



**Ndiege v Judicial Service Commission (Cause 793 of 2019)  
[2022] KEELRC 12709 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12709 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 793 OF 2019**

**M MBARŪ, J**

**MAY 26, 2022**

**BETWEEN**

**JAMES OTIENO NDIEGE ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The claimant is an adult male. The respondent is established under article 171 (1) of the [Constitution](#).
2. On May 5, 2004 the respondent employed the claimant as executive officer II and then upgraded to executive office I at a salary of Ksh 78, 740 per month which increased to Ksh 169, 740 per month.
3. The claim is that on August 16, 2016 the claimant received letter from the respondent laying out charges of him being absent from duty without permission. He was also suspended from duty on the same date.
4. The claimant's case is that the allegations made against him were baseless and without evidence. Following the suspension, the claimant was entitled to an alimentary allowance as indicated under section II of the Judiciary Human Resource Manual, September 2014 which was never paid and despite his desperate pleas to be paid, there was no response.
5. In February, 2019 the respondent deposited Ksh 45, 000 in his salary account without stating the purpose.
6. On March 27, 2019 the respondent deliberated on the claimant's disciplinary case and resolved to dismiss him from employment. For the entire period alimentary allowance was not paid. The respondent acted with malice and in breach of the statutory duty of care on the grounds of failing to pay the due alimentary allowance and which resulted in loss and damage.
7. The claimant is seeking the following dues;



- a. Alimentary allowance of Ksh 839,893.44;
- b. Costs of the suit.

## Response

8. In response, the respondent's case is that the claimant was employed as executive officer and on December 1, 2012 he was promoted to executive officer I which position he held until his suspension and then dismissed on March 27, 2019.
9. On March 24, 2016 the Presiding Judge of the Environment Land Court (ELC) in Nairobi reported to the acting human resource and administration that the claimant formed the habit of absenting himself from duty without permission and would deliberately switch off his phone during such times which affected the smooth operations of the court registry where he was deployed as the in charge and that his persistent absenteeism in the registry without notice had impacted negatively on the performance and service delivery of the court.
10. The claimant was suspended in accordance with the Judiciary Human Resource Policies and Procedures Manual on account of absenteeism in letter dated August 16, 2016. The charges made against him were on the basis that;
11. On March 24, 2016 there was a complaint from ELC against the claimant as the in charge ELC registry;
12. On May 16, 2017 the respondent deliberated on the claimant's case and resolved that he appears before the human resource management committee;
13. On March 5, 2018 and June 7, 2018 the claimant was given a hearing where he attended and made representations,
14. On March 12, 2019 the respondent deliberated on the matter and resolved to dismiss the claimant from the service.
15. The claimant is not entitled to any alimentary allowance since the same is not paid to a staff who absents themselves from duty without permission. The salary was stopped with effect from the date of absence until the discipline case was determined.
16. There existed valid and justified grounds for dismissal of the claimant from employment. Several complaints had been received, he was issued with the allegations he faced from the officer of chief registrar, he was allowed to attend for the hearing of his case and the reasons leading to dismissal were outlined in the letter terminating employment.
17. Both parties agreed and filed written submissions.
18. The claimant submitted that the claimant was suspended from duty on August 16, 2016 and dismissed on March 27, 2019 and under the Judiciary Human Resource Policies and Procedures manual, 2014 he was entitled to alimentary allowance accrued during the period of suspension under section H.14. The defence that such an allowance was not payable to an employee who absents himself from duty is not entitled to the alimentary allowance which does not apply under the applicable policy.
19. The wording of section H.14 of the policy is stated in mandatory terms that an officer on suspension shall be paid one third of the basic pay which is due as held in *Bildad Rogoncho Kamwele v Judicial Service Commission* [2020] eKLR.
20. In reply, the respondent submitted that the claimant was charged for being absent from duty without permission on different dates between July 8, 2015 and May 4, 2016 and in a show cause notice



dated August 16, 2016 the particulars of the same were outlined. The claimant is not entitled to any alimentary allowance as he was absent from duty without permission contrary to the [Judicial Service Code of Conduct and Ethics](#) and the [Judicial Service Act](#) and the Judiciary Human Resource Policies and Procedures Manual which amounted to gross misconduct.

### **Determination**

21. The single issue for determination is whether the claimant is entitled to payment of alimentary allowance during his suspension period.
22. The facts of the matter leading to the dismissal of the claimant are not contested. Through letter dated August 16, 2016 the claimant was suspended from duty for being habitually absent from duty without permission which was found to be persistent and affected the performance of duty at his station, the ELC Registry. Through letter dated March 27, 2019 the claimant was dismissed from duty after the hearing of his case and the allegations made found justified.
23. The letter terminating employment was based on the provisions of the JSC Human Resource Management Committee on disciplinary hearing, the application of the [Judicial Service Code of Conduct and Ethics](#), [Judicial Service Act](#) and the Judiciary Human Resource Policies and Procedures Manual. With regard to the claimant, the provisions relating to his case were that of paragraph 21 part IV of the third schedule of the [Judicial Service Act](#), 2011 which allowed he respondent to terminate employment when an officer such as the claimant was absent from duty without leave.
24. The application of the Judiciary Human Resource Policies and Procedures Manual on the claimant is not contested.
25. Under paragraph 17(3) of the third schedule to the [Judicial Service Act](#) provides that;
  - (3) While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the commission may by regulations determine.
26. Upon suspension, the claimant had no control over the process moving forwards. The respondent took charge of his affairs with regard to his employment. However grave the offences the claimant had committed and which led to termination of his employment, the speed, process and dates for the hearing of his case was upon the respondent to determine.
27. It took the claimant from August 16, 2016 to March 27, 2019 a period of 31 months (2.9 years) to get an outcome of his case.
28. Effectively, the claimant remained the employee of the respondent up and until March 27, 2019. The benefits due under the applicable Judiciary Human Resource Policies and Procedures Manual were due and including the payment of alimentary allowance as provided for under rule 17 of the third schedule of the [Judicial Service Act](#).
29. The respondent shall pay the alimentary allowance due to the claimant based on the basic pay due from August 16, 2016 up and until the March 27, 2019.
30. The claimant confirmed that during his suspension he received the sum of Ksh 45, 000 without any explanation. The respondent shall put into account such payment.
31. The respondent shall further put into account the provisions of section 19 (1)(c) of the [Employment Act](#), 2007 and the notice to show cause letter with details of the total number of days the claimant



was absent from duty without leave and take account therefore in the tabulation of the alimentary allowance due to him.

1. Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

...

(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

32. Judgement is hereby entered for the claimant against the respondent in the following terms;

a. The respondent shall pay the claimant payment of alimentary allowance covering August 16, 2016 to March 27, 2019 based on one third of the basic salary;

b. Dues (a) shall be paid less the sum of Ksh 45,000 received;

c. Dues (a) shall be paid less the daily wage for every day the claimant was absent from duty without leave.

d. The due alimentary allowance shall be paid within 45 days after which date the same shall be due with interests until paid in full.

e. Each party shall bear own costs.

Orders accordingly.

**DELIVERED IN COURT AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....

