



REPUBLIC OF KENYA



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**Kiptalam v County Government of Kwale (Cause 95 of 2019 & E006 of 2021
(Consolidated)) [2022] KEELRC 3809 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3809 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 95 OF 2019 & E006 OF 2021 (CONSOLIDATED)**

B ONGAYA, J

JULY 29, 2022

BETWEEN

SAMUEL KIPYATOR KIPTALAM CLAIMANT

AND

COUNTY GOVERNMENT OF KWALE RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim in cause No 95 of 2019 on December 5, 2019 through Ngonze & Ngonze Advocates. The claimant prayed for judgment against the respondent for orders:
 - 1) Salary withheld from July 31, 2019 Kshs 152,900.00 per month until payment in full.
 - 2) Maximum compensation for such unlawful withholding.
 - 3) Interest on (1) and (2) at court rates.
 - 4) The respondent to forthwith reinstate the claimant to the station, destination and remuneration assigned to him prior the illegal or unprocedural transfer and stoppage of salary.
 - 5) The respondent to forthwith remit to the claimant the entirety of his dues illegally withheld from him with effect from July 31, 2019 to date.
 - 6) The respondent to forthwith cease and desist from any further harassment and intimidation of the claimant through illegal or unlawful transfer; illegal or unlawful stoppage of salary; and, illegal or disguised disciplinary proceedings.
 - 7) Costs of the suit.
2. The claimant's case is pleaded as follows. He was employed by the Government of Kenya as a Registered Clinical Officer (RCO) under the Ministry of Health and posted to Coast Province, Kwale District effective 2001 as per appointment letter dated June 28, 2001. By letter dated October 5, 2005 he



was confirmed in permanent and pensionable service effective July 24, 2001. The claimant's monthly pay is Kshs 152,900.00. On May 22, 2019 the claimant was summoned by the Kwale County Chief Executive Office for Health who informed the claimant about theft of a patient's monitor, singled out the claimant and others as perpetrators, and threatened to transfer the claimant on account of the theft. The Directorate of Criminal Investigation (DCI) officers investigated and exonerated the claimant from culpability of the alleged theft. A posting order was issued on June 10, 2019 posting the claimant to Samburu Hospital. The claimant opposed the transfer on the ground that he had to have his name cleared prior to taking up the transfer. The claimant's further case is that the respondent unprocedurally and unlawfully stopped his salary and summoned him to appear before the Departmental Human Resources Advisory Committee (DHRAC) on September 18, 2019. The claimant attended and the committee resolved not to hear him until he reported at Samburu Hospital as posted. The committee deferred until September 23, 2019. Further, on 23.09.2019 the claimant met the County Chief Executive Officer for Health who apologised as regards the turn of events and that the transfer would be reversed for the claimant to be redeployed to KMTC-Msambweni. However, the transfer was not reversed and the stoppage of salary was not lifted. The claimant alleges violation of his rights to human dignity per article 28, fair labour practices per article 41, fair administrative action per article 47, and, fair hearing per article 50 of the *Constitution of Kenya, 2010*. He alleges that stoppage of the salary violated section 18(4) and (5) of the *Employment Act, 2007*.

3. The respondent filed the statement of response on March 16, 2022 through Muturi Gakuo & Kibara Advocates. The respondent denied the claimant's claims and pleaded that the deployment by the letter dated June 10, 2019 from Kwale Sub-County Hospital to Samburu Sub-County Hospital was due to service needs and was required to report to office on June 21, 2019. He reported to work on February 14, 2020 and did not assume duty because he occasionally absconded duty without proper leave. The medical superintendent reported the absconding to the Chief Officer, Department of Health by the letter dated November 10, 2020. The Chief officer then issued the notice to show cause dated November 23, 2020. The claimant's salary was stopped and the notice to show cause issued per clause 4.4 of the Public Service Commission Discipline Manual for Public Service which applied in event an officer was absent from duty without leave, or, reasonable or lawful cause and, not traced within a period of 10-days from the date of commencement of absence. Further, the claimant never requested for permission to be away from duty and the stoppage of salary was lawful and fair. Further he did not attend duty and fill the duty roster as expected. A final decision on the disciplinary process had not been arrived at. The respondent denied the claimant's claims as well, further denied the prayers. The respondent prayed on its part that the suit be dismissed with costs.
4. The claimant filed the statement of claim in Cause No E006 of 2021 on January 18, 2021. The claimant repeats his history of employment as pleaded in the earlier case. He repeats that his salary is Kshs 152,900.00 per month. He further pleaded as follows:
 - a) Following the outbreak of Covid-19 pandemic within the Republic of Kenya, the Government issued a myriad of directives and protocols on containment of the scourge. By circular dated July 20, 2020 on compliance with work-place guidelines on Covid-19 pandemic, the Head of Public Service noted that public servants had not strictly complied with the guidelines and measures in the previous circulars dated March 17, 2020, March 26, 2020, and, April 23, 2020, thereby exposing themselves, colleagues, and families to the risk of infection and fatalities. The circular directed that all state and public officers with pre-existing medical conditions or aged 58-years and above serving in CSG5 (Job Group S) and below or their equivalent were to forthwith work from home.



- b) By the letter dated September 8, 2020 the claimant notified the respondent of his pre-existing conditions and sought leave to work away from his designated station. By letter dated September 10, 2020 the Senior Physician, Msambeni County Referral Hospital acknowledged the foregoing letter and advised as regards ensuring adequate measures are taken to reduce the risk of contracting the infection at work places.
 - c) By letter dated November 23, 2020 the Chief Officer for Health Services indicated that the claimant was absenting himself from duty without permission and he should show cause why disciplinary action should not be taken against him, and, the claimant's salary be stopped forthwith. The claimant replied by the letter dated December 1, 2020 but stoppage of his salary was not lifted.
 - d) The claimant's further case was that he had made no error to justify stoppage of his salary. He claims his salary was stopped without a warning, he was not given a notice of stoppage of salary, he was not summoned to answer any charge, he was not given documents constituting charges or allegations prior to the stoppage of his salary, he had no chance to defend himself prior to the stoppage of salary, and was not heard or given chance to defend himself prior to the stoppage. He alleges he had a clean record of service free from warnings or dereliction of duty.
 - e) He worked overtime throughout his service being 6 hours (7.00am to 10.00pm) per day 7 days a week and he has not been compensated.
 - f) The stoppage of the salary was unfair for no given reasons.
 - g) The respondent has rejected reconciliation of the dispute.
5. The claimant claimed and prayed for judgment against the respondent for:
- 1) A declaration the stoppage of the claimant's lawful salary by the respondent was and remains wrongful, unlawful, illegal, unprocedural, unfair or irregular.
 - 2) Maximum compensation for wrongful stoppage of salary Kshs 152,800 x 12-months = Kshs 1,834,800.00.
 - 3) Stoppage of wage as at January 8, 2021 Kshs. 305, 800.00 (two months' salaries).
 - 4) Any further withheld salaries at Kshs 152,800.00 per month.
 - 5) Overtime Kshs 42,453,611.60
 - 6) Any other or further entitlement or order as the honourable court may deem fit and just to award in the circumstances of the case.
 - 7) Costs of the suit.
 - 8) Interest on 2, 3, 4, and 5 above from the date of filing the suit till full payment.
6. The respondent filed the response to the statement of claim in Cause No E006 of 2021 on April 30, 2021. The respondent pleaded the deployment to Samburu Sub-County Hospital as was pleaded in the earlier case and as invoking the Commission. That the claimant was deployed by letter dated June 10, 2019 requiring him to report on June 21, 2019. He reported on February 14, 2020 but he would occasionally be absent from duty without leave or proper cause. A report was made to the Chief Officer per letter dated November 10, 2020 who issued a letter to show cause dated November 23, 2020. Further, the disciplinary process was being undertaken per the Human Resource Policies and Procedures Manual of the Public Service. The stoppage of salary was per clause 4.4 of the Public



Service Commission Discipline Manual for Public Service and as also pleaded in the earlier case. The respondent's case is that the claimant never requested for permission to be away from work and the stoppage of salary was lawful. He never filled the duty roster for days he was to be away and there was no requirement for a notice or a hearing for stoppage of salary on account of absence from duty as was done.

7. The respondent prayed that the suit be dismissed with costs.
8. The suits were consolidated. The claimant testified to support his case. The respondent's witness (RW) was Dr Samuel Mungai, the Medical Superintendent, Samburu Sub-County Hospital. The final submissions were filed for the parties. The court has considered all the material on record and returns as follows:
 - 1) As urged and submitted for the respondent, the claimant was transferred to Samburu Sub-County Hospital on need basis. There is no evidence to show that the transfer was on account of the monitor which the claimant testified had gone missing and staff including the claimant implicated in the alleged theft. The claimant testified that he resisted the transfer because he had a grievance being to clear his name in view of the alleged theft. Nothing on record shows that the claimant could not pursue his grievance in that regard even if he had proceeded on transfer. The court finds that the existence of the grievance has not been established to have been a bar to pursuing the grievance as the claimant would have desired to pursue. The court returns that the reason for the transfer was service needs as stated in the letter dated June 10, 2019 and it was not unfair at all. In any event the respondent has established that Samburu Sub-County Hospital had been upgraded and the claimant's services as a Clinical Officer Anaesthetist were needed effective sometimes in 2019. Further, it was the respondent's prerogative to decide where best to deploy the claimant.
 - 2) The court returns that the claimant has established that he is entitled to payment of the salaries for July, August, September, October, November to December 19, 2019. The letter of deployment did not state when the claimant was to report at Samburu Sub-County Hospital. It is not clear when he was released to report. After the court intervention, he reported effective March 2020. The withholding of his salary from July 31, 2019 to March 2020 appears to have been without due process and a fair reason. As already ordered by the court (Rika, J) at the interlocutory stage, the same is due. The claimant is awarded the salary for that period being as computed in the final submissions filed for him Kshs 1,299,650.00.
 - 3) The evidence by the claimant is that from March 2020 to end December 2020 he was paid his salary. However, his salary has been stopped from December 2020 to date. The reason given for that stoppage is that he absconded duty. By letter dated September 10, 2020, Dr Ndegwa Wajuki, Physician, Msambweni County Referral Hospital confirmed that the claimant was his patient for follow up for type 2 diabetes mellitus. The letter further confirmed that the claimant by that medical status was at a high risk of getting severe Covid-19 pneumonia. He was therefore advised to take adequate measures to reduce his risk of contracting the infection at his work place. There is no dispute that the claimant worked as a Clinical Officer (Anaesthetist) with the role of attending to patients during medical procedures or operations. The claimant submitted the letter to his employer and the Sub-County Health Administrative Officer at Kinango Sub-County Hospital endorsed it to RW directing that the claimant be involved at duty only when it was very necessary due to his medical condition and until the situation returned to normal. That was on September 11, 2020. The letter to show cause was dated November 23, 2020 and it alleges absence from duty for 14 days in August 2020; 14 days in September 2020; 14 days in October 2020 and 14 days in November 2020. His salary



was then stopped. He replied by his letter dated December 1, 2020 stating that in view of his medical condition he had spoken to his colleague to hold brief for him due to the prevailing circumstances and in view of his physician's letter dated September 8, 2020. He stated that the arrangement was temporary as the Medical Superintendent would make arrangements with the office of the Chief Officer for continued service delivery. The claimant's letter concluded

“It has never been my wish to have a medical condition which put me at risk of contracting severe Covid-19 disease as per the attached medical report. The stoppage of my salary during this pandemic is not justifiable and will deprive me of my rights and subject me to untold suffering. I look forward for your understanding and support during this difficult time of up surging Covid-19 disease.”

It appears thereafter parties engaged in no more correspondence and the claimant's salary remained stopped. The court has considered the evidence and has taken judicial notice that at the material time Covid-19 pandemic was at its peak with its full uncertainties and impact. While RW testified that the claimant was to be at work, RW showed no specific measures taken to facilitate the claimant's sporadic attendance at work on very necessary basis as endorsed on the claimant's physician's letter by the Sub-County Health Administrative Officer at Kinango Sub-County Hospital. In replying to the show-cause letter, the claimant specifically requested for support in view of the very difficult prevailing circumstance – and contrary to the submissions made for the respondent, the court finds that the physician's letter amounted to a sufficient notice of the claimant's medical status as envisaged in section 30 of the *Employment Act, 2007*. The court finds that in essence he was raising a grievance in view of his health status, the need to be at work, and the need for the respondent as the employer to render assistance. His grievance is found to have been responsible and with good foundation so that the court finds that it could not be a fair reason for imposing a punishment (such as stoppage of salary) as was done as per section 46(h) of the *Employment Act, 2007*. The stoppage of salary and the proposed disciplinary action as per the letter to show cause dated November 23, 2020 are found to have been unfair. The letter to show cause also shows that the claimant had worked some of the days in the months he was alleged to have been absent and which the court finds to be a manifestation of the claimant's willingness to work despite the difficulty and risky Covid-19 pandemic and his predisposed health status. As submitted for the claimant he is entitled to salary withheld from November 30, 2020 to date at Kshs 152,120 x 21 months thus Kshs 3,236,520.00. The claimant is also entitled to lifting of the stoppage of the salary forthwith and to continue in service within the protective measures against Covid-19 pandemic as instituted by the government and to be agreed between the claimant and his supervisor; and the claimant to report to the Medical Superintendent at Samburu Sub –County Hospital not later than August 8, 2022 for assignment of duty accordingly. It was submitted for the respondent that the claimant should have reported at work and applied the respondent's protective measures. However, the circular of July 20, 2020 was categorical and in mandatory terms that persons with pre-existing conditions had to work from home and the court finds that it would have been absolutely irresponsible and against the circular for the claimant to report on duty with the disclosed pre-existing condition. Further, the Medical Superintendent was to have him at work only when it was very necessary. First, there was no evidence that a scenario arose when it was very necessary for the claimant to report at work and second, the Medical Superintendent required the claimant to report at work in such very necessary situation and the claimant failed to do so.

- 4) The claimant has not established the basis for the claim and prayer for payment of compensation of 12 months' salaries for withheld salaries. The claimant has not also established



the contractual and statutory basis for the overtime claimed. No sufficient evidence was provided to support the prayer for overtime. Particulars of the hours of overtime and the rate of payment were not established at all. Those prayers will collapse as not justified.

- 5) It is submitted for the respondent that the claimant ought to have appealed to the Public Service Commission per article 234(2), section 85(c) and 87(2) of the Public Service Commission Act, 2017 as read with section 77 of the County Governments Act. The respondent relies on Catheri Gathoni Otenyo v Governor County Government of Kakamega & 3 others [2022] eKLR following holding of the Court of Appeal in Secretary County Public Service Board and another v Hulbhai Gedi Abdalla [2017] eKLR that the claimant should have utilised the appeal procedure under section 77 of the County Governments Act. It is true that the claimant would have such right of appeal to the Public Service Commission. However, as submitted for the respondent in urging as much, it appears to the court that it was moved as an interlocutory measure by the claimant. Second, the respondent is raising the issue of alternative dispute resolution procedure belatedly and in the final submissions without the relevant pleading in that regard. The court finds that it must be taken that the respondent waived such an objection as it was not pleaded at all. The court finds that the plea of alternative dispute resolution procedure if upheld as belatedly done would seriously prejudice the claimant who will not have an opportunity to be heard in that regard. The parties must be bound by their own pleadings and the belated plea will be declined and the respondent deemed to have waived insistence on the appellate procedure before the Commission. In any event, the claimant was not challenging the transfer decision only that he wished his grievance about alleged theft resolved and then, no disciplinary sanction or punishment had been imposed to constitute an appealable decision. The court finds that the proceedings were in the nature of interlocutory suit and relief as the respondent had not yet made decisions that would properly be subject of appeal to the Commission.
 - 6) The claimant has succeeded in his case. The court has considered the otherwise continuing employer-employee relationship. The court returns that the respondent will pay only 50% of the claimant's costs of the consolidated suits.
9. In conclusion judgment is hereby entered for the claimant against the respondent for:
- 1) The respondent to pay the claimant withheld salaries in the sum of Kshs 4,536,170.00 (less PAYE) by October 1, 2022 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
 - 2) The declaration that the claimant is entitled to lifting of the stoppage of the salary by setting aside of the letter dated November 23, 2020 forthwith and to continue in service within the protective measures against Covid-19 pandemic as instituted by the government and to be specifically agreed between the claimant and his supervisor, and, the claimant to report to the Medical Superintendent at Samburu Sub –County Hospital not later than August 8, 2022 for assignment of duty and continued full payment of remuneration and other benefits without break in service, accordingly.
 - 3) The declaration that the deployment of the claimant to Samburu Sub-County Hospital was regular and on service needs basis and the deployment did not in any manner bar the claimant from raising a grievance about the alleged theft as at the material time of deployment.
 - 4) The respondent to pay 50% of the claimant's costs of the suit.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS
FRIDAY 29TH JULY, 2022.**

BYRAM ONGAYA

JUDGE

