory orders that the stoppage of his salary without due process and the attendant delay in administrative action are illegal null and void; an order that the Respondent be barred from re-opening the flawed disciplinary process against him; an order that he be paid all withheld salaries and allowances from the date of stoppage; perpetual injunction by this Honourable Court restraining the Respondent and/or its servants, agents or otherwise, from proceeding with any disciplinary action, dismissing, purporting to dismiss or in any way interfering with his employment; general damages; an award for diminished employability; costs of this Claim; and interest at court rates.
 3. In response the Respondent filed a Reply to Amended Claim dated 18th December 2021 denying the averments by the Claimant and averring that the Claimant unlawfully absented himself from work without any justifiable cause. It avers that the Claimant was issued with a show cause letter and granted 21 days to respond, was invited for a disciplinary hearing, and was heard. The Respondent avers that the Claimant was however unable to explain his absence or provide proof of the alleged school engagement and was thus dismissed for gross misconduct. It is the Respondent's averment that the Claimant was accorded adequate time to defend himself, he failed to do so and was then properly dismissed. The Respondent prays that the claim herein be dismissed with costs.

4.

Claimant's Submissions

The Claimant submits that he testified having been employed into the Ministry of Health by the Public Service Commission (PSC) and later seconded to the 1st Respondent County Government as evidenced by the letter dated 20th November 2014. He submits that Section 138 of the County Governments Act more relevant and material as Section 138(1)(b) is clear that a seconded officer can only be removed from service in accordance with the terms and conditions as the date before the establishment of County Governments, and that terms of service cannot be altered to the detriment of an employee. He submits that although he was under the 1st Respondent's payroll, the Public Service Commission delegated its powers to the 2nd Respondent Board which dealt with all labour issues except dismissal proceedings. The Claimant submits that in this regard he is guided by the case of *Kenya National Union of Nurses v Chief Officer Public Service Management (Miriam Kosgei) County Government of Uasin Gishu & 3 Others* [2016] eKLR. The Claimant submits that the 1st Respondent



did not by letter or other means recall him from his extended study leave requiring him to report to work and only claimed he had absconded in February 2019. The Claimant submits that he is subject to the Public Service Human Resources Manual which provides guidelines in the management of human resources and that if the Respondents had any issue with him then they were obligated to apply the said manual. He particularly refers to regulation K.8 (1) of the Manual regarding the alleged absence from duty and which provides that where an officer is absent from office for a period exceeding 24 hours and cannot be traced in 10 days, the salary payment shall be stopped and the employee issued with a notice to show cause and given a chance to reply within 21 days and that the due salary should not be paid where such employee fails to attend. The Claimant submits that for his case he was not issued with any notice or allowed a hearing before the sanction and stoppage of salary was taken when in fact the 1st Respondent was seized of his phone number, email and postal address and would therefore have contacted him at any time. Further, the 1st Respondent was aware that he was in school and also aware of his extended period of study. The Claimant submits that in any event it did not follow the outlined procedure in the Manual which must be followed before an employee's salary can be stopped, in violation of his fundamental rights enshrined in Article 41 and 47 of *the Constitution* of Kenya on fair labour practices and fair remuneration for work done and on fair administrative action. The Claimant submits that the Respondent stopped payment of his salary despite knowing and approving his undertaking of studies, contrary to the principles of fair labour practices and that this Honourable Court should so hold. In this regard he cites the case of Magare Gikenyi J. *Benjamin v County Government of Nakuru & 4 Others* [2020] eKLR. He further submits that the PSC Discipline Manual 2016 and the PSC Act of 2017 provide that before the employee's salary is stopped, a finding of abscondment of duty has to be made if there is absence without leave, reasonable or lawful course and attempts to trace the officer through personal contacts are unsuccessful. The Claimant submits that in the case of *Brian Mandila Khaemba v Chief Justice and President of the Supreme court of Kenya* [2019] eKLR, it was held that:

“Section 19 of the *Employment Act* which allows for deduction of wages does not have any provision which would permit an employer to deduct any money from the employee or withhold any money as a disciplinary step or sanction.”

5. The Claimant submits that his salary could only be stopped following a decision by the 2nd Respondent Board that he had absconded, that he could not be traced through personal contacts and next of kin or if serving a term of imprisonment. He submits that since none of this applied in his case, there is no basis why his salary was stopped and or withheld. The Claimant further submits that as per Gazette Notice No. 825 of 7th February 2014, disciplinary control of seconded officers is the function of the County Public Service Board as delegated by PSC and the County Public Service Board cannot delegate that function further. He further refers to the case of Kenya National Union of Nurses (*supra*) where the court held that seconded officers are employees of Public Service Commission. It is the Claimant's submission that he performs a devolved function and that the County Human Resources Advisory Committee which convened to hear him has powers to only discipline staff performing functions of the national government in the counties e.g. County Commissioners, as per paragraph 22 of the Public Service Commission Delegation instrument. The Claimant submits that therefore the author of the abscondment letter, the Chief Officer, Medical Services and the Human Resources Advisory Committee have and had no jurisdiction to discipline him as he is a seconded officer, subject to be disciplined by the 2nd Respondent Board. The Claimant submits that their actions were without any legal basis and hence null and void ab initio and on this submission he heavily relies on the case of *Evans Mumo Mwangangi v Kitui County Public Service Board & Another* [2016] eKLR where the Court held that the said County officials had overstepped their mandate by initiating a disciplinary process against the claimant.



6. It is the Claimant's submission that the Human Resources Advisory Committee delayed the disciplinary process. He submits that he was issued with a notice to show cause 7 months after stoppage of salary, a hearing was conducted 4 months later and a decision is yet to be delivered by the said Committee 40 months after the event. The Claimant submits that this delay is against Regulation G33(13) of the Code of Regulations governing the Civil Service which specifies that disciplinary proceedings should be dealt with promptly and finalized within six months. He submits that 40 months as at the time of hearing this claim is inordinate delay and a violation of Article 47 of *the Constitution* and that he has also been without pay for 40 months. He cites the case of *Grace A. Omolo v Attorney General & 3 Others* [2012] eKLR where the court held that a year of inaction in the disciplinary process was an inordinate delay and infringed the petitioner's rights protected under Article 47 of *the Constitution*. The Claimant further relies on the case of *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2015] eKLR where the court held that a prolonged disciplinary process against an employee amounts to an unfair labour practice and must be decisively discouraged.
7. It is submitted by the Claimant that he has demonstrated that the stoppage of his salary was unfair and unprocedural; that the disciplinary process is yet to be concluded; and that the 1st Respondent has overstepped its mandate and violated his constitutional rights. That the Respondent on its part did not call any witness or avail any evidence before Court to controvert his claim and that his evidence in Court thus stands unchallenged. He submits that he has been in limbo during this whole period and has thus suffered diminished employability and that he urges this Court to award him general damages for emotional trauma as a result of the stoppage of salary.
8. Respondents' Submissions
The Respondents submit that the Court has no jurisdiction to hear this matter. The Respondents submit that Section 59(1)(c) of the County Governments Act provides that that one of the functions of the County Public Service Board shall be on behalf of the county government to exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part. The Respondents submit that Section 77 of the Act provides for Appeals to the PSC for decisions by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer. It is the Respondents' submission that the Claimant went straight to court instead of appealing to the PSC and is thus in clear contravention of Section 77(2)(a) of the County Governments Act 2012. Furthermore, going by the Claimant's assertion that he is yet to be given a ruling for the disciplinary hearing, this suit is premature and should await a verdict of the 2nd Respondent Board over his disciplinary hearing. It relies on this Court's decision in *Fred Marmalei Loronyokwe v County Government of Samburu & Another* [2020] eKLR that a decision on the exercise of disciplinary control should first be challenged before the Public Service Commission which has the mandate to determine the matter before the claimant can approach the Court for relief. The Respondents further rely on the Court of Appeal case of *Secretary, County Public Service Board & Another v Hulbbhai Gedi Abdille* [2017] eKLR which affirmed that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
9. The Respondents further submit that the Claimant having been seconded to the County Government of Machakos was therefore subject to the disciplinary powers vested in the County Public Service Board. Further, the Claimant was being paid by the 1st Respondent County Government who also allowed him to apply for a study leave. On this submission the Respondent relies on the case of *Fredrick Odmbambo Ndede v Makeni County Public Service Board & Another* [2018] eKLR. It also refers this Court to the process of discipline set out in the County Public Service Human Resource Manual at



Regulations D. 28 and D. 29 and submits that the 2nd Respondent Board was therefore within the law to take any disciplinary measure as against the Claimant. It is the Respondents' submission that the Claimant chose to be absent from work even after the study leave had ended without formally applying for extension or any communication and only came out to allege he had not finished school when disciplinary action had already been taken. On the allegation of an improperly constituted disciplinary panel, the Respondents submit that there is no such evidence to support the same and that the County Public Service Board is constituted for every department when it comes to disciplinary issues. The Respondents submit that the reason is because persons from other departments like road, tourism, sport etc. cannot sit in the board to discipline a person from another profession and in this case the Claimant is from the department of health. It prays the Court finds that the Claim lacks merit and dismissed the same with costs.

10. The Claimant's case is that he was disciplined without adherence to laid down procedure. The Respondents assert the Claimant was disciplined for cause and that he ought in the first instance have appealed the decision to the PSC. The Claimant was a seconded officer and in terms of the discipline manual, the Chief Officer, Medical Services and the Human Resources Advisory Committee did not have the mandate to initiate the disciplinary action that is subject of this suit and as such having overstepped their mandate it is only a court of law that can remedy that breach of the law. The case of *Evans Mumo Mwangangi v Kitui County Public Service Board & Another* (supra) applies mutatis mutandi to this case. The cases cited by the Respondent in relation to the appeals to PSC therefore have no bearing in this case. The Claimant has never received the outcome of the disciplinary action 40 months plus after the hearing. As held in the case of *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* (supra), a prolonged disciplinary process against an employee amounts to an unfair labour practice which must be deprecated. The Respondents have infringed on the Claimant's right to fair administrative action in terms of Article 47 of *the Constitution* of Kenya and must accordingly recompense the Claimant. This unexplained delay in determining the outcome of the hearing undertaken over 40 months ago is egregious. The lengthy and unconcluded disciplinary process has resulted in loss of employment for the Claimant as he has not worked for the Respondents since his alleged abscondment. In the final analysis I enter judgment for the Claimant for:-

- i. Compensation by payment of 12 month's salary for the unlawful termination of service – Kshs. 1,364,160/-;
- ii. Certificate of service in strict compliance with Section 51 of the *Employment Act*;
- iii. Kshs. 500,000/- being compensation for breach of his constitutional right to prompt disciplinary action per Article 47 of *the Constitution*.
- iv. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

NZIOKI WA MAKAU

JUDGE

