



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 480 OF 2017**

**DUNCAN MUGANE.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF EMBU.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent averring that he was at all material times an employee of the Respondent under the terms and conditions of an employment contract entered into during the Respondent's former status of the Municipal Council of Runyenjes. The Claimant averred that she applied for and obtained the Respondent's approval of a paid study leave period of 2 years commencing on 19<sup>th</sup> November 2010 to the 31<sup>st</sup> October 2012. The Claimant averred that by a letter dated 17<sup>th</sup> February 2012 the Respondent stopped payment of the study leave agreement stopped payment of the Claimant's monthly salary and immediately thereafter coerced him to tender resignation from employment on 14<sup>th</sup> September 2012. The Claimant averred that he was entitled to 7 months salary arrears from 1<sup>st</sup> January 2012 to 30<sup>th</sup> June 2012 the month of August 2012 amounting Kshs. 393,160/- which despite demand the Respondent. The Claimant averred that he was entitled to the leave for the year 2010/2011 to the year 2011/2012 amounting to Kshs. 2,904,158/-.

2. The Respondent in its defence averred that the Claimant was not entitled to the sum of Kshs. 393,160/- being his unpaid salary for 7 months. The Respondent put him on strict proof. The Respondent averred that the claim and the amount stated does not make sense, is ridiculous and untenable and should be dismissed with costs.

3. The Claimant and the Respondent consented to disposing the matter on the basis of documentation filed. The Claimant and the Respondent each filed documents and submissions in denied that their respective cases. The Claimant attached the letter dated 31<sup>st</sup> August 2010 requesting for study leave, the letter communicating the decision of the Municipal Council of Runyenjes under the hand of the Town Clerk Maina Wa Njoroge dated 9<sup>th</sup> December 2010, extract of the minutes of the finance staff and general purposes committee held on 11<sup>th</sup> November 2010 in the Municipal Council of Runyenjes Social Hall, the extract of the minutes of the ordinary council meeting held on 26<sup>th</sup> November 2010 adopting the finance, staff and general purposes committee minutes of 11<sup>th</sup> November 2010, a letter dated 11<sup>th</sup> May 2012 referenced 'absenteeism – Duncan M. Gichovi' from the Municipal Council of Runyenjes, the Claimant's resignation letter dated 14<sup>th</sup> September 2012 and the Respondent's acceptance of the Claimant's resignation dated 17<sup>th</sup> June 2014. The Respondent on its part annexed the Claimant's letter to the County Administrator Embu County dated 27<sup>th</sup> June 2014; the Claimant's letter of 21<sup>st</sup> June 2013 seeking remittance of the unpaid remuneration; the Claimant's letter for study leave dated 31<sup>st</sup> August 2010; the letter communicating the decision of the Municipal Council of Runyenjes under the hand of the Town Clerk Maina Wa Njoroge dated 9<sup>th</sup> December 2010; an extract of the minutes of the finance staff and general purposes committee held on 11<sup>th</sup> November 2010 in the Municipal Council of Runyenjes Social Hall; the extract of the minutes of the ordinary council meeting held on 26<sup>th</sup> November 2010 adopting the finance, staff and general purposes committee minutes of 11<sup>th</sup> November 2010; a letter dated 11<sup>th</sup> May 2012 referenced 'absenteeism – Duncan M. Gichovi' from the Municipal Council of Runyenjes; a letter dated 25<sup>th</sup> May 2012 from the Claimant; the Claimant's letter dated 5<sup>th</sup> October 2010 seeking a salary loan; the Claimant's letter of offer from the University of Nairobi dated 6<sup>th</sup> August 2010; the Claimant's pay certificate dated 30<sup>th</sup> May 2008; the Claimant's resignation letter dated 14<sup>th</sup> September 2012 and the Respondent's acceptance of the Claimant's resignation dated 17<sup>th</sup> June 2014.

4. The Claimant submitted that the Respondent had unprocedurally stopped his salary despite his adherence to the terms of the study leave. He submitted that the Respondent's failure to pay his salary forced him to resign. He submitted that the Respondent from its defence did not dispute the facts surrounding the claim but took issue with the sums claimed. He submitted that the Respondent promised to settle the dues the Claimant was entitled to upon the handover of the assets and liabilities of the defunct Municipal Council of Runyenjes. The Claimant submitted that on basis of the correspondence the Respondent was estopped from contesting the sum sought.

5. The Respondent submitted that the issue for determination was whether the Respondent owed the Claimant any dues and whether the Claimant honoured his obligation regarding the study leave granted. The Respondent submitted that the Claimant was granted study leave on condition that he would avail himself once every fortnight to attend to weighty issues in his department. The Respondent submitted that the Claimant did not sign documents or deal with issues arising in his department for long periods of time prompting the letter dated 11<sup>th</sup> May 2012. He responded on 25<sup>th</sup> May 2012. The Respondent submitted that the Claimant stated in the first paragraph of his reply that his last salary was in December 2011 and that he stopped reporting to the office every fortnight. The Respondent submitted that the Claimant subsequently resigned. The Respondent submitted that the correspondence the Claimant adverted to about admission of liability was a stock letter issued to all who had claims against the defunct municipal councils and that the work of the Transition Authority in regard to payments was to enable the state organ to verify the liabilities and conclude a nationwide audit of assets and liabilities before any action could be taken by the county government. The Respondent submitted that the letter was not an admission of debt as claimed by the Claimant. The Respondent submitted that on the principle of 'no work no pay' the Claimant was not entitled to receive payment for days he did not work for the Respondent. The Respondent submitted that he who comes to equity must come with clean hands and asserted that the Claimant had

claimed dues for 2011 yet he admitted receipt of salary up to December 2011. The Respondent urged the court to dismiss the claim as the Claimant wanted to reap where he did not sow at the expense of the tax payer.

6. The Claimant was from all correspondences availed by the parties permitted to for study leave. He had a condition to fulfil which was attendance once every fortnight at the Respondent to attend to critical issues at his department in the Respondent. It would seem there was a contest as to whether he attended as agreed. The Respondent accused him of absenteeism and he denied it. The employer as required under Section 74 of the Employment Act should have kept records of the employee and show evidence the employee failed to attend or failed to perform duties. He was not shown to have failed to appear at work and his letter protesting what he termed as false accusations was not rebuffed with proof of his absenteeism. On a balance of probabilities he was not absent given the absence of any evidence that he was. The Respondent is however right that there is no pay for no work done. The Claimant ceased attending the office in 2012 and was therefore not entitled to either leave dues or any pay for the days not worked. He was entitled to recover only the unpaid dues from 2011. From the record before me, it seems the Claimant ceased attending his workplace in March 2012. If he was not paid from December 2011 it means he was not paid for 3 months. He would therefore be entitled to recover the salary for the 3 months and no more. He was earning Kshs. 56,165.70 based on his unpaid salary claim. He would therefore be entitled to Kshs. 168,497.10 as unpaid salary arrears. He resigned after the stoppage of salary which amounts to constructive dismissal and for that he would be entitled to recover compensation which I fix at 3 months for the said unlawful dismissal. He is also entitled to costs of the suit as well as interest on the sums he is awarded from date of judgment till payment in full. The rest of the claims were unproved and are accordingly disallowed. In the final analysis I enter judgment for the Claimant against the Respondent as follows:-

- a. Kshs 168,497.10 being salary for the months of January, February and March 2012 when he was unpaid but was still attending work;
- b. Kshs. 168,497.10 being 3 months compensation for the unlawful constructive dismissal
- c. Cost of the suit
- d. Interest at court rates on a) and b) above from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 31<sup>st</sup> day of October 2019**

**Nzioki wa Makau**

**JUDGE**