



**Wenyaa v County Government of Machakos & another (Cause
1431 of 2018) [2022] KEELRC 4064 (KLR) (6 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4064 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1431 OF 2018**

M MBARÚ, J

JUNE 6, 2022

BETWEEN

JAMES WAFULA WENYAA CLAIMANT

AND

COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF MACHAKOS 2ND RESPONDENT

JUDGMENT

1. Issue in dispute – unfair and unlawful suspension of the claimant, withholding and stopping of salary.
2. The claimant is a male adult and a Medical practitioner.
3. The 1st respondent is established under article 176 of *the Constitution*. The 2nd respondent is established under section 57 of the *County Government Act*.
4. The respondents employed the claimant earning his full salary until April, 2015 when the claimant’s salary was reduced by half without being given any reason or a disciplinary process.
5. The claimant was appointed by the Public Service Commission (PSC) through letter dated April 2, 2012 as Medical Officer intern Job Group ‘L’ effective February 5, 2010. He was promoted by the PSC through letter dated April 2, 2012 effective December 1, 2011 as Medical Officer job group ‘M’. He was then promoted by the Ministry of Medical Services through letter dated May 31, 2012 to Medical Officer in Charge of Kathiani District Hospital.
6. On August 18, 2014 the claimant was arrested and taken to Kyumbi Police Station and charged in Criminal Case No.993 of 2014 on August 19, 2014 at Mavoko Law Court over alleged stealing by a person employed by the public service contrary to section 280 of the *Penal Code*.



7. In April, 2015 the respondents placed the claimant on half pay without notice or being given any reasons. The reasons given was that he had a pending criminal case in Criminal Case No.993 of 2014.
8. On August 28, 2017 the respondent withdrew the criminal charges under section 204 of the Criminal Procedure Code.
9. The claimant wrote several demands for reinstatement of his salary without success. On September 18, 2018 the respondent wrote to the claimant that his salary had been completely stopped following a staff audit despite placing the claimant on suspension.
10. Upon employment, the claimant had a basic salary of Ksh.30,472 and through increments has ksh.215,660 with a house allowance of Ksh.15,000, commuter allowance of Ksh.8,000, health risk allowance ksh.20,000, non-practice allowance Ksh.19,000, emergency call allowance Ksh.72,000 and extraneous allowance ksh.30,000 per month.
11. Upon the stoppage of full salary the claimant is claiming the following;
 - From April to December, 2015 Ksh.1,031,083;
 - January to November, 2016 Ksh.1,260,215;
 - December, 2016 to December, 2017 Ksh.2,803,580;
 - January to September, 2018 Ksh.1,940,940
 - Total Ksh.7,035,735.
12. The claim is that the respondents are in breach of the law in stopping the claimant's salary without notice or being given an opportunity to be heard and defend him. This was done in disregard of employment rights and meant to cause ridicule and damage to his reputation contrary to section 41 and 44 of the Employment Act.
13. The claimant is seeking judgement against the respondents for;
 1. A declaration and or finding that the respondent's action of stopping the claimant's services and reducing the salary was unprocedural, wrongful and illegal which amounted to unfair labour practices.
 2. An order for 12 months compensation to the claimant for unlawful and unfair labour practices by the respondents;
 3. A declaration that the claimant's fundamental rights to fair administrative action, access to information, right to fair hearing was transgressed on by the respondents, an order for compensation for general damages for breach of article 47 of the Constitution;
 4. A declaration that the claimant's fundamental right to fair labour practices was breached by the respondents and an order for compensation for general damages for breach of Article 41 of the Constitution;
 5. An order for payment of Ksh.7,035,735 being withheld salaries from April, 2015 to September, 2018;
 6. A order of reinstatement of the claimant to the County Public Service without loss of benefits, status and accounting for promotions due; and
 7. An order that the respondents pay costs.



14. The claimant testified in support of his case and in the absence of any response.
15. The claim is for reinstatement, payment of salary arrears and career progression. Upon employment, the claimant worked diligently into August, 2014 when he was arrested and taken to Kyumbi Police Station, Machakos and charged in Criminal case No.993 of 2014 at Mavoko Law Courts. The respondents placed him on half pay and verbally suspended him from work. On 28th August, 2019 the criminal case was withdrawn.
16. The claimant has since reported to the respondent for reinstatement without success. He only received letter indicating that his salary had been stopped due to the on-going criminal case and salary had been stopped following staff audit.
17. The claimant filed suit and obtained interim orders directing the respondents to pay his salary arrears, reinstate him and conduct disciplinary hearing which was not done within 6 months and there is no compliance. The claimant was forced to commence contempt of court proceedings and payment of salary arrears.
18. The claimant testified that following his arrest and stoppage of half salary his life changed and has had a negative impact to family and self. He has been unable to support his immediate family in school, housing and medical attention. His wife became sick and required surgery but he could not afford it. She still suffers as a result. When his daughter was born in the year 2015 he had no salary and his mother had to pay the maternity bill. The claimant had taken a loan from the Sacco at ksh.3 million and was unable to repay and this has accrued interests and has faced many attempts by auctioneers demanding for payments. His landlord has locked him out of the rented premises severally causing him grief and embarrassment.
19. The claimant had hoped to progress in his career as a medical doctor and become a specialist like his colleagues similar placed upon employment but following his arrest, suspension without due process, he has stalled in his career, he has remained in the same job group at 'M' while his peers are in job group 'P'. this has caused him psychological torture and mental anguish taking into account the respondent has acted with impunity and in utter disregard of the law and due process.
20. Upon cross-examination, The claimant also testified that on March 13, 2019 he got part of the salary arrears of ksh.11 million but this was not in compensation. Upon taxation, he received Ksh.8 million. by then he owed so many people money and nothing was left.
21. He had taken a loan of Ksh.3 million in November, 2014. The interests have gone up due to non-payment. Pending this case, he was working for his father as a volunteer in an engineering firm. He never sought other employment.
22. The respondents has never issued a letter terminating employment.
23. Without any defence, at the close of the hearing, parties agreed to file written submissions. Only the claimant complied.
24. The claimant submitted that before the stoppage of his salary by the respondents in April, 2014 there was no due process or application of the County Public Service Human Resources manual published by the PSC in May, 2013. This was a fundamental breach of the right to natural justice and fair hearing and compensation is due as held in *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR.
25. Due to the violation of the claimant's rights at work he filed suit and application seeking urgent orders and the court directed the respondent to conclude any disciplinary hearing and reinstate the claimant



within 6 months and compelled the payment of salary arrears and currently such arrears stand at ksh.730,341.60.

26. The actions of the respondents have caused the claimant mental anguish, his career suffered and this has forced him to rely on friends and relatives to survive and compensation for unfair labour practices should be at 12 months as held in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR.
27. The respondents are in breach of the claimant's fundamental rights and freedoms to fair administrative action under article 47 and fair labour practices under article 41 of *the Constitution*. the arrest and arraignment in court without any due process and stoppage of payment of salary were meant to injure the claimant without due process. The respondents have no justification in failing to pay the claimant pending any matter which should have been addressed in accordance with the given policy and the law. the claimant is entitled to damages of Ksh.3,000,000 as held in *Kusow Billow Isaack v Ministry of Interior and Coordination of National Government & 3 others* [2021] eKLR.

Determination

28. The non-payment of the claimant's salaries by the respondents has been a back and forth issue for the last three years leading to the court issuing orders against the respondent so as to comply. There is part payment and a balance of ksh.730,341.60.
29. There is no defence filed.
30. On the onset, the conduct of the respondents towards compliance with court orders, directions has not demonstrated parties keen to abide by the Rule of Law. this goes further in demonstrating the manner the respondents treated the claimant in his employment.
31. I take it, the respondents, despite enjoying the labours of the claimant, they are not keen to pay or follow the due process to address any allegations they may feel he has committed but apply the law of the jungle. Upon arrest of the claimant, his salary was reduced by half, the charges were withdrawn but all these were done verbally without any resort to the applicable human resource policy or the County Public Service Human Resources manual published by the PSC in May, 2013.
32. The picture painted of the respondents is dire.
33. In the affidavit of DR. Joel Mwova dated January 22, 2021 he confirmed that the claimant was reinstated back to his position on 23rd July, 2020. He attached letter dated July 23, 2020 which directs the claimant to report back to work. Such action followed constant court directions. This shall suffice.
34. An employer has the prerogative to suspend an employee from his employment for good cause. However, such action disrupting employment must be done in writing and the reason and or purpose for the suspension stated.
35. The essence of a suspension is to remove the employee from the shop floor for good cause. to allow for investigations. To allow for a disciplinary hearing. To allow the employer address a workplace issue. There must be good cause for such action.
36. In the case of *Elizabeth Cheroni Kurgat versus Kenya Literature Bureau* [2014] eKLR the court in addressing the issue of sending an employee on suspension and compulsory leave held as follows;

... the claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave.



She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.

37. In this case, the claimant was arrested at Kyumbi Police Station on 1 August 8, 2014 and the next day he was charged in Criminal Case No. 993 of 2014 at Mavoko Law Court.
38. There was no written notice, action or matter addressed by the respondent following such arrest and arraignment in court save, based on the claimant's evidence, he was verbally suspended.
39. On August 28, 2017 the respondents withdrew the criminal case.
40. Again, there is no defence to the claimant or any explanation as to how these decisions, actions and matters against the claimant were being addressed.
41. The respondents, well aware of their mandates under *the Constitution*, 2010 and the law and further the application of County Public Service Human Resources manual published by the PSC in May, 2013 should have done better.
42. An employee who is removed from work without any good cause is denied an essential part of himself. The dignity to wake up to a job and offer his labour and progress in his career. Such an employee is left watching his peers and workmates waking up and working and getting returns which buoy them with life and career satisfaction. This was not to be for the claimant who was left stagnated at job group 'M' while his peers have since become specialists and promoted to job group 'P'.
43. Fair labour relations dictates that every employee should be treated fairly, with justice and good reason.
44. The right to fair labour practices is deliberately placed as part of the Bill of Rights for good reason. This is to ensure that every employee has the right not to be unfairly treated in employment and labour relations and or be subjected to unfair labour practice.
45. Similarly, and flowing from the provisions of sections 41 and 45 of the *Employment Act*, 2007 an unfair labour practice means any unfair conduct or omission that arises between an employer and an employee. These provisions obviously derive from the constitutional right to fair labour practices guaranteed to everyone under article 41 of *the Constitution*, 2010. Significant with the provisions of section 41 of the *Employment Act*, 2007, it is an unfair labour practice where through an act of omission and commission an employer goes ahead of itself and fails to issue notice to an employee for any acts of misconduct or gross misconduct and without due process suspends part of the salary due and further removes the employee from the shop floor without any due regard to the workplace policy. Such cannot be defined under any other terms than being unfair labour practice and contrary to article 41 of *the Constitution*. It is a flagrant breach, violation and threat to the Bill of Rights secured for employees under article 41 of *the Constitution*, 2010.
46. The court finds the respondents jointly and severally breached the claimant's right to fair labour practice and further his rights under the law enshrined under section 41 of the *Employment Act*, 2007.
47. On the reliefs sought, reinstatement addressed as above, the payment of due salary arrears stands at ksh.730,341.60 and which shall be paid in full and attract interests from the date of this judgement.
48. On the breaches to the claimant's right to fair labour practices and the law, compensation is due and account taken of the grave hardship placed on the claimant and the psychological torture this had had



on him, a maximum compensation at 12 months is hereby found justified all at 230,620 of gross salary x 12 all Ksh.3,847,440.

49. The claimant testified that while out of employment he was on half salary and he mitigated his loss by taking up jobs with his father at the engineering firm. On the fact of half pay, the great portion of the salary arrears now settled by the respondents, the compensation awarded address and redress the breaches committed by the respondents against the claimant save costs for the suit are due.
50. On the loss with regard to Sacco loan and how this has affected the claimant's life, such matter ought to have been pleaded and addressed instantly for interim measures, orders and directions. The loss incurred noted, the compensation awarded shall suffice.

Accordingly, judgement is hereby entered for the claimant against the respondents jointly and severally in the following terms;

- a. A declaration is hereby entered that The respondents are in breach of the claimants right to fair labour practice and the law;
- b. Compensation awarded at ksh.3,847,440;
- c. Pay the claimant salary arrears at ksh.730,341.60 with interests from the date of this judgement;
- d. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF JUNE, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

