



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.22 OF 2019**

**DR. MAGARE GIKENYI J. BENJAMIN.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF NAKURU .....1<sup>ST</sup> RESPONDENT**

**THE NAKURU COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY, NAKURU COUNTY GOVERNMENT..... 3<sup>RD</sup> RESPONDENT**

**CHIEF OFFICE OF HEALTH, NAKURU COUNTY GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF MEDICAL SERVICES, NAKURU COUNTY GOVERNMENT.....5<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

The claimant filed his Memorandum of Claim on 22<sup>nd</sup> March, 2019 and an Amended Memorandum of Claim on 4<sup>th</sup> September, 2019 and is seeking the following orders and reliefs against the respondent;

- a. A declaration that the claimant's employment has been constructively terminated on the 15<sup>th</sup> October, 2018.
- b. A declaration that the claimants' salary stoppage and termination of his employment services are unlawful and unfair.
- c. An order reinstating the claimant to original position without loss of benefits including due promotion, salary arrears and allowances from the month of November 2018 to date.
- d. An award of compensation for unlawful, unfair and unprocedural stoppage of salary and termination of services.
- e. A declaration that the respondents have violated the claimant's rights guaranteed and protected by articles 19, 27, 28, 30, 41, 43, 47 and 50 of the constitution.
- f. An award of general damages for the violation of and or breach of the claimant's constitutional rights I prayer (e) above.
- g. General and punitive damages for libel.
- h. Costs of the suit and interest on the sum awarded at court rates.
- i. Any other relief that the court may deem fit to grant.

**Claim**

The claimant is an adult male and medical practitioner in the employment of the County government of Nakuru and the time of filing suit was a student at Moi University School of medicine undertaking Masters in Medicine (General Surgery).

The 1<sup>st</sup> respondent is a County government within the meaning of Article 176 of the constitution. The 2<sup>nd</sup> respondent is a Board within the

meaning of Article 235 of the constitution with mandate for staffing of county government and provision of human resource policy and the employer of the claimant. The 3<sup>rd</sup> respondent is the county secretary and officer of the 1<sup>st</sup> respondent as the head of the civil service and secretary to the 2<sup>nd</sup> respondent. The 4<sup>th</sup> respondent is the chief officer health of the 1<sup>st</sup> respondent and the chief accounting officer in the department of health services. The 5<sup>th</sup> respondent is the officer of the 1<sup>st</sup> respondent and director of medical services responsible for ensuring provisions of medical services within the county of Nakuru. All the respondents act on behalf of the 1<sup>st</sup> respondent. The claimant was appointed into the public service on 14<sup>th</sup> January, 2008. He was then seconded to the 1<sup>st</sup> respondent and employed in the year 2013 upon devolution of health services as a senior medical officer.

On 2<sup>nd</sup> March, 2012 the claimant applied for study leave with the respondents to pursue masters in general surgery at Moi University. In the year 2013 the claimant was admitted at the Moi University and on 12<sup>th</sup> August, 2012 he received the admission letter to the university on 2<sup>nd</sup> September, 2013. At the time the claimant was the medical officer of Elbugon Nyayo hospital of the 1<sup>st</sup> respondent.

On 22<sup>nd</sup> October, 2013 the claimant was allowed leave to study at Moi University for 4 years.

During the years of study there were national industrial actions which affected the completion of study;

On 5<sup>th</sup> December, 2016 the Kenya Medical Practitioners Pharmacist and Dentists Union (KMPDU) issued a national wide strike notice and which took close to 4 months;

In the year 2014, 2016 and 2017 the Kenya National Union of Nurses (KNUN) went on strike countrywide affecting teaching at Moi teaching and Referral hospital and Moi University;

In February, 2018 the Universities Academic Staff Union (UASU) went on strike affecting learning at Moi University from 1<sup>st</sup> March, 2008; and

On 6<sup>th</sup> June, 2019 KMPDU issued a national wide strike notice to Moi University management due to failure to pay enhanced call and emergency allowances to lecturers and doctors and which strike took almost two months until 23<sup>rd</sup> August, 2019;

The strike by KMPDU, KNUN and UASU were interrelated. This affected and learning at Moi University. These events interrupted the study period for the claimant.

In January/February, 2018 the claimant was unprocedurally suspended by the university and by Moi Teaching and Referral Hospital which he challenged and filed **Judicial Review application No.1 and 2 of 2018, Eldoret High Court.**

These intervening matters were beyond the claimant's control and pushed the completion of his studies. The claimant wrote a letter dated 20<sup>th</sup> May, 2018 to the 1<sup>st</sup> respondent explaining the various circumstances leading to his extension of study. There was no communication in response and the claimant opted to continue with his studies.

On 5<sup>th</sup> October, 2018 the claimant wrote another letter to the 4<sup>th</sup> respondent reminding him about the same issue of delayed study. There was no response. The claimant continued with his studies.

In November, 2018 the claimant went shopping at *Woolmart Central Supermarket* in Nakuru with his family being sure that his salary had been deposited to his bank account. At the paying counter, the cashier swiped the visa card but the payment was rejected. The claimant was forced to return his shopping to the shelves. This caused him thorough embarrassment. This was in the presence of his children who started crying after their snacks previous picked from the shelves had to be returned. Fellow customers on the queue laughed at him and others talked and wondered in hushed tones as to why he had purchased many items which he clearly could not afford.

The claim is that the claimant suffered distress, agony, mental torture, humiliation, scandal and contempt in the eyes of the public and has been injured in his character, credit and reputation. This was caused by the actions of the respondents who were malicious and in breach of the contractual duty of care owed to the claimant and which was portrayed by depicting the claimant as an impecunious person craving for goods and services he could not afford; as a person not in a position to meet his financial obligations; dishonest considering his position in society, not credit worthy and should be shunned for being financial indiscipline; that he was reckless to his children, unprofessional and larking thief who brings his profession as a doctor into disrepute,

That the respondents were malicious for the reasons that they stopped the due salary without a good cause terminated employment without notice or warning or issuing a letter of notice to show cause, there was no due process and they did not care over their actions and the implications to the claimant and his family.

As a result of the breach of duty, the law and obligations by the respondents, the claimant was unable to meet his financial obligations to financial institutions over credits existing and has suffered loss and damage.

The claimant was called by banks due to failure to remit third party deductions to Cooperative Bank of Kenya and Faulu Kenya. Through these happenings the claimant came to realise that the respondent had stopped his salary and or terminated his services without notice or any justifiable cause.

On these events the claimant only realised that the respondents had stopped his salary payments without notice upon failing to meet his financial obligations. There was no notice, warning or communication of the stoppage of salary.

On 27<sup>th</sup> November, 2018 the claimant wrote an email to the 2<sup>nd</sup> respondent and various officers of the respondent with a view of seeking reinstatement of his salary or be given reasons for stoppage and if his services have been terminated. There was no reply. The claimant continued to suffer with his family of 5 children and a wife without a salary and support in school.

On 12<sup>th</sup> February, 2019 the claimant wrote to the 4<sup>th</sup> respondent another letter and copied the 3<sup>rd</sup> and 4<sup>th</sup> respondents seeking for a reason why his salary had been stopped but there was no response. On 13<sup>th</sup> February, 2019 the claimant sent the same letter via email but there was no reply.

To date there are no reasons for the stoppage of salary.

The claim is also that the claimant never deserted duty and remained under study at Moi University and attending to patients at Moi Teaching and Referral Hospital as part of his studies. This was without pay and amounted to servitude contrary to the law and the constitution.

The respondent acted contrary to Articles 47 of the constitution by denying him the right to a fair administrative action, the right to be informed before an adverse action was taken. This was despite the knowledge that there were several other doctors of the respondent undertaking similar studies like the claimant. Other doctors whose salaries were stopped had a reinstatement but not to the claimant resulting in discriminatory practice which may be related to the claimant being from a minority group. The failure to reply to various letters by the claimant denied him fair administrative action and a shot at the respondents were acting selectively, with impunity and in discrimination.

The actions by the respondents are contrary to the Employment Act and the constitution on equality and non-discrimination on the grounds of ethnicity or social origin on the reasons that the remuneration of his classmates and work colleagues in similar circumstances was restored and he was treated differently due to his ethnicity. The respondents reinstated, promoted and remunerated two of his colleagues who had also allegedly absconded duty while they rejected the claimant's claims for the payment of his salaries. The respondents failed to promote the claimant as required under the scheme of service for medical practitioner and there was no response to the numerous letters sent to this effect by the claimant.

On the claims made, the claimant is seeking the payment of his salary arrears.

The claimant received letter dated 5<sup>th</sup> February, 2014 promoting him from job group 'M' to 'N' from October, 2013. The claimant made an application with the 3<sup>rd</sup> and 4<sup>th</sup> respondents dated 5<sup>th</sup> February, 2014. The promotion was not effected.

On 7<sup>th</sup> July, 2017 the claimant wrote to the respondents requesting them to effect his promotions and the payment of arrears but the promotion was only effected in March, 2008. There was also no payment of non-practicing allowance and these are due.

The claimant is also seeking that his promotion to job group 'P' be effected.

On 7<sup>th</sup> July, 2016 the claimant wrote letter to the 3<sup>rd</sup> and 4<sup>th</sup> respondents to effect his promotion to job group 'P' as required under the scheme of service and despite being qualified for the same this has not been effected.

In November-December, 2018 the respondents published the names of employees including the claimant to be promoted but this never materialised and there is no approval. The claimant has since completed a senior management course as part of the promotion requirements to job group 'P' and despite filling the necessary forms this has not been effected. The refusal to promote the claimant is irrational and without justification and has caused him suffering, loss and damage. The claimant had found it difficult to raise his family without a salary. The banks where the claimant took developmental loans have put a lot of pressure on him due to non-remittance of repayments.

The respondents have also failed to remit statutory deduction to NHIF, NSSF and PAYE for the claimant.

These actions are contrary to the Employment Act and the constitution under article 28 on the right to be treated with dignity, article 19 and 22 on the protection of the Bill of Rights and freedoms, article 41 on fair labour practices article 27 on the right against discrimination and equality, article 30 on the right against servitude and forced labour, article 47 on the right to fair administrative action, and article 50 on the right to fair hearing.

The claimant has also relied on the provisions of the Employment Act, Labour Relations Act, County Government Act, Fair Administration Act, the ILO conventions, and the revised scheme of service for doctors.

The claimant filed his witness statement and also gave his sworn evidence in court.

## **Defence**

The respondents filed no defence.

At the close of the hearing both parties filed written submissions.

The claimant submitted that upon employment by the respondents in the year 2013 following secondment by the national government as a senior medical officer and on 2<sup>nd</sup> March, 2012 he applied for study leave at Moi University where he was admitted and on 22<sup>nd</sup> October, 2013 the respondents granted study leave for 4 years. For reasons beyond the claimant's control and following various industrial actions by doctors, nurses and lecturers his study was delayed and he informed the respondents but there was no response to letters dated 30<sup>th</sup> May,

2018 and 5<sup>th</sup> October, 2018.

The claimant also submitted that in November, 2018 he went shopping at **Woolmart Central Supermarket in Nakuru** with his family sure that his salary had been paid through his bank account but at the counter paying point his visa card was found without sufficient funds forcing him to return the goods picked back on the shelves. This caused him great embarrassment as it happened in the presence of his wife and children, members of the public and staff and only then did the claimant know that the respondent had not paid his salary for the month.

On 27<sup>th</sup> November, 2018 and 12<sup>th</sup> February, 2019 the claimant communicated to the respondents about the non-payment of his salary but this did not elicit any response.

The claimant remained undertaking his studies and on the duty rota for the hospital where he was attending to patients without pay.

The stoppage of payment of salary was without notice or any good cause. The claimant has suffered loss and damage and seeks the orders set out in his Memorandum of Claim.

The claimant also submitted that his employment was constructively terminated by the respondents as held in the case of **Coca Cola East and Central Africa Limited versus Maria Kagai Ligaga [2015] eKLR** that where there is a fundamental breach of the terms of the contract of service the same repudiated and such breach allow the employee to claim constructive dismissal from employment. The claimant was allowed study leave by the respondent on 22<sup>nd</sup> October, 2013 for 4 years but due to unavoidable circumstances he could not complete his studies in time but from November, 2018 his salary was stopped causing him great loss, damage and financial embarrassment as he could not meet his financial obligations to his family and financial institutions where he was enjoying various services.

There was constructive dismissal from employment by the conduct of the respondents as the employer and the claimant is seeking reinstatement back to his employment and payment of his salary arrears.

The claimant submitted that the stoppage of his salary was unlawful.

In November, 2018 the claimant's salary was stopped without notice and there was no payment until May, 2020 when the hearing of the instant suit was awaited. The respondent in the affidavit of the 5<sup>th</sup> respondent dated 29<sup>th</sup> April, 2019 averred that the claimant had absconded duty and on 4<sup>th</sup> October, 2018 the 4<sup>th</sup> respondent took an administrative measure against the claimant and two other doctors who had failed to resume duty and stopped remittance of salary.

The claimant submitted that the action of the respondent was contrary to article 47 of the constitution which requires that fair administration action only be taken upon notice and hearing which was not done in his case before stoppage of salary.

The human resource manual for public service provides guidelines in the management of human resource. In the event the respondents had any issue with the claimant, there was an obligation to apply regulation K.8(1) of the manual with regard to 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 for over 10 days then the salary payment shall be stopped and the employee issued with a notice to show cause and should be given a chance to reply within 21 days and where such employee fails to attend the due salary should not be paid. In his case the claimant was not issued with any notice or allowed a hearing before the sanction and stoppage of salary was taken. In the case of **Onyango Oloo versus AG [1986 - 1989] EA** the court held that natural justice applies where ordinary people would reasonably expect those making decisions which affect others to act fairly and not act without giving an opportunity to be heard.

The claimant also submitted that his rights were violated.

The right to equality and non-discrimination were violated as held in the case of **Masai Mara (SOPA) Limited versus Narok County Government [2016] eKLR** that discrimination occurs where there is intentional or direct differentiation on grounds relating to personal characteristics of the individual or group and which has the effect of imposing burdens, obligations, or disadvantage on such individual or which withholds or limits access to opportunities, benefits and advantages available to other members of society. In the case of **Harksen versus Lane NO [1998] 1 SA** the Court in South Africa held that the question whether there has been differentiation on a specified or an unspecified ground must be answered objectively. The question should be whether the alleged differentiation is unfair and if yes, there is discrimination on a specified ground. In the case of **Jonathan Spangler versus Centre for African Family Studies (CAFS) [2017] eKLR** the court in interrogating whether the employee was discriminated held that section 5 of the Employment Act has outlawed discrimination against any person directly or indirectly. A claimant should only establish a *prima facie* case and a presumption that there was discrimination leading to termination of employment or an unfair action taken as held in **Catherine Munguti & 21 others versus National Bank of Kenya Limited Cause No.1301 of 2014**.

The claimant submitted that his rights were violated when the respondents stopped the payment of his salary together with two of his colleagues and who undertaking study at Moi University but their salaries were reinstated. In the affidavit of the 5<sup>th</sup> respondent dated 29<sup>th</sup> April, 2019 he avers that there were two doctors Dr Wanini Mary Gathogo and Dr Humphrey Hinga Mwaura whose salary had been stopped and who reported to the 4<sup>th</sup> respondent to clarify the same and upon confirmation that they were still undertaking study at Moi University the remittance of salary was resumed.

By letter dated 3<sup>rd</sup> October, 2018 the Dean School of Medicine, Moi University wrote to the 4<sup>th</sup> respondent on the status of study for Dr Gathogo, Dr Mwaura and the claimant. Despite the confirmation that the claimant was still undertaking his studies with his two colleagues, his salary was not reinstated with the others. Such amounted to different treatment and discrimination contrary to section 27 of the constitution.

The right to dignity was violated contrary to article 28 of the constitution. In **Republic versus Kenya National Examination Council & another ex parte Audrey Mbugua Ithibu [2014] eKLR** the court held that human dignity is that intangible element that takes a human being complete. It goes to the heart of human identity. In the case of **Jonathan Spangler versus Centre for African Family Studies (CAFS) [2017] eKLR** the court held that there is something that a salary cannot do to a man. It gives him job satisfaction. Payment of a salary comes with that spring and gait towards the office to accomplish tasks. The job gives one a dignified self and a purpose to return each day to accomplish more. When a salary is not paid an employee becomes anxious and demoralised and denies him the human dignity and eventually work is not voluntary but servitude so as to be paid he due salary and arrears. This is contrary to article 31 of the constitution.

The claimant continued to work while undertaking his studies at Moi Teaching and Referral Hospital and when his salary was stopped without notice he was under distress and financial embarrassment for being unable to take care of his family, wife and five children. He was unable to meet his financial obligations and commitments made with various financial institutions.

The claimant also submitted that the respondents violated the right to fair labour practices.

Article 41 of the constitution entails that every person should be accorded fair labour practices, fair remuneration for work done and such employment not be adversely compromised without notice or a hearing. Despite the claimant being an employee of the respondent and being aware that he was undertaking his studies with approval, they proceeded and stopped the payment of his salary contrary to the principles of fair labour practices. The applicable scheme of service for doctors was not followed. The respondents failed to promote the claimant despite working for 7 years. The due promotional increments were also not made. This was in breach of the provisions of article 43 of the constitution on the right to economic rights for work done.

The claimant submitted that he is entitled to the remedies sought for the violation of his rights, the payment of general damages for constitutional violations and which should be paid at ksh.9 million as held in **VMK versus Catholic University of Eastern Africa [2013] eKLR; Geeta Josho versus Padya Memorial Hospital [2019] eKLR** and **OI Pejeta Ranching Limited versus David Wanjau Muhoro [2017] eKLR** where the employee was awarded Ksh.7.5 million for discrimination arising from racial differentiation. Based on similar cases decided by the court, the claimant is seeking damages for discrimination at ksh.9 million.

The claimant is also seeking for the payment of his salary arrears from November, 2019 to May, 2020. The claimant was promoted to job group 'N' with effect from 30<sup>th</sup> October, 2013 but the respondents failed to effect the promotion salary increment. The respondent admitted to these facts and in the affidavit of the 5<sup>th</sup> respondent dated 29<sup>th</sup> April, 2019 that the claimant was promoted in March 2013 from job group 'M' to 'N' but the promotion was only effected in March, 2018. That the claimant's arrears could not be paid since his salary had since been stopped. The claimant thus submitted that the actions by the respondents were based on unfair labour practice and the due promotion and salary payments should be paid;

November, 2013 he was paid ksh.121, 910 instead of Ksh.258, 430 and balance due is ksh.136, 520;

December, 2013 he was paid ksh.121, 910 instead of ksh.258, 430 and balance dues is ksh.136, 520;

January, 2014 he was paid ksh.147, 880 instead of ksh.258, 430 and balance dues is ksh.110, 550;

February, 2014 he was paid ksh.150, 190 instead of ksh.258, 430 and balance dues is ksh.108, 240;

March, 2014 he was paid ksh.150, 190 instead of ksh.258, 430 and balance dues is ksh.108, 240;

April, 2014 he was paid ksh.150, 190 instead of ksh.258, 430 and balance dues is ksh.108, 240;

In that order up to May, 2014 to February, 2018 and the claimed total unpaid salaries amounting to ksh.4, 666,456.

The claimant received his salary for July, August, September and October, 2018 before the same was stopped in November, 2018. The payment of salary only resumed in May, 2020. The owing and unpaid salaries;

November, 2018 unpaid salary ksh.258, 430;

December, 2018 unpaid salary of ksh.264, 430 and including travel allowance of ksh.6, 000 unpaid;

January to December, 2019 unpaid salary Ksh.258, 430 each month;

January, to March, 2020 unpaid salary at ksh.258, 340 each month and April, 2020 Ksh.20, 000 unpaid allowance per the COVID-19 frontline allowance.

Total unpaid salaries ksh.4, 648.310.

The claimant is also seeking damages for defamation. Following the non-payment of the salary due, the claimant suffered embarrassment and his reputation when he went shopping at Woolmart Central Supermarket with his family and children and his visa card was found not having sufficient funds. On the evidence placed before court and as held in the case of **Hon. Nicholas R.O. Ombija versus Kenya Commercial Bank Limited [2009] eKLR** where the plaintiff was not informed that his account was without money and for breach of contract and libel and publication of defamatory material to persons at the supermarket damages were awarded. This was also upheld in the case of **Equity**

## **Bank Limited & another versus Robert Chesang [2016] eKLR.**

The respondent's failure to activate the claimant's salary so that he could access using his visa card was reckless and wilful and malicious and damages should be paid at ksh.1.5 million

The claimant is also claiming for costs and interests on the awards made by the court. Despite making demand and various communications to the respondents to pay, there is no payment of salary arrears, the stoppage of salary payment was without notice or good cause and hence the dues claimed should be paid with interests and costs.

The respondents submitted that there exists an employer-employee relationship between the claimant and the 1<sup>st</sup> respondent and who granted him study leave for 4 years from 22<sup>nd</sup> October, 2013 and ending in the year 2017. The study period ended but the claimant failed to report back to work necessitating the 4<sup>th</sup> respondent to stop payment of salaries as part of an administration action.

The decision to stop payment of salary was informed by the information the respondents received from Moi University where the claimant was undertaking his studies. The 4<sup>th</sup> respondent requested for a status report with regard to all the doctors who had been released and information was received on 31<sup>st</sup> August, 2018 whereupon the respondents were advised that the claimant had been suspended early in the year 2018 for disciplinary issues.

The claimant did not take the initiative to inform the respondents of the disciplinary issue he was facing and neither did he resume duty after the agreed period of study lapsed.

Acting on good faith, the respondents wrote to Moi University on 29<sup>th</sup> March, 2019 on the study status for the claimant and were advised that disciplinary proceedings were still on-going before the university senate.

Even where industrial actions at the workplace may be beyond the claimant's control, he failed to disclose the disciplinary cases against him which information was vital. It was also legitimately expected that after the end of his study period he would seek for an extension which he failed to do.

The respondents also submitted that under the Human Resource Policies and Procedures Manual for the Public Service, 2016 clause K.8(1) provides that where an employee is absent from duty without leave or lawful cause for 24 hours and cannot be traced within 10 days the payable salary should be stopped and action for dismissal initiated.

In stopping the payment of salary to the claimant, the respondent advised him to follow up on the status of his studies. The claimant was not the only one affected and there were two other doctors whose salary payments were stopped. The university formally confirmed that they were still on-going with their studies and salary payment was reinstated. The claimant failed to address as directed and clear with the learning institution and advise the respondents on the status of his studies.

The respondents also submitted that the claimant has since finished his studies and resumed duty and his salary reinstated. The stoppage of salary payment was procedural, lawful and taking into account prevailing circumstances of him being on suspension and undergoing disciplinary procedures with the learning institution and where he failed to report back upon the end of his study period or seek for an extension.

There was never termination of employment as alleged. The claimant has remained an employee of the 1<sup>st</sup> respondent.

There was no discrimination against the claimant as alleged and outlined under article 27 of the constitution and section 5(3) of the Employment Act. The respondents are aware of the need to promote equality and non-discrimination at the workplace which fosters the rule of law as held in the case of **Wycliffe Lisalitsa versus Chief Executive Officer Kenyatta National Hospital & 5 others [2014] eKLR** that for an employee to prove discrimination the employee has to establish that two or more persons doing the same work were treated differently. In the case of **Reuben Wamukota Sikulu versus the Director human Resources Management Ministry of Devolution and Planning & 2 others [2020] eKLR** the court held that what an employee is required to establish in a claim of discrimination is a *prima facie* case through direct evidence or statistical proof that he was treated differently on any ground set out under Article 27(4) of the constitution.

The claimant failed to prove there was discrimination against him by the respondents. The respondents went out of their way to find out the study status of its doctors which was the duty of the claimant and others to communicate. Despite being aware of the study period, the claimant failed to report back or seeks for an extension forcing the employer to learn that he had been suspended and was undergoing disciplinary action. Such does not in any way amount to discriminatory practices or unfair labour practice.

The respondents also submitted that the claimant was promoted to job group N on 30<sup>th</sup> October, 2013 and his assertion that he ought to have been promoted to job group P is wrong. Under the County Government, the Nakuru County Government Service Board under section 63(1) of the County Government Act only the Board can promote officers in the public service of the 1<sup>st</sup> respondent. Under the Revised scheme of Service for Medical Officers, Dental Officers and Pharmacists, 2016 there is provision for promotion of various officers. Such scheme of service allow for promotion of officers within the service subject to availability of a vacancy, merit and upon approval of the public service commission.

### **Determination**

On the pleadings, the claimant's evidence and written submissions by both parties the court has put these in account and the issues which

emerge for determination can be summarised as follows;

Whether there was constructive dismissal from employment;

Whether there are constitutional violations;

Whether the stoppage of salary amounted to termination of employment;

Whether there should be reinstatement of the claimant to his position with the respondent with payment of salary arrears, promotion and salary due with allowances;

Whether there was libel/defamation and if so whether the remedy sought should issue;

Whether the remedies sought should issue with costs and interests.

On the first issue as to whether there was constructive dismissal of the claimant from his employment with the respondents, as cited by the claimant in the case of **Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga [2015] eKLR** the Court of appeal held that;

.. constructive dismissal occurs where, “an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer’s conduct.” ... constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer’s behavior in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship.

Resignation is regarded as constructive dismissal if the employer’s conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract.

The employee initiates termination of the employment contract by reason of the employer’s conduct. There is repudiation of the contract by the conduct of the employer for making continued employment of the subject employee intolerable and making continued working impossible or where the employer has seriously damaged the employment relationship and forcing the employee to resign.

To therefore satisfy for a case of constructive dismissal the court in **Solid Doors (Pty) Ltd versus Commissioner Theron and Others (2004) 25 ILJ 2337 (LAC)** laid out the key ingredients as follows;

.. There are three requirements for constructive dismissal to be established.

The first is that the employee must have terminated the contract of employment.

The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee.

The third is that it must have been the employee's employer who had made continued employment intolerable.

All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. ...

In this case, the claim is that sometime in November, 2018 the claimant went shopping with his family to *Woolmart Central Supermarket* Nakuru and when paying for the picked items his visa card was found without sufficient funds. He tried to fuel his vehicle at a gas station nearby and again the visa card was rejected. Then he realised that his salary had not been remitted by the respondents to his bank account. That the stoppage of his salary was without notice or warning or being given any reason(s).

The court finds no proper case for constructive dismissal from employment. The claimant has since resumed duty with the respondents. There was no termination of employment save for stoppage of payment of salary.

The claimant then moved the court under Certificate of Urgency and a Notice of Motion seeking various orders and including the reinstatement of his salary as the stoppage was said to be causing him great financial loss and damage and that he was unable to take care of his family and other financial obligation with various institutions.

Is this a case of constructive dismissal?

On the facts of the case, the claim herein does not fit constructive dismissal. There is no termination of employment by either party. The stoppage of salary is not similar to termination of employment. Where the claimant was facing financial hardship, was unable to take care of his family and meet his financial obligations, he did not initiate termination of employment. The employment relationship subsists.

On whether there was libel and defamation and the claimant should be awarded damages, in the case of **Equity Bank Limited versus Robert Chesang** the court held that;

...The relationship between a bank and its customer is that of principal and agent. Consequently, the bank being the holder of customer's money is under a duty to pay a customer's order where there are sufficient funds to his credit and where there is such failure, a cause of action will accrue.

Where the banks decline to honour a customer's order for the money held in account, without any sufficient explanation, that refusal or failure constitutes a breach of contract for which the banker is liable in damages

The claimant held a *visa card* with a bank/institution which has not been disclosed to this court. For him to hold the respondents liable for the actions of his bankers/financial institution for non-payment of goods upon use of his *visa card* should not be visited against the respondents who were not parties to the transaction. Even where the claimant had his salary stopped by the respondents, his use of the *visa card* and which was declined for lack of sufficient funds, for any action to arise against the bank and institution issuing such *visa card* the claimant should have had sufficient funds to his credit so as to offer the *visa card* for payment of his order(s) at *WoolMart Central Supermarket* at Nakuru or with any other third parties.

The claimant as the holder of the *visa card* had a duty to verify his cash balances with his bankers and or financial institution which had offered the credit before proceeding to make purchases. Unlike the case of **Robert Chesang** and **Hon. Nicholas Ombija**, cited above, and who had sufficient funds in their bank accounts when the credits cards were rejected and found to have 'insufficient funds' the claimant had no funds in his bank account at all! This cannot be visited against the respondents and claim in libel or in defamation. Account must be taken and responsibility be borne by the claimant himself.

On whether the claimant's rights were violated, the claim is that upon the claimant being allowed to undertake his studies vide letter and approval by the respondents on 22<sup>nd</sup> October, 2013 for a period of 4 years but he could not complete his studies in time due to intervening matters which were beyond his control. There were industrial actions called by KMPD, KNUN and UASU affecting learning and work at Moi University and Moi Teaching and Referral Hospital following doctors going on strike, this was followed by nurses going on strike and then lecturers went on strike all impacting on teaching and finalisation of study.

The claim is also that during his studies the claimant was with two other colleagues Dr Gathogo and Dr Mwaura approved by the respondents to undertake studies at Moi University and who were also affected in the completion of their studies and when they all wrote to the respondents, the other colleagues and doctors had their salary payment reinstated but the claimant was not. That this resulted in discriminatory practice against the claimant on the ground of his ethnicity and being from a minority community and this caused him loss and damage as he was not able to take care of his family or be able to meet his financial obligations. The claimant was forced to continue attending to his studies and work at Moi Teaching and Referral Hospital without pay which was slavery and servitude and lived a life of indignity and his economic rights were violated. These violations took place without fair administrative action, contrary to fair labour practices and should be compensated with payment of damages.

By letter dated 22<sup>nd</sup> October, 2013 the respondent released the claimant to study in the following terms;

REF: RELEASE LETTER

Following your admission to Moi University you are hereby released to report for your postgraduate studies to pursue MMED (general surgery) for four years.

Effectively by such release, the claimant study was to end and or the release lapsed as of 21<sup>st</sup> October, 2017.

By letter dated 20<sup>th</sup> May, 2018 the claimant wrote to the respondent that;

RE: STUDY PERIOD

The above refers.

I hereby take this opportunity to explain that my study leave was to take 4years. However, due to multiple strikes (nurse's strike, doctor's strike and lecturers strike) the period has been pushed forward a little due to these unavoidable circumstances. ...

Again the claimant wrote to the respondents on his delayed studies vide letter dated 5<sup>th</sup> October, 2018 this was followed with an email to the 4<sup>th</sup> and 5<sup>th</sup> respondents dated 22<sup>nd</sup> November, 2018 following stoppage of salary. Again by letter dated 12<sup>th</sup> February, 2019 the claimant complained that his salary had not been paid since November, 2018 causing him great hardship.

Of concern, is the period from 22<sup>nd</sup> October, 2017 to 5<sup>th</sup> October, 2018.

The claimant has not accounted for this period at all.

Study leave and release to study vide letter dated 22<sup>nd</sup> October, 2013 was for a fixed period of 4 years. Upon lapse, there is no communication or application for more time or extension of study leave or further time of release to complete studies.

It seems the respondent continued paying the salary due to the claimant until November, 2018 when the same was stopped. Study leave had lapsed and was not extended. Stoppage of salary for being absent from duty was allowed under the guidelines and Regulation K.8.

These were as serious lapse and omission by the claimant. Without the study release being extended by the employer, such amounted to absence from his duty station without approval. Such amounts to gross misconduct under the law and pursuant to the provisions of section 44(3) and (4)(a) of the Employment Act, 2007. Such omission is a fundamental breach of his employment contract with a sanction of summary dismissal.

In the case of **Consolata Kemunto Aming'a versus Milimani High School [2019] eKLR** the court held that;

The claimant did not explain her whereabouts from 21<sup>st</sup> to 28<sup>th</sup> March, 2017. Absence from work without good cause and without the permission of the employer is a matter categorised as gross misconduct under section 44(4) of the Employment Act, 2007.

In **Kennedy Moss Cheptum versus Geothermal Development Company [2019] eKLR** the court held that;

.....Summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice than that which the employee is entitled to by any statutory provision or contractual term. In cases of serious breach of a contract as under section 44(3) or on committing acts as outlined under Section 44(4) of the Employment Act, an employee being absent from work, ...

The Court of Appeal in **Civil Appeal No.373 of 2017 - Rodgers Titus Wasike versus General Motors E.A. Limited** in addressing a case of an employee who had been absent from work without permission from the employer and nobody knew of his whereabouts held that;

It is clear from the evidence on record, that the appellant acknowledged that he left his work place on 8th July, 2014 before the designated departure time of 4.00 p.m. without permission from the respondent. Secondly, even after absconding duty he continued to be absent from work for a period of 8 days without leave from the respondent. More importantly, no one from the respondent knew where he was or the reason for his absence. Perhaps, it is also fundamental to state that the appellant knew or ought to have known that his conduct would attract disciplinary action which included summary dismissal.

In this case, the claimant was released for a fixed period of 4 years. He did not report back or communicate with the respondent at the end of such period. Where there were intervening circumstances beyond his control and which required him to remain away from his employment, before proceeding with his study, reason demanded that he secures fresh mandate and extension of the release as otherwise, such time away from his employment was without good cause and justified summary dismissal under the law.

Absence from work other than being gross misconduct, the law under section 19(1)(c) of the Employment Act, 2007 allow the employer to make a deduction of the wage/salary due for each day the employee is not at work for no good cause;

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;

The claimant testified that;

During the years of study, national industrial actions (strikes) occurred which affected the completion of my Mmed (Gen. Surgery) programme within the 4 years.

Following the lapse of the strike notice, on 5<sup>th</sup> December, 2016 KMPD issued a strike call to all national and county governments. The strike took almost 4 months. ...

Later in February 2018 UASU issued a strike notice for industrial action due to failure of government to honour the previous CBA. The UASU strike affected my studying as part of Mmed Gen Surgery Programme at Moi University.

On 1<sup>st</sup> March 2018, the UASU strike kicked off across all universities. ...

The entire evidence well assessed, there is no account of the claimant's whereabouts from 21<sup>st</sup> October, 2017 up and until his letter to the respondent dated 20<sup>th</sup> May, 2018. Even where the industrial actions were on-going in the year 2018 there was no effort to return back to the respondents to have the study leave extended.

Effectively, by his own inaction, the claimant was absent from his duty station without permission and approval by the employer from the end of his study release ending 21<sup>st</sup> October, 2017. He also failed to disclose material facts that he was facing disciplinary action initiated by the study institution, Moi University. Whether justified or without justification, this having compromised his study period and release by the employer, the claimant had a duty to full disclosure to the employer. Despite filing Judicial Review proceedings before the high Court, Eldoret, where such proceedings affected the completion of the study period, the burden was on the claimant to disclose these facts to his employer. Such formed a material basis for his continued absence from duty so as to be able to complete his studies and the basis for his release by the employer, the respondents. It was not sufficient that the respondents learnt of the disciplinary proceedings against the claimant upon enquiry about his study status. His other colleagues, Dr Gathogo and Dr Mwaura had no such disciplinary matters pending.

The respondents continued to pay the claimant his salaries for a record one (1) year without knowing his whereabouts. Pursuant to section 19(1)(c) of the Employment Act, 2007 read together with Article 226(5) of the Constitution, 2010 which requires that;

5. If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or

instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

The payment of salary while absent from work without permission was unlawful and this put into waste public funds. See **Nicholas Muturi Okemwa & 8 others versus Judicial Service Commission [2016] eKLR**.

On the claims that there was discrimination against the claimant, that he was treated without dignity, he was under slavery and servitude and that the respondents were in breach of fair labour practices and fair administrative action, without termination of employment and the claimant failing to account for his time after the study leave ended, he authored his own problems.

The court finds no lawful cause for absence from work. The stoppage of salary payments was justified. Such ought to have stopped on the last date of release, 21<sup>st</sup> October, 2017.

The claim that there was discrimination against the claimant on the basis of his ethnicity and being from a minority community as against Dr Gathogo and Dr Mwaura whose salaries was stopped and later reinstated is a serious claim and where proved, there is serious implication on the respondents. Discrimination at the workplace is outlawed under section 5 of the Employment Act, 2007 and a serious human rights violation under the Bill of Rights pursuant to article 27 of the Constitution, 2010.

A claim that there is discrimination against any person must be given its due weight with sufficient evidence. Failure to prove has potential to create a serious dent in employment and labour relations. It is not sufficient to allege there is discrimination against an employee at the workplace. Such an allegation must be proved.

In this case the foundation of the claimant's case is that he was set apart and treated differently from his colleagues. However, the claimant was released to undertake studies vide letter dated 22<sup>nd</sup> October, 2013. The circumstances leading to his two other colleagues being absent from work, the stoppage of their salaries and later reinstatement cannot apply to justify the claimant being absent from work without permission and on this basis claim that he was discriminated against by the respondents. Far from it, such other colleagues though similarly situate and undertaking studies with the claimant at Moi University, the reason and periods of their release and the terms and conditions of the stoppage and reinstatement of their salaries must be taken into account. The two other colleagues are not parties herein and even where their cases here are reiterated to demonstrate there was discrimination against the claimant by the respondents, the foundation of the claimant's case pegged on stoppage of his salary, addressed above, was justified.

Discrimination against the claimant following stoppage of salary for a period he remained absent from work without permission cannot be a good basis and foundation to claim violation of his rights under the constitution and statute where such absence from work is not justified.

The claimant was in breach of his duty release. Such compromised his employment with the respondents. He suffered loss of salary and retained his employment.

The court finds no constitutional or statutory rights violations.

On the claims made for salary arrears and unpaid allowances, by letter dated 5<sup>th</sup> February, 2014 the respondent and through the Ministry of Health promoted the claimant to Senior Medical Officer with effect from 30<sup>th</sup> October, 2013 and placed at salary scale job group 'N' with a salary increment and *future incremental date will be 1<sup>st</sup> October*.

As set out above, there was no defence filed to challenge this evidence. The promotion and salary increment for the claimant stands at every 1<sup>st</sup> day of October.

It is not in dispute that the claimant was an employee of the 1<sup>st</sup> respondent and subject to human resource policy for public service. Under the scheme of service for public officers employed by the 1<sup>st</sup> respondent County government, promotion of employees and including the claimant is subject to the provisions of section 63 of the County Government Act. Under such provisions, the County Nakuru Public Service Board, 2<sup>nd</sup> respondent is required to put in place modalities and address any employee(s) gaps and recruit and or promote those in the service based on need and availability of resources.

The promotion of the claimant from one job group to the next is the duty of the 2<sup>nd</sup> respondent based the set modalities and availability of vacancy and resources. There is no material evidence that the 2<sup>nd</sup> respondent properly moved has acted outside the law and the policy guidelines and regulations in place.

With regard to the claim for unpaid salary arrears, without a defence as to how the principal letter of employment and promotion and with regard to the claimant was addressed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents particularly as regards his claims for salary arrears as of 1<sup>st</sup> day of October based on letter dated 5<sup>th</sup> February, 2014 and taking effect 30<sup>th</sup> October, 2013 is not challenged. The evidence of the claimant in this regard was uncontroverted.

On the analysis above, the claimant was paid his salaries up and until October, 2018. The due salaries for his job group as graduated each year is due as claimed for this period save vide letter dated 5<sup>th</sup> February, 2014 the date the promotion took effect is 1<sup>st</sup> October, 2013 but the claimant has analysed his due unpaid salary increments from November, 2013.

The arrears are therefore due from November, 2013 to October, 2018.

Effectively, from November, 2013 the claimant was underpaid by Kshs. 136,520;

December, 2013 by Ksh.136, 520;

January, 2014 by Ksh.136, 520;

February, 2014 by Ksh.110, 550;

March, 2014 by Ksh.108, 240;

April, 2014 by Kshs. 108,240

May, 2014 by Kshs. 108,240

June, 2014 by Kshs. 108,240

July, 2014 by Kshs. 108,240

August, 2014 by Kshs. 108,240

September, 2014 by Kshs. 108,240

October, 2014 by Kshs. 108,240

November, 2014 by Kshs. 108,240

December, 2014 by Kshs. 108,240

January, 2015 by Kshs. 108,240;

February, 2015 by Ksh.105, 840;

March, 2015 by Ksh.105, 840;

April, 2015 by Ksh.105, 840;

May, 2015 by Ksh.105, 840;

June, 2015 by Ksh.103, 290;

July, 2015 by Ksh.103, 290;

August, 2015 by Ksh.103, 290;

September, 2015 by Ksh.90, 288;

October, 2015 by Ksh.100, 956;

November, 2015 by Ksh.100, 956;

December, 2015 by Ksh.100, 956;

January, 2016 by Ksh.100, 956;

February, 2016 by Ksh.100, 956;

March, 2016 by Ksh.100, 956;

April, 2016 by Ksh.100, 956;

May, 2016 by Ksh.100, 956;

June, 2016 by Ksh.100, 956;

July, 2016 by Ksh.98, 622;  
August, 2016 by Ksh.98, 622;  
September, 2016 by Ksh.98, 622;  
October, 2016 by Ksh.89, 922;  
November, 2016 by Ksh.95, 922;  
December, 2016 by Ksh.95, 922;  
January, 2017 by Ksh.95, 922;  
February, 2017 by Ksh.95, 922;  
March, 2017 by Ksh.95, 922;  
April, 2017 by Ksh.95, 922;  
May, 2017 by Ksh.33, 922;  
June, 2017 by Ksh.33, 922;  
July, 2017 by Ksh.31, 590;  
August, 2017 by Ksh.31, 590;  
September, 2017 by Ksh.27, 590;  
October, 2017 by Ksh.21, 590;  
November, 2017 by Ksh.27, 590;  
December, 2017 by Ksh.27, 590;  
January, 2018 by Ksh.27, 590; and  
February, 2018 Ksh.27, 590.

**Total arrears Ksh.4, 694,756.**

For the period of November, 2013 to February, 2018 the claimant is entitled to Ksh.4, 694,756 in salary arrears.

There is no claim from March, 2018 to October, 2018.

The period of November, 2018 to January 20<sup>th</sup> 2020 when the claimant resumed work there are no salary arrears as there was no work performance for the respondents. Such period is removed.

The claimant filed the memorandum of claim on 22<sup>nd</sup> March, 2019. The Claim was amended and filed on 4<sup>th</sup> September, 2019. Part of the claims is the all overriding claim for the remedy of *any further relief this court may deem fit to grant*.

The claimant having resumed duty as of 20<sup>th</sup> January, 2020 during the pendency of these proceedings, the salaries due from the period of 20<sup>th</sup> January, 2020 to April, 2020 is due. The evidence that the claimant reported to work and was allocated duties since was not challenged. The salaries due are payable in full.

In this regard, for the 11 days worked in January, 2020 at a gross salary of Ksh.258, 430 due the claimant are entitled to Ksh.8, 336.45;

February, 2020 due Ksh.258, 430;

March, 2020 due Ksh.258, 430;

**Total due ksh.525, 196. 45.**

Total unpaid salaries for the period of 20<sup>th</sup> January, 2020 to March, 2020 are awarded at ksh.525, 198.45.

The claim for Ksh.20,000 in April, 2020 for an allowance to COVID-19 frontline allowance announced by the president to all health care workers, such is a promise by a third party and not by the respondents herein for the petitioner to enforce against the cited respondents. Such claim has arisen after pleadings closed denying the respondents a fair chance to offer any response or submissions. Such is not due herein.

On the claim that there was no payment of NSSF and PAYE, the particulars of these claims are not outlined. Where such relates to the period the claimant was in employment and was paid his salary or the salary arrears have been assessed and awarded, all dues paid to the claimant shall be subject to the provisions of section 49(2) of the Employment Act, 2007. Where the statutory dues claimed relate to the period removed and where salary payment was stopped for a justified reason, with stoppage of salary, the respondents have no duty to extract and pay any statutory dues for the claimant while away from duty.

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

- a. Salary arrears for the period of November, 2013 to February, 2018 at Total areas Ksh.4, 694,756.**
- b. Unpaid salary for the period of 20<sup>th</sup> January, 2020 to April, 2020 awarded at ksh.525,196.45;**
- c. The dues a) and b) above are payable with interests from the date due until payment in full at court rate interests;**
- d. As both parties are in an employment relationship and to ensure continued industrial peace the claimant is awarded 50% of his costs.**

**Delivered electronically and dated this 24<sup>th</sup> July, 2020 at 0900hours.**

**M. MBARU**

**JUDGE**