



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 33 OF 2020

IN THE MATTER OF ARTICLES 41, 47 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

DAVID WARAMBO ODEE.....PETITIONER

v

KENYA FORESTRY RESEARCH INSTITUTE.....RESPONDENT

JUDGMENT

Background

1. David Warambo Odee (Petitioner) was employed as a Trainee Technical in Research conservancy of the Forest Department in the Ministry of Environment and Natural Resources in 1979.
2. On or about 5 July 2016, the Director of Kenya Forestry Research Institute (KEFRI) wrote to the Petitioner to note that he (the Petitioner) had not reported back to work after the completion of his study leave (granted in 2007 and extended until December 2010).
3. The letter directed the Petitioner to resume work and also to give an explanation for the absence within 14 days.
4. In a response dated 18 July 2016, the Petitioner stated that he had reported back after completion of the study leave but due to collaborations between KEFRI, the European Union and CEH (host institution), where he served as an unpaid Research Scientist, he spent time between the institutions.
5. KEFRI replied to the Petitioner's explanation on 23 September 2016 and appreciated the good work he had done but instructed that he (Petitioner) start operating from the official duty station (KEFRI offices) with effect from 1 October 2016.
6. Through a letter dated 29 September 2016, KEFRI assured one of its partners of continued collaboration and the availability of the Petitioner to give any required support in the implementation of project deliverables.
7. The Petitioner, it appears fell sick and in a letter dated 30 September 2016 informed the Director of KEFRI that he had undergone emergency surgery and would return to work on 20 January 2017 as advised by his doctor.
8. On 18 August 2017, the Petitioner communicated with KEFRI concerning the sick leave and in a response dated 21 August 2017, KEFRI advised the Petitioner on the provisions of the Human Resource Manual on sick leave (the Petitioner was advised that he had exhausted his sick leave days and would be placed on half salary for 3-months effective 1 August 2017).
9. On 16 October 2017, KEFRI notified the Petitioner that his sick leave had lapsed and therefore he was construed as being absent without permission from 9 October 2017. He was informed that his salary would be stopped from 1 October 2017 and also requested to explain his

whereabouts within 7 days.

10. Alarmed, the Petitioner wrote to the Director on 22 October 2017 explaining that he had fallen ill during an official trip to Slovakia in March 2017 and had been undergoing treatment in the United Kingdom since then and that the decision taken to apply section 12.6(c) of the Human Resource Manual without consulting him was insincere. He further stated he had accrued leave but his application had been rejected.

11. Responding on 3 November 2017, KEFRI advised the Petitioner that after considering his case, his withheld salary for October 2017 would be released but that the salary would stand stopped from 1 November 2017 as he had exhausted his leave days.

12. The Petitioner resumed work on 29 January 2018 and on 11 February 2018 requested for a flexible work schedule which would allow him time to travel for treatment out of the country. The Petitioner sought for permission to travel out of the country on 9 February 2018 and permission was granted by the Head of Public Service on 16 February 2018.

13. The Petitioner made further requests to travel out of the country and for the reinstatement of salary.

14. On 3 April 2018, the acting Director of KEFRI wrote to the Director of Medical Services requesting that the Petitioner appears before a Medical Board to assess his suitability to continue working.

15. The Petitioner sought a review of the decision through a letter dated 14 April 2018. In the course of the month, the Petitioner was granted permission to travel out of the country for medical treatment.

16. On 29 June 2018, the acting Director KEFRI wrote to the Petitioner to inform him that effective 1 July 2018 he would revert to the position of Chief Research Scientist. As a result, the Petitioner signed a Performance contract for the period 1 July 2018 to 30 June 2019.

17. The Director of Medical Services accepted the request for Medical Board by KEFRI and on 11 May 2018, directed the convening of a Medical Board.

18. The Medical Board scheduled a meeting for 12 July 2018 and the Petitioner appeared before the Medical Board.

19. On 17 July 2018, the Petitioner sought permission to travel out of the country for medical attention. The permission was granted.

20. The Petitioner was expected on duty on 16 August 2018 and when he did not report, the acting Director KEFRI issued a show-cause dated 30 October 2018 requiring him to explain within 14 days why he had been absent without permission. He was also warned of anticipated disciplinary action.

21. The Petitioner replied to the show cause on 9 November 2018 indicating that it was absurd to issue a show-cause before the report of the Medical Board was released.

22. In a letter dated 31 January 2019 to the State Department of Public Service, KEFRI requested counselling services for the Petitioner and also indicated that the Medical Board had concluded that the Petitioner was fit to serve but should continue with medication.

23. In the course of 2019, the Petitioner made several work-related trips out of the country. On 1 August 2019, he made another request for reinstatement of salary.

24. A few days later, on 5 August 2019, KEFRI wrote to the Petitioner to notify him of intent to terminate his services based on the findings of the Medical Board and feedback from the counselling services unit.

25. The broad reasons for the notification were that the Petitioner had failed to return to work fully and because of absence without permission. The Petitioner was requested to show cause within 21 days.

26. The Petitioner responded to the show cause on 29 August 2019 and on 20 September 2019, he was invited to appear before the Board of Management of KEFRI.

27. The Petitioner appeared before the Board on 25 September 2019 and vide a letter dated 26 September 2019, he was requested to submit certain documents in support of his case.

28. The Petitioner submitted some of the documents through a letter dated 9 October 2019. In the letter, the Petitioner confirmed that he had dual citizenship (of the United Kingdom and Kenya).

29. In the meantime, the Petitioner had applied for annual leave on 19 September 2019. In a letter dated 2 December 2019, the Director informed the Petitioner that it had been noted he had proceeded on the annual leave without the approval of his supervisor and also left the country without clearance.

30. The letter asked the Petitioner to explain the absence without permission and the travel out of the country without clearance within 21 days.

31. In a response dated 18 December 2019, the Petitioner indicated that he had already resumed duty and that his superiors had failed to act

on his leave application and in the circumstances, he had to travel (medical attention).

32. On 6 February 2020, KEFRI notified the Petitioner of the termination of his services and this prompted him to move the Court through a Petition alleging breach of contract (withholding of salary) and unfair, unlawful, unconstitutional termination of employment.

33. The Petition was accompanied with a motion seeking conservatory order staying the termination of the contract.

34. On 5 March 2020, the Petitioner abandoned the application and the Court directed KEFRI to file Response to the Petition (timelines were not complied with and Court extended time on 19 May 2020).

35. KEFRI filed a Reply to the Petition on 18 June 2020, the Petitioner filed a Reply to the Defence on 17 July 2020 and submissions on 30 July 2020. KEFRI filed its submissions on 27 August 2020.

36. The Court has considered all the material placed before it.

37. The Petitioner identified some 9 questions for the determination of the Court.

38. In the view of the Court, the Issues can be condensed as examined hereunder.

Breach of contract

39. Issues 2, 8 and 9 addressed the decision by KEFRI to withhold the Petitioner's salary allegedly for not reporting to work and to further surcharge him Kshs 4,844,307/10 for days not worked.

40. The general rule is that an employer is entitled to deduct from wages for the days an employee is absent from work without leave or lawful cause. The rule has statutory backing in section 19(1)(c) of the Employment Act, 2007.

41. The general rule would mean that the employer would deduct or not pay wages for days of absence without permission or lawful cause.

42. In the case at hand, the Petitioner was on full salary for 3 months of sick leave and was thereafter placed on half salary for the next 3-months with effect from 1 August 2017. The half salary was to be paid until the end of October 2017.

43. KEFRI, however, withheld the salary for October 2017 but after an appeal by the Petitioner, the withheld salary was released but with a rider that the salary would be stopped with effect from 1 November 2017, for 3-months.

44. In taking the decision, KEFRI made express reference to section 12.6(c) of the Human Resource Manual.

45. According to the Petitioner, he reported back to work on 29 January 2018 wherein he sought for a flexible working schedule.

46. There is material on record which show that the Petitioner requested to leave the country immediately upon resumption and permission was granted severally. The Petitioner was meant to report back on 26 March 2018.

47. The Petitioner was on sick leave for more than 6 months and in terms of section E.11(3)(iv) of the Human Resource Manual could not be reinstated on the payroll without a determination on fitness by the Medical Board.

48. The Petitioner did not rebut KEFRI's contention that he had been on sick leave for over 1-year and that in terms of the Human Resource Manual he could only be reinstated into the payroll upon a determination of the Medical Board.

49. The Petitioner did also not challenge the validity or legality of the Human Resource provision or the statutory power of the Respondent to deduct wages for days absent from work without permission or lawful cause.

50. This head of the claim was further in the nature of special damages.

51. The Petitioner did not meet the threshold of proving that there was a breach of contract. Relief is declined.

52. On the question of surcharge, the Court finds that the decision to surcharge the Petitioner for the days he did not report to work had no contractual or any other legal basis.

Unfair termination of employment

53. The Petitioner set out the question of the unfairness of termination of his employment as Issues 1, 3, 4, 5, 6 and 7.

Procedural fairness

54. Although the Petitioner gave this head of the claim a constitutional flavour, it was an Issue which could be determined on the basis of statutory law and contractual agreements (Human Resource Manual).

55. Section 35(1)(c) of the Employment Act, 2007 envisages written notice of termination of employment of at least 28 days where the employee is paid by the month while section 41 on the other part contemplates affording the employee an opportunity to make representations where the ground for termination is *misconduct, poor performance and/or physical incapacity*.
56. The grounds advanced for the termination of the Petitioner's employment generally fall under *misconduct and physical incapacity*.
57. KEFRI first issued a letter to the Petitioner on 5 July 2016 instructing him to report back to work. He was also given 14 days to explain the absence from duty. The Petitioner replied on 18 July 2016.
58. KEFRI accepted the explanation but directed the Petitioner through a letter dated 23 September 2016 to report and work from its offices from 1 October 2016.
59. Upon receiving the directive the Petitioner brought up the issue of having been hospitalised for emergency surgery and indicated that he would resume duty on 20 January 2017.
60. On 18 August 2017, the Petitioner sought for sick leave and by a letter dated 21 August 2017, KEFRI advised him that he had exhausted his sick leave with full pay entitlement and that he should inform the Management of his whereabouts otherwise he would be treated as being absent without leave.
61. When the Petitioner's sick leave lapsed on 8 October 2017, he did not report to work and on 16 October 2017, he was instructed to explain his absence within 7 days.
62. In his explanation dated 22 October 2017, the Petitioner stated that he had not been absent without leave but had failed to submit his sick leave certificates due to an oversight.
63. KEFRI advised the Petitioner on 3 November 2017 that he had exhausted all his sick leave and would not be entitled to a salary from 1 November 2017 and that it looked to his return to work.
64. The Petitioner reported back on 29 January 2018 and sought permission for a flexible working schedule. The Petitioner then sought severally and got travel clearance to get out of the country until his case was referred to the Medical Board.
65. On 30 October 2018, KEFRI issued a formal *show-cause* notice to the Petitioner and the allegations were not reporting back to work by 16 August 2018 after the expiry of foreign travel permission. The Petitioner was asked to respond within 14 days.
66. The Petitioner responded on 9 November 2018 in which he contested the bona fides of the *show-cause notice* on the ground that the Medical Board had not released its report on his fitness to work within 2 weeks as promised.
67. On 5 August 2019, KEFRI notified the Petitioner of intention to terminate the contract and the allegations given were
- (i) Failing to fully return to work after the expiry of study leave in 2010.
Failing to return to work after and 5 July 2016, and failing to explain his whereabouts after the expiry of the study leave.
 - (ii) Failing to inform the office of whereabouts after study leave
68. KEFRI gave the Petitioner 21 days to *show-cause* and he replied on 26 August 2019.
69. Consequent upon the response, KEFRI through a letter dated 20 September 2019 invited the Petitioner to a disciplinary hearing to be held on 25 September 2019. The Petitioner attended the hearing but KEFRI not being satisfied requested him to furnish it with certain documents to support his explanation(s). The Petitioner submitted some of the documents on 9 October 2019.
70. On 2 December 2019, KEFRI issued another *show-cause notice* asking the Petitioner to explain why he had proceeded on annual leave without approval. He was asked to explain within 21 days. The Petitioner responded on 18 December 2019.
71. On 6 February 2020, KEFRI notified the Petitioner of the termination of his employment and the reasons given were briefly
- Failure to return to work after 5 July 2016 and from 22 September 2016 to date of termination.
 - Failure to explain whereabouts fully after December 2010.
 - Failure to disclose dual citizenship within 3 months after attaining dual citizenship.
72. The Petitioner was issued with *show-cause letters* (s) such as those dated 21 August 2017, 16 October 2017, 5 July 2018 and 2 December 2019.
73. The Petitioner was accorded time to respond in writing to the allegations. He did respond.

74. KEFRI subsequently called the Petitioner to attend an oral hearing which he attended.

75. Based on the evidence on record, the Court is satisfied that KEFRI was in substantial compliance with the requirements of procedural fairness as envisaged by sections 35(1)(c) and 41 of the Employment Act, 2007 as read with Article 41 of the Constitution and the Human Resources Manual.

Substantive fairness

76. KEFRI gave 3 primary reasons for terminating the Petitioner's contract in the letter dated 6 February 2020 and the Court has outlined them in the preceding paragraphs.

77. These were the reasons KEFRI was expected to prove in terms of sections 43 and 45 of the Employment Act, 2007.

78. In an effort to discharge the burden, KEFRI filed a witness statement by the Chief Executive Officer and several documents.

79. In justifying the decision to terminate the Petitioner's contract, KEFRI contended that each employee had an obligation to be present at the place appointed for work and in case of absence to inform the employer.

80. And to demonstrate that the Petitioner did not fulfil that contractual obligation, it was contended that the Petitioner did not report back to work after concluding his study leave in December 2010.

81. According to KEFRI, the Petitioner was not at the head office or any of its research stations from 2011 to 2017.

82. According to KEFRI, the Petitioner spent most of his time in the United Kingdom, neglecting his job in Kenya and making only technical appearances to apply for permission to travel out of the country and that he did not sign any performance contracts from 2011 to 2019.

83. KEFRI also asserted that the Petitioner failed to file reports after attending numerous conferences, failed to file performance appraisal forms, tax returns and/or disclose that he had dual citizenship.

84. To support the assertion that the Petitioner was not reporting to work, KEFRI stated that the Petitioner was not appraised in 2014/2015 and 2015/2016 and that the appraisals for 2017/2018 and 2018/2019 were incomplete or not signed.

85. On whether the Petitioner had lawful cause to be away (sick leave), it was contended that the Petitioner was absent for about 1 year 5 months (the period for which no sick/medical records were made available).

86. In this regard, as an illustration, it was stated that the Petitioner had 14 days sick leave from 22 September 2016 to 6 October 2016 but he was away for 5 months and 13 days (was not at work from 7 October 2016 to 19 April 2017); had 6 weeks sick leave from 9 October 2017 to 20 November 2017 (but only reported on 1 March 2018).

87. According to KEFRI, the Petitioner failed to uphold the values and principles expected of public officers spelt out in Article 232 of the Constitution and had his contract terminated due to his conduct and compatibility.

88. As part of the disciplinary hearing, the Petitioner was requested to furnish KEFRI with certain documents such as copies of approvals to work from the offices of the Centre for Ecology and Hydrology in the United Kingdom, performance appraisals, passports and visas. The Petitioner did not submit all the documents.

89. The failure to submit approvals to work from the Centre for Ecology and Hydrology and appraisal forms give credence to the assertion by KEFRI that the Petitioner was not at work as required and/or mainly made technical appearances in the workplace, otherwise, he would have been evaluated.

90. The Petitioner could only produce some unsigned copies of appraisal forms dated 2017.

91. The state of the record shows that the Petitioner was not ready to serve his employer with dedication. He was mostly out of the country, sometimes as a *visiting scientist* even while failing to report to KEFRI offices on grounds of ill- health.

92. The last *show-cause notice* to the Petitioner alleged that he had gone on leave without permission or approval. The Petitioner admitted that his supervisors *would not act on it* (leave application) dated 19 September 2019. The leave was to commence on 1 October 2019.

93. It is true that the Petitioner had a medical appointment in October 2019, but it is equally true that within the same time the Petitioner sought clearance to travel for a meeting in Boulder Colorado. The request was kept pending submission of certain documents by the Petitioner.

94. The Petitioner did not submit all the documents.

95. It is perplexing that the Petitioner was ready to attend conferences outside the country but fail to appear at the appointed workplace in Kenya on the grounds of ill-health.

96. The reasons for the Petitioner's failure to attend work kept mutating during the contractual relationship.

97. What the record shows is a problematic relationship between the Petitioner and his employer. Despite having a medical appointment, the Petitioner went on leave before securing approval. If he had only gone for the appointment, he might have had lawful cause to be away from work.

98. The Court is satisfied that KEFRI had and has proved valid and fair reasons to terminate the Petitioner's employment.

Harassment and torture

99. Although pleading damages for harassment and mental torture, the Petitioner did not prove in any way that he was subjected to harassment and mental torture by KEFRI.

100. Equally not proved were the allegations of financial and emotional embarrassment.

101. Before concluding, the Court notes that the Petition raised many disputed facts which would have been legally prudent to be interrogated through cross-examination. The Petition also did not raise any significant constitutional questions.

Conclusion and Orders

102. From the foregoing, the Court finds no merit in the Petition, and it is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 2nd day of October 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. K'opere instructed by T. O. K'opere & Co. Advocates

For Respondent Mr. Odukenya, Litigation Counsel, Office of the Hon Attorney General

Court Assistant Judy Maina