# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

*(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

## PETITION NO. E048 OF 2024

–BETWEEN–

**DR. MAGARE GIKENYI ..... APPELLANT**

–AND–

**COUNTY GOVERNMENT OF NAKURU ..... 1ST RESPONDENT**

**THE NAKURU COUNTY PUBLIC SERVICE BOARD ..... 2ND RESPONDENT**

**COUNTY SECRETARY, NAKURU COUNTY GOVERNMENT ..... 3RD RESPONDENT**

**CHIEF OFFICER OF HEALTH, NAKURU COUNTY GOVERNMENT ..... 4TH RESPONDENT**

**DIRECTOR MEDICAL SERVICES, NAKURU COUNTY GOVERNMENT ..... 5TH RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nakuru (**Warsame, Ochieng & Achode, JJ. A**) delivered on 11th October, 2024 in Civil Appeal No. E007 of 2020)*

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Representation:

Dr. Magare Gikenyi the Appellant
(*In person*)

Ms. Maureen Litunda for the 1st to 5th Respondents
(*Office of the County Attorney, Nakuru County Government*)

## JUDGMENT OF THE COURT

## A. INTRODUCTION

**[1]** This appeal invokes the Courts' appellate jurisdiction under Article 163(4)(a) of the Constitution. According to the appellant, Dr. Magare Gikenyi, this appeal turns on the interpretation and application of the Constitution. The germane issue that cuts across the grounds of appeal is whether the respondents followed due process as enshrined under Article 47 of the Constitution before stopping the payment of the appellant's salary. Concomitantly, this Court has been called upon to determine whether the respondents, in taking the aforementioned administrative action, violated the appellant's rights and fundamental freedoms under Articles 1 (sovereignty of the Kenyan people), 3(defence of the Constitution), 10 (national values and principles of governance), 25 (non-derogable rights and freedoms), 41 (right to fair labour practices), 43 (economic and social rights), 47 (right to fair administrative action), 232 (values and principles of public service) and 236 (protection of public officers) of the Constitution.

## B. BACKGROUND

### *(i) Factual History*

**[2]** The appellant joined public service on 14th January, 2008 as a Medical Officer (intern) engaged by the then Ministry of Health. Subsequently and upon devolution of health services from the National Government, his services were transferred to the County Government of Nakuru (the County Government) in 2013 where he was employed as a Senior Medical Officer. Thereafter, by a letter dated 2nd September 2013, the appellant was admitted to undertake a Masters of Medicine Degree in General Surgery (MMed Surgery) at Moi University, School of Medicine. He therefore applied and was granted 4 years paid study leave with effect from 22nd October 2013. At that point in time, he was the Medical Officer in-charge (Medical Superintendent) of Elburgon Nyayo Hospital, a sub-county hospital of the County Government.

**[3]** As part of his Masters programme, the appellant was attached to the Moi Teaching and Referral Hospital (the Referral Hospital) by the university. During the course of his programme, several national industrial actions by the University's Academic Staff Union (UASU), the Kenya Medical Practitioners, Pharmacist and Dentist Union (KMPDU) and the Kenya National Union of Nurses (KNUN) took place, all of which affected programmes at Moi University, and in turn, prolonged the appellant's duration of study. According to the appellant, he wrote to the 4th respondent, the Chief Officer of Health in the County Government, on 20th May 2018 and 5th October 2018 informing him of the industrial actions and the effect they had on completion of his Masters programme. The appellant maintains that he never received any response from the 4th respondent. Furthermore, in 2018, the appellant was suspended from both Moi University and the Referral Hospital on disciplinary grounds. Nonetheless, he successfully challenged the suspension in court vide **Eldoret HC Judicial Review Applic. Nos. 1 & 2 of 2018**. Consequently, he resumed his studies and attachment at the Referral Hospital.

**[4]** Further to the above, the appellant pleaded that, in November 2018, he and his family went to Woolmart Supermarket in Nakuru to purchase some items. He was certain that by this time his salary had been credited to his account by the County Government. However, upon presenting his visa card for payment of the goods, it was declined due to insufficient funds. Accordingly, the appellant, had no option but to return the goods he had sought to purchase. Later, he also received calls from his bank with regard to non-payment of his financial obligations. In his view, this state of affairs could only mean that either the County Government had stopped payment of his salary and/or terminated his services without notice. It is on that basis that the appellant wrote to the respondents on 27th November 2018, 12th February, 2019 and 13th February, 2019

seeking an explanation as to why payment of his salary had been stopped and/or his services terminated. He claimed that his letters and emails went unanswered.

### *(ii) Litigation History*

#### *(a) At the Employment and Labour Relations Court*

**[5]** Based on the foregoing, the appellant filed a statement of claim on 22nd March, 2019 at the Employment and Labour Relations Court, being **ELRC Case No. 22 of 2019**, which was later amended on 4th September, 2019. In summary, the appellant claimed that the delay in conclusion of his studies was occasioned by circumstances beyond his control. Furthermore, the appellant averred that he had informed the respondents of the circumstances that occasioned the delay. As far as he was concerned, the respondents' conduct was malicious as they stopped payment of his salary and/or terminated his services without any justifiable reason, notice or an opportunity to be heard contrary to Articles 47 and 50 of the Constitution.

**[6]** The appellant argued that his visa card was declined due to the stoppage of his salary, and the same not only occasioned him distress and humiliation but also affected his standing in public and his family. He further asserted that the respondents' conduct portrayed him as an impecunious man who lived beyond his means. Moreover, that the stoppage of his salary meant that he was unable to meet any of his financial obligations and violated his right to dignity under Article 28. Additionally, that he continued with his studies and attachment at the Referral Hospital without pay which was tantamount to servitude and contrary to Article 30 of the Constitution. Besides, it was urged that in contrast, two of his colleagues, who faced similar circumstances, reached out to the 4th respondent and their salaries were reinstated. In that regard, the appellant's position was that the respondents had discriminated against him on account of his ethnicity and being from a marginalised community contrary to Article 27 of the Constitution. He also

claimed that the respondents' actions violated his right to fair labour practices under Article 41 of the Constitution.

**[7]** Lastly, the appellant contended that, despite being promoted by the County Government from job group 'M' to 'N' with effect from 30th October 2013 vide a letter dated 5th February 2014, he had not been paid his incremental salary which accrues annually on every 1st of October. Furthermore, it was his position that the County Government failed to remit his NSSF, NHIF and PAYE contributions.

**[8]** Ultimately and for the above reasons, the appellant sought the following reliefs:

*a) A declaration that the appellant's employment was constructively terminated on 15th October, 2018.*

*b) A declaration that the appellant's salary stoppage (sic) and termination of his services was unlawful and unfair.*

*c) An order reinstating the appellant 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(sic) and termination of his services.*

*e) A declaration that the respondents violated the appellant'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 and/or breach of the appellant's constitutional rights in prayer (e) above.*

*g) General and punitive damages for libel.*

*h) An award of damages as contemplated under Section 12 of the Employment and Labour Relations Court Act.*

*i) Costs of the suit and interest on the sum awarded at court rates.*

j) *Any other or further relief the Honourable Court may deem fit to grant.*

**[9]** Apart from a replying affidavit sworn by the 5th respondent in response to the appellant's application dated 22nd March 2019 seeking reinstatement of his salary pending the determination of the suit (which was dismissed), the respondents did not file any statement of defence. In that affidavit, the respondents posited that following his admission at Moi University, the appellant was granted 4 years paid study leave with effect from 22nd October 2013. The study leave was to conclude at the end of October 2017 but the appellant failed/neglected to resume his duties with the County Government. Consequently, on 31st August 2018, the respondents wrote to the Dean of Moi University, School of Medicine inquiring about the status of not only the appellant's studies but also of other doctors in the County Government's employment who were pursuing the same programme. By a letter dated 3rd October 2018, the Dean informed the respondents that the appellant had been suspended in early 2018 from his studies on disciplinary grounds.

**[10]** On the basis of the aforementioned feedback, coupled with the fact that the appellant had neither informed the County Government of his suspension from the University nor resumed his duties, the County Government deemed the appellant as having absconded from his duties. As a result, the 4th respondent took administrative action of stopping payment of the appellant's salary in line with Clause K.8 (1) of the Human Resource Policies and Procedures Manual for the Public Service, 2016. The said clause permitted the County Government to stop the payment of the salary of a public officer, such as the appellant, who is absent from duty without leave or reasonable cause for a period exceeding 24 hours, and cannot be traced within a period of 10 days from the commencement of such absence. In addition, the respondents posited that contrary to the appellant's contention, he was informed of the reasons for stoppage of payment

of his salary. Therefore, the respondents maintained that the appellant's services were not terminated, and that stoppage of payment of his salary was lawful and procedural.

**[11]** With regard to the other doctors referred to by the appellant, the respondents claimed that following the stoppage of payment of their salaries, the said doctors reported to the 4th respondent's office to clarify their position. Moreover, the said doctors followed up with the University which formally confirmed they were still continuing with their studies. It was on that basis, the respondents postulated, that the payment of salaries of the named doctors were reinstated. The respondents averred that the appellant on his part did not take any of the aforementioned actions despite being prompted to do so.

**[12]** On the issue of the appellant's promotion, the respondent conceded that the appellant had indeed been promoted from Job group 'M' to 'N' with effect from 30th October, 2013. Nevertheless, it was asserted that the salary incremental adjustments had not been paid to all doctors who had been promoted, including the appellant, due to budgetary constraints. In point of fact, that the said arrears were to be paid in December, 2018 save that payment of the appellant's salary had been stopped by then and therefore he did not receive the said arrears.

**[13]** All in all, the respondents' position was that none of the appellant's rights and fundamental freedoms had been violated as alluded to. Moreover, that the appellant was not entitled to the damages sought with respect to the alleged violations.

**[14]** The matter proceeded for formal proof where only the appellant testified. Subsequently, the appellant and respondents filed written submissions in support of their respective cases. It is instructive to note that during the hearing period, the appellant completed his Masters programme and reported back to the County Government on 21st December, 2019 with a completion certificate from the Dean of Moi

University. He was then posted for duty on 13th January 2020 by the 4th respondent. According to the appellant's testimony in court, even upon being posted back on duty in January 2020, the County only resumed paying his salary from May 2020.

**[15]** The ELRC (*Mbaru, J.*) by a judgment dated 24th July, 2020 delineated six issues arising for determination. *On whether there was constructive dismissal of the appellant*, the learned Judge held that neither the appellant nor the County Government had terminated their employer/employee relationship. In any event, the court held that stoppage of payment of the appellant's salary is not synonymous with termination of employment.

**[16]** The court went on to find that the appellant's study leave was for a fixed period of 4 years. Therefore, having commenced on 22nd October 2013, the appellant's study leave ought to have concluded on 21st October 2017. While acknowledging that the industrial actions were beyond the appellant's control, the court found that he was still required to seek extension of his study leave from the respondents, which he failed to do. The trial court observed that up until the appellant's letter dated 20th May 2018, there was no communication on his part to the respondents on his whereabout and/or the extension of his study leave. Moreover, the court also found the appellant was guilty of material non-disclosure of his suspension from the university which fact affected his study period. In totality, the learned Judge held that the appellant was absent from his duty station without approval of the County Government from 21st November 2017, when his study leave concluded.

**[17]** In the circumstances, the court found that the respondents were justified to stop payment of the appellant's salary in line with Clause K.8 (1) of the Human Resource Policies and Procedures Manual for the Public Service, 2016. Besides, the court also made reference to Section 19(1)(c) of the Employment Act, Cap 226 which, according to the trial Judge, grants an employer the right to deduct the wages/salary due for each

day to an employee who is not at work for no good cause. Based on the foregoing, the learned Judge took issue with the County Government for continuing to pay the appellant's salary after the conclusion of his study leave from 21st October 2017 until November 2018 when payment thereof was stopped. According to the court, the same amounted to misuse of public funds.

**[18]** As to *whether the respondents' conduct of stopping payment of the appellant's salary amounted to defamation*, the court held that the effects of rejection of the appellant's visa card for insufficient funds could not be visited upon the respondents. The trial Judge held instead that, the respondents were not privy or parties to the agreement upon which the visa card was issued to the appellant. In any event, the court found that the responsibility lay with the appellant to confirm his bank balance or sufficiency of funds before presenting his visa card for payment.

**[19]** *Pertaining to the allegation of discrimination*, the court held that the said claim had no merit since the circumstances leading to the absence of the appellant's colleagues from work, the stoppage of payment of their salaries and subsequent reinstatement of the same could not apply to justify the appellant's absence from his work station without the County Government's permission. In any event, the learned Judge held that the stoppage of payment of the appellant's salary during the period of his absence from work without permission could not be the basis of a claim violation of his rights.

**[20]** *On the issue of the incremental salary arrears*, the trial Judge found that it was common ground that the appellant had been promoted from Job Group 'M' to 'N' with effect from 30th October 2013. Therefore, based on the appellant's submissions, the court computed the incremental salary arrears due to him from November 2013 to February, 2018 at Kshs. 4,694,756. Nevertheless, relying on the same submissions, the trial Judge found that the appellant had made no claim for the incremental salary

arrears from March 2018 to October 2018. Further, the court held that from the period between November 2018, when appellant's salary was stopped, and 20th January 2020, when he resumed his duties with the County Government, the appellant had not performed any duties and as such, was not entitled to any salary incremental arrears.

**[21]** *On the issue of unpaid salary*, the trial court found that the appellant was entitled to payment of his salary from 20th January, 2020 when he resumed his duties with the County Government until April 2020 when the payment of salary was resumed. The unpaid salary was calculated at Kshs. 525,196.45. Lastly, on the issue of payment of NSSF and PAYE, the court found that no particulars of the aforementioned claim were given by the appellant. Nonetheless, the learned Judge held that all dues paid to the appellant are subject to Section 49(2) of the Employment Act and ought to be remitted by the employer to the relevant agencies.

**[22]** In the end, the trial court entered judgment against the respondents jointly and severally as follows:

***a) Payment of incremental salary arrears for the period of November, 2013 to February, 2018 at total of Kshs.4, 694,756 to the appellant.***

***b) Payment of unpaid salary for the period of 20th January, 2020 to April, 2020 awarded at Kshs.525,196.45.***

***c) The dues in 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 appellant was awarded 50% of his costs.***

### *(b) At the Court of Appeal*

**[23]** Aggrieved with ELRC'S decision, the appellant filed an appeal in the Court of Appeal, **Civil Appeal No. E007 of 2020**. The Court of Appeal (*Warsame, Ochieng & Achode, JJ.A*), found that the appeal revolved around three issues, namely, *whether the appellant was constructively terminated; whether the withholding and stopping of the appellant's salary was in line with the provisions of Articles 25, 41, and 47 of the Constitution as read together with the Fair Administrative Actions Act; and whether the appellant's rights under the Constitution were violated, and if so, which ones and in what manner*?

**[24]** The Court of Appeal, just like the trial court found that the respondents were justified in stopping the payment of the appellant's salary on account of his failure to notify his employer of the delay in completion of his studies as well as being absent from duty without permission. The appellate court also found that none of the appellant's rights had been violated. Ultimately, by a judgment dated 11th October 2024, the Court of Appeal dismissed the appeal before it and upheld the ELRC's decision.

### *(c) At the Supreme Court*

**[25]** Undeterred, the appellant has filed this second appeal challenging the Court of Appeal's decision. According to him, the appeal turns on the determination of the following issues:

i. *Whether administrative action can legally and constitutionally be undertaken without due process as envisaged in Article 47 read with the Fair Administrative Action Act, and if not, what is the legal effect of unconstitutional action and/or omission (sic).*

ii. *Whether the superior courts below were constitutionally justified in stopping the respondents from paying the appellant's withheld*

*salaries whereas the respondents were willing to pay the said amount.*

iii. *Whether there was invidious discrimination and violations of other rights and fundamental freedoms under Articles 27,28,30,41 and 43 of the Constitution; and if so, whether such violations can be compensated in damages.*

**[26]** Based on the foregoing, the appellant seeks the following reliefs: -

*(a) The judgment of the Court of Appeal delivered on 11th October, 2024 be set aside.*

*(b) A declaration that, before an administrative action is undertaken, a decision maker should at all times ensure that due process as envisaged in inter alia Article 47 of the Constitution read with the Fair Administrative Action Act, 2015 is followed without any exception.*

*(c) A declaration that the administrative action which was undertaken by the respondents of abruptly withholding and stopping of the appellant's salary(sic) without due process was contrary to Articles 1, 3, 10, 25, 41, 43, 47, 232 & 236 of the Constitution as read with the Fair Administrative Action Act, 2015 hence the same was unfair, unlawful, null and void.*

*(d) A declaration that the actions and/or omissions of the respondents against the appellant was discriminatory contrary to Article 27 of the Constitution.*

*(e) This Court be pleased to give detailed test/points to consider on the following:*

*(i) Principles of application of invidious discrimination.*

*(ii) Application of due process and Fair Administrative Action Act.*

*(iii) Principles applied on constructive termination and doctrine of frustration.*

*(f) An award of general and exemplary/punitive damages for violations of various rights and fundamental freedoms inter alia, (i) right to equality and freedom from discrimination; (ii) right to dignity; and (iii) right to fair labour practices.*

*(g) The Court be pleased to direct the respondents to release the appellant's withheld salaries with interests for the duration of November 2018 to January 2020 amounting to Kshs. 3,888,450.*

*(h) Any other order or/and modification of the appellant's prayer(s) which the Court may deem fit.*

*(i) The appellant be awarded costs of this appeal and costs at the superior courts.*

## C. PARTIES SUBMISSIONS

### *(i) The Appellant's Submissions*

**[27]** Having read the appellant's written submissions which he highlighted during the hearing, we note that he reiterates the claim that the respondents' administrative action of abruptly withholding and stopping payment of his salary was made without following due process. Citing the decisions in ***Pastoli Vs Kabala District Local Government Council & Others*** (2008) 2 EA 300; and ***Onyango Oloo Vs Attorney General*** [1986-1989] EA 456, he emphasises that a cardinal rule of natural justice is that no one should be condemned unheard. He further contends that he did not abscond duty, and that even assuming that he did, the law provides that there should be due process prior to an adverse administrative action being taken against an

employee. To that extent, he contends that Section 67 of the Public Service Commission Act, para. 60 of the Public Service Regulations No. 3 of 2020 and Clause K.8 & K.4 of the Human Resource Policies and Procedure Manual for Public Service 2016, give an elaborate process of what is required to be done before an administrative action is taken. He posits that the aforementioned provisions do not give room for abrupt stoppage of payment of salary as was done in his case.

**[28]** According to the appellant, the impugned judgment was to the effect that failure to request for extension of his study leave and to inform the respondents of his suspension at Moi University, which action had in any event been quashed by a court order, ousted the provisions of Article 47 of the Constitution as read with the Fair Administrative Action Act. Moreover, the appellant submits that the appellate court erred by shifting the burden of justifying an unfair administrative action taken against an employee by the employer to the employee. This, he argues, is contrary to Articles 25, 47 and 232(1)(e) of the Constitution as read with Section 43 of the Employment Act

**[29]** Alternatively, he asserts that the appellate court adjudicated on irrelevant matters which were not before the court and failed to adjudicate on the main issue, which is the administrative action of stopping payment of his salary without due process. He, in that regard, invites this Court to find that the two superior courts abdicated their constitutional duty as provided in Article 50(1) of the Constitution by failing to make a pronouncement on the constitutionality of an administrative action taken without due process.

**[30]** It is the appellant's position that the respondents at the trial court, vide their written submissions, were willing to pay his withheld salaries from November, 2018 to January 2020 just as they had paid his two colleagues. Consequently, he urges this Court to order the respondents to release his withheld salary for the aforementioned period aggregating to Kshs. 3,888,450.00.

**[31]** The appellant further submits that the respondents' conduct violated his right to dignity, fair labour practices, fair remuneration, professional development, and the right to economic and social rights as provided under Articles 41 and 43 of the Constitution. In expounding on the foregoing, he maintains that the abrupt stoppage of his salary caused him financial distress, embarrassment and untold general suffering including inability to access health services as the respondents failed to remit NHIF. He also claims that he has stagnated in his career development despite the presence of a negotiated scheme of service between the union and the respondents. Making reference to the Supreme Court of Canada decision ***Doucet-Boudrea Vs Nova Scotia [Minister of Education***] M2003 SCC 62, the appellant urges this Court to award him a global sum of Kshs. 9,000,000/= as a just and appropriate remedy for violation of his rights.

**[32]** On constructive termination, the appellant maintains that he was frustrated by the respondents through omission and commission and subjected to unreasonable and harsh conditions including discrimination while still in employment. To buttress that line of argument, he refers the Court to ***Coca Cola East & Central Africa Limited Vs Maria Kagai Ligaga*** [2015] eKLR and ***Jones Vs F. Sirl & son (Furnishers) Ltd.*** [1997] IRLR 493, where it was held that "*there can still be constructive dismissal if the employee waits to leave until he has found another job to go to*."

**[33]** He therefore prays that the appeal be allowed with costs and interest.

### *(ii) The Respondents' Submissions*

**[34]** At the onset, the respondents aver that they failed to file their defence before the ELRC because the dispute was being addressed internally, leading to reinstatement of the appellant's salary. They further submit that the appellant's rights were not violated, and in any event, he has not tendered any evidence to substantiate those allegations.

They further posit that the appellant's reference to the reinstatement of salaries of two of his colleagues, by itself, does not amount to proof of discrimination against him as every case was dealt with based on its own facts and the appellant failed to seek extension of his study leave. Moreover, they contend that this Court does not have the benefit of examining the circumstances under which the salaries of the said colleagues were reinstated so as to determine whether there was discrimination against appellant.

**[35]** The respondents argue that the appellant is not entitled to an award of compensation as sought. They maintain that the appellant absconded duty, and therefore the prescribed procedure under their Human Resource Policy was followed in stopping payment of his salary. Moreover, they assert that at no point in time were the appellant's services terminated. To the contrary, that he is still an employee of the County Government enjoying all the benefits pertaining to his employment.

**[36]** Concerning the withheld salary for the period between November 2018 and January 2020, the respondents submit that the appellant was duly compensated for the duration during which payment of his salary had been stopped. In that regard, they contend that the appellant's study leave was to end in October 2017; however, he continued to draw a salary from that time until October 2018, when the 4th respondent made an administrative decision to stop further payment. The respondents further assert that the appellant absconded duty throughout this period and continued to receive remuneration for work not performed. They add that the appellant provided no plausible explanation for his failure to resume duty after the expiry of his study leave. In their view, as public entities and public officers, they are obligated to safeguard public funds and avoid unnecessary expenditure, and the stoppage of payment of the appellant's salary was justified in the circumstances.

**[37]** In conclusion, the respondents submit that all the dues owing to the appellant were duly paid and no further awards should be entertained by this Court. They urged this Court to dismiss the appeal and affirm the decision of the superior courts below.

## D. ANALYSIS

**[38]** Upon consideration of the pleadings, the impugned judgment, and the written submissions filed and highlighted by the parties, we have identified the following issues as arising for our determination in this appeal:

i. *Whether this Court has jurisdiction to entertain the appeal, and if so;*
ii. *Whether the respondents' administrative action of stopping payment of the appellant's salary was proper and lawful;*
iii. *Whether the appellant was constructively dismissed from employment;*
iv. *What remedies, if any, is the appellant entitled to?*
v. *What orders should issue?*

### *i. Whether this Court has jurisdiction to entertain the appeal*

**[39]** Although there was no challenge on our jurisdiction to entertain the appeal, this Court has a duty to independently satisfy itself that a matter placed before it properly invokes its jurisdiction. In this regard, we note that this appeal is brought as of right under Article 163(4)(a) of the Constitution, which provides that an appeal shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. In ***Nduttu & 6000 Others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR), this Court clarified the threshold to be met under Article 163(4)(a), stating:

> ***"...the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a)."***

**[40]** Moreover**,** mere assertion by a party that an appeal is founded on constitutional interpretation or application is not sufficient to invoke our jurisdiction under Article 163(4)(a) of the Constitution. An appellant must demonstrate that the constitutional issues were both raised and determined in the courts below. See ***Nicholus Vs Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties)*** [2023] KESC 113 (KLR).

**[41]** Our perusal of the record, including the pleadings, submissions, and judgments of the superior courts below, confirms that in consideration and determination of the dispute herein both superior courts were called upon to interpret and apply Articles 27, 28, 30, 41, 43, 47 and 50. These provisions were central to the reasoning and disposition by the courts below and remain the basis of the arguments advanced by the parties before this Court. In light of the foregoing, we are satisfied that this appeal meets the jurisdictional threshold under Article 163 (4)(a) of the Constitution and is properly before this Court.

**[42]** Turning to the substance of the appeal, we note that the appellant has raised certain issues for the first time before this Court. For instance, the question of violation of Articles 232 and 236 of the Constitution was never raised before nor was it considered by the superior courts below. What is more, the appellant is calling upon this Court for the first time to give a detailed test or points for consideration of: application of invidious discrimination; due process and Fair Administrative Action Act; constructive termination and doctrine of frustration; and principles to be applied with respect to the doctrine of frustration. The issue of formulation of the aforementioned tests was never tabled before the superior courts below. Besides, this Court cannot engage in an academic exercise by delving into matters which were neither considered nor determined by the superior courts below. See ***Joho & another Vs Shahbal & 2 others*** [2014] KESC 34 (KLR). Doing so would amount to this Court assuming the role of a court of first instance, a jurisdiction it does not possess. Consequently, we decline the invitation to pronounce ourselves on the aforementioned issues.

### *ii. Whether the respondents' administrative action of stopping payment of the appellant's salary was proper and lawful*

**[43]** The appellant's contention on this issue is that, contrary to the respondents' position, he never absconded from his duties. In point of fact, that the delay in completion of his studies was occasioned by circumstances beyond his control, and that he had in fact informed the respondents of the said circumstances. He further asserts that, prior to what he terms as the abrupt stoppage of payment of his salary, the respondents did not serve him with notice of such stoppage nor give him an opportunity to be heard contrary to Article 47 of the Constitution. Thus, in his view, the respondents' conduct violated his rights and fundamental freedoms protected under the Constitution.

**[44]** In ***Wanderi & 106 others Vs Engineers Registration Board & 7 others; Egerton University & another (Interested Parties)*** [2018] KESC 54 (KLR), this Court found that the question of legality or the lawfulness of an act lies at the core of Article 47(1) of the Constitution. In particular, this Court pronounced itself as follows:

> ***"[126] In examining Article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry."*** [Emphasis added]

**[45]** It follows therefore that, in determining the issue under this head, this Court must address the following sub-issues:

a) *Whether the administrative action of stopping payment of the appellant's salary was lawful.*
b) *Whether the administrative action complied with Article 47 of the Constitution and the Fair Administrative Action Act.*
c) *Whether the administrative action violated any other rights and fundamental freedoms of the appellant.*

### *a) Whether the administrative action of stopping the appellant's salary was lawful*

**[46]** The administrative action in this case pertains to the stoppage of payment of the appellant's salary by the respondents. It is not in doubt that the appellant's services were transferred to the County Government in 2013 after the devolution of

health services from the National Government. He served as a Medical Officer (Medical Superintendent) of Elburgon Nyayo hospital within the same county. In the same year, the appellant was admitted to pursue his Masters degree in General Surgery at Moi University, School of Medicine. Consequently, he applied and was granted paid study leave by the County Government to pursue his Masters. The Employment Act does not define study leave but the terms and parameters of such leave are normally delineated in the Human Resource policies of institutions of an employer or according to release letters by the employer. In the present case, the study leave, as per the release letter dated 22nd October 2013 which was issued under the hand of the County Director of Health (the 5th respondent), was granted in the following terms:

> "***REF: RELEASE LETTER***
>
> ***Following your admission to Moi University, you are hereby released to report for your post graduate studies(sic) pursue MMED (General Surgery) for four years."***

**[47]** The study leave which was for a duration of 4 years commenced on 22nd October, 2013 as per the date of the aforementioned letter and the essence of the study leave was that the County Government allowed or permitted the appellant to be away or absent from his duty station, which at the time was Elburgon Nyayo Hospital. It is not disputed that the study leave was to conclude after a duration of 4 years, that is, on 21st October, 2017.

**[48]** Equally, the appellant does not deny that after the conclusion of the study leave on 21st October 2017, he neither returned to his work station nor performed his duties as the Medical Superintendent at Elburgon Nyayo Hospital or any other duties assigned by the County Government. From the appellant's pleadings and evidence on record, the

appellant however maintains that the duration of his studies was prolonged by industrial actions which were beyond his control. We therefore understand the appellant's position to be that the industrial actions which prolonged his study period justified his absence from his work station and non-performance of his duties as assigned by the County Government after conclusion of the 4 years' study leave. We, however note that, the appellant has not demonstrated how the industrial action stopped him from performing his duties or from specifically seeking an extension of the study leave.

**[49]** What is also poignant to note is that the 4 years paid study leave that commenced on 22nd October 2013 and concluded on 21st October 2017 was through the consent of the County Government as the employer following the appellant's request for the same. The fact that there were industrial actions during the study leave period, did not by itself act to automatically extend the period of the study leave granted by the County Government. In any event, the appellant, as correctly held by the superior courts below, was required to inform the County of the intervening circumstances and therefore explain why an extension of the study leave period would be necessary. Study leave by its nature entails absence of an employee from his work station and relieves an employee from performance of his duties for a specified period with the approval of the employer. Therefore, any extension of study leave cannot be assumed or unilaterally taken by an employee without the express consent of the employer upon a specific request being made by the employee. It has to be approved by the employer as some of the terms of a contract of service include job description of the employee, the place of work and hours of work. See Section 10 of the Employment Act. These terms are so central to any contract of service to the extent that absence of an employee from his place of work without leave or permission of the employer or lawful cause may amount to gross misconduct and justify summary dismissal of the employee. See Section 44(4)(a) of the Employment Act.

**[50]** In the present case, while the appellant informed the respondents of the industrial actions vide a letter dated 20th May 2018, ***albeit almost a year after the conclusion of the 4 years' study leave period***, he did not specifically seek extension of his study leave. The said letter reads in part as follows:

> ***"RE: <u>STUDY PERIOD</u>***
>
> ***The above refers.***
>
> ***I hereby take this opportunity to explain that my study leave was to take 4 years. However, due to multiple strikes (nurses strike, doctors strike and lecturers strike) the period has been pushed forward a little due to these unavoidable circumstances.***
>
> ***<u>I expect to complete my study possibly by the end of this year.</u>***
>
> ***<u>The purpose of this letter is to kindly inform and explain the above circumstances which are beyond my control as being the reasons behind my slight extension of my study period.</u>***
>
> ***Meanwhile, thanks a lot for your continued support. Thanks in advance…"*** [Emphasis added]

It is clear from the above letter that the appellant simply informed the County Government about the industrial actions and in no way did he seek an extension of his study leave period from the County. Rather, our reading of the said letter reveals that the appellant unilaterally purported to extend his own study leave by adding the words ***"…as being the reasons behind the extension of my study period.".***

**[51]** The appellant, we have no doubt, was required to seek extension of his study leave from the County Government, which would then take a position of either approving or disallowing the application. In the instance case, the County Government did not

approve the extension of the appellant's study leave after its conclusion on 21st October, 2017. This therefore meant that the appellant's absence from his duty station and non-performance of his duties was without the County Government's approval. Moreover, we note that by a letter dated 31st August, 2018 the 5th respondent wrote to the Dean of Moi University, Medical School, inquiring about the status of the appellant's studies amongst other employees undertaking studies at the school. It is only after the University, by a letter dated 3rd October 2018 under the hand of the Dean aforesaid, did the County Government learn that the appellant had been suspended as a student. This meant that the appellant was actually not undertaking his Masters programme at that particular point of time neither was he undertaking his duties as an employee of the County at Elburgon Nyayo Hospital. In totality, the appellant neither obtained the County Government's approval for extension of his study leave nor did he have a lawful cause for not reporting back to his duty station after the conclusion of his study leave. Therefore, the respondents could not, in such circumstances, be faulted for deeming that the appellant had absconded from his duties.

**[52]** In addition to the above, and according to the respondents, based on the aforementioned circumstances they took the administrative action of stopping payment of the appellant's salary in accordance with Clause K.8 of the Human Resource Policies and Procedures Manual for the Public Service, 2016. The clause in question provided as follows:

> ***"Absence from duty without leave or reasonable lawful cause***
>
> ***K.8***
>
> ***1) Where a public officer is absent from duty without leave or reasonable or lawful cause for a period exceeding twenty-four (24) hours, and is not traced within a period of ten (10) days from commencement of such absence, the officer's***

***salary shall be stopped and action to dismiss the officer initiated."***

**[53]** It follows that from the above clause, the County Government had power to stop payment of the appellant's salary on account of his absence from duty without leave or reasonable cause. Towards this end, the 4th respondent by a letter dated 15th October 2018 directed the stoppage of the appellant's salary amongst other doctors in the following terms:

***"RE: <u>STOPPAGE OF SALARY</u>***

***The following officers were released to attend post graduate courses in Moi University and the period of study has expired without them reporting: -***

***...***

***This is to request you to stop their salary with immediate effect.***

***By a copy of this letter the respective Medical Superintendent is required to institute disciplinary procedures to the officers accordingly and report to this office the minutes and deliberations."*** *(sic)*

In our view and for reasons we have articulated above, the action of stopping payment of the appellant's salary was a natural and logical consequence of his absconding from duty for a period exceeding ten days. Accordingly, the County Government cannot be faulted for acting within the purview of its Human Resource Policies and Procedures Manual aforesaid which was binding on it and the appellant.

### *b) Whether the administrative action complied with Article 47 of the Constitution and the Fair Administrative Action Act*

**[54]** The right to fair administrative action as enshrined under Article 47 of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. See ***Shollei Vs Judicial Service Commission & another*** [2022] KESC 5 (KLR).

**[55]** Under this sub issue, the appellant's argument is that the respondents' conduct was not procedurally fair as they did not adhere to due process. More specifically, he claims that the respondents did not issue him with notice and nor was he granted an opportunity to be heard prior to the decision to stop payment of his salary.

**[56]** In ***Sonko Vs County Assembly of Nairobi City & 11 others*** [2022] KESC 76 (KLR), this Court held that the *audi alteram partem* rule, which is a facet of procedural fairness, requires that those who are likely to be directly affected by the outcome of a decision should be given prior notification of the action proposed to be taken, and an opportunity to be heard. The same procedural fairness is captured under Clause K. 8 ii) & iii) of the Human Resource Policies and Procedures Manual for the Public Service 2016 as follows:

"***K. 8***

***i)*** ***...***

***ii)*** ***The public officer shall be addressed a 'show cause letter' through his last known address by registered post.***

iii) ***If the officer does not resume duty or respond to the 'show cause' letter within a period of twenty-one (21) days, from the date of the 'show cause' letter, the case shall be referred***

***to the respective Human Resource Management Advisory Committee for summary dismissal…"***

**[57]** Our perusal of the record reveals that the respondents do not deny that they never served the appellant with notice or show cause letter referred to above. Similarly, they never gave the appellant an opportunity to be heard before adverse decisions were taken against him. Consequently and without saying more, it is our finding that the respondents did not adhere to due process to the aforementioned extent and therefore breached the appellant's right to fair administrative action under Article 47 of the Constitution. So that, although the respondents were justified to stop the appellant's salary, they failed to accord him a hearing before doing so.

### *c) Whether the administrative action violated any other rights and fundamental freedoms of the appellant*

**[58]** Under this sub issue, the appellant argues that firstly, the respondents discriminated against him based on his ethnicity and being a member of a marginalized community contrary to Article 27 of the Constitution. The basis of his contention was that the salaries of two of his colleague doctors who faced similar circumstances as he did were reinstated by the respondents.

**[59]** Firstly, and in answer to the above claims, it is well established that the burden of proof in cases of discrimination lies with the claimant, which burden in this case is to be borne by the appellant. Discrimination occurs where a person is treated differently from other persons who are in similar positions on the basis of one of prohibited grounds like race, sex disability or due to unfair practice; without any objective and reasonable justification. See ***Gichuru Vs Package Insurance Brokers Ltd*** [2021] KESC 12 (KLR). In this case, apart from alleging that his two colleague doctors who were in similar circumstances had their salaries reinstated after approaching the

respondents, the appellant in our view failed to demonstrate how this happened through his evidence. There is nothing on record from the superior courts below that would enable this Court to make a finding that the appellant's colleagues were treated differently and as a result, the appellant's freedom from discrimination was violated. As we observed in ***Gwer & 5 others v Kenya Medical Research Institute & 3 others*** (Petition 12 of 2019) [2020] KESC 66 (KLR), even in situations where a respondent does not file or tender evidence to counter a petitioner's case, the petitioner still bears the burden of establishing their allegations on a balance of probabilities.

**[60]** Secondly, the appellant claimed violation of his right to human dignity under Article 28 of the Constitution. According to him, the stoppage of payment of his salary by the respondents resulted in his visa card being rejected for having insufficient funds and also affected his ability to meet his financial obligations. We agree with the superior courts below, that the issue of rejection of the appellant's visa card had nothing to do with the respondents since the terms under which it was issued is private and between the appellant and his respective bank. As for his inability to meet his financial obligations, the circumstances leading to the stoppage of payment of the appellant's salary were precipitated by his conduct of failing to resume duty or seek extension of his study leave upon conclusion of the same. We have addressed that issue in detail above. In addition, we find that the appellant has failed to establish his claim with respect to violation of his right to fair labour practices as well as social and economic rights under Articles 41 and 43 of the Constitution. We have found no evidence of such violations beyond the bare statements by the appellant.

**[61]** Thirdly, the appellant submitted that, despite continuing his studies and working at the Referral Hospital, the respondents stopped payment of his salary in November, 2018 and refused to reinstate the same which was tantamount to servitude contrary to Article 30 of the Constitution. On this allegation, it is important to clarify that following

the appellant's absence from his work station (Elburgon Nyayo Hospital) and non-performance of his duties as assigned by the County Government, he did not perform any work that would entitle him to payment of his salary during the period of his absence without leave or permission of the County Government. His attachment to the Referral Hospital had nothing to do with the respondents but was part of his Masters programme with Moi University. In the circumstances, the appellant could not reasonably expect the County Government to continue paying his salary on the basis that he was attached to the Referral Hospital. This allegation must fail for these reasons and we so hold and find.

**[62]** In conclusion on the issue before us, we find that, while the respondents' administrative action of stopping payment of the appellant's salary due to his absence from duty without leave or reasonable grounds was lawful, the respondents failed to adhere to due process by failing to issue the appellant with notice or show cause letter before taking the impugned action.

### *iii. Whether the appellant was constructively dismissed*

**[63]** Circumstances giving rise to constructive dismissal are varied and are to be determined on a case-by-case basis. The persuasive decision of the Court of Appeal in ***Coca Cola East & Central Africa Limited Vs Maria Kagai Ligaga*** [2015] KECA 394 (KLR) at para 30 sets out the test for constructive dismissal as follows

> *"*
>
> ***a) What are the fundamental or essential terms of the contract of employment?***
>
> ***b) Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?***

***c) The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.***

***d) An objective test is to be applied in evaluating the employer's conduct.***

***e) There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.***

***f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.***

***g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.***

***h) The burden to prove repudiatory breach or constructive dismissal is on the employee."***

**[64]** Applying the above test which we approve, we are satisfied that the circumstances leading to the stoppage of payment of the appellant's salary were precipitated by the appellant's absence from duty without leave of the County Government or reasonable grounds. It follows therefore that the appellant cannot rely on the said stoppage of his salary which was a consequence of his absence from duty as the basis of substantiating

his claim of constructive dismissal. In any event, as rightly observed by the superior courts below, there was no evidence tendered to suggest there was termination of the appellant's contract of service or employer/employee relationship by either the appellant or the respondents. It is also common ground that, after completion of his Masters programme, the appellant resumed his duties with the County Government and was posted in January, 2020. Accordingly, we find no justification for us to interfere with the superior courts' finding that there was no constructive dismissal of the appellant.

### *iv. What remedies, if any, is the appellant entitled to?*

**[65]** Under this issue, two sub issues arise for our consideration namely,

a) *Whether the appellant is entitled to salaries for the period between November 2018 and January 2022.*

b) *Whether the appellant is entitled to general damages and punitive damages for violation of his rights and fundamental freedoms.*

### *a) Whether the appellant is entitled to salaries for the period between November 2018 and January 2022*

**[ 66]** Having found that the appellant was absent from duty without leave of the County Government or reasonable grounds after the conclusion of his study leave on 21st October, 2017 until he resumed his duties in January 2020, is the appellant entitled to salaries for the period between November 2018 and January 2020? We don't think so. During that period, the appellant neither reported to his duty station nor rendered any services to the County Government. Salary is payable in consideration of work performed, and there would therefore have been no lawful basis for remunerating the appellant when he had not resumed duty or undertaken any responsibilities/duties

assigned by the County Government. It is also noteworthy that the appellant's attachment at the Referral Hospital formed part of his Master's programme at Moi University and bore no relation to his employment obligations to the County Government. To hold otherwise would be to sanction payment for work not done, thereby resulting in unjust enrichment on the part of the appellant.

**[67]** Besides, Clause K. 8 iii) of the Human Resource Policies and Procedures Manual for the Public Service 2016 resonates with the above finding as it provides that –

> ***"K. 8***
>
> iv) ***When an officer has been absent from duty without permission and subsequently resumes duty, he shall not be eligible for payment of salary for the period of absence and any amount erroneously paid to him shall be recovered from his salary."*** [Emphasis added]

**[68]** Consequently, we find that the appellant is not entitled to payment of a salary for the period between November 2018 and January 2020 since he neither reported to his duty station nor rendered any services to the County Government during that period.

### *b) Whether the appellant is entitled to general damages and punitive damages for violation of his rights and fundamental freedoms*

**[69]** On this issue the appellant failed to prove the violation of his rights and fundamental rights as alleged save for infringement of his right to fair administrative action under Article 47 of the Constitution. This Court in ***Wamwere & 5 others Vs Attorney General*** [2023] KESC 3 (KLR), pronounced itself as follows with regard to remedies and damages for violation of human rights and fundamental freedoms:

"***Crafting of remedies in human rights adjudication goes beyond the realm of compensating for loss as it is principally about vindicating rights.***

**...**

***In awarding damages, courts exercise a very broad, open-ended remedial discretion taking into account what is just, fair and reasonable in the circumstances of the case."***

**[70]** Based on the foregoing, and bearing in mind that the appellant was not entirely blameless, having absented himself from his duty station without the leave of the County Government or any justifiable cause, we find that the salary paid to the appellant from 21st October 2017, when his study leave lapsed, up to November 2018, when his salary was stopped, constitutes sufficient remedy to vindicate the violation of his right to fair administrative action.

**[71]** This is because, upon the conclusion of his study leave on 21st October 2017, the appellant was required to resume and perform his duties at his designated work station, Elburgon Nyayo Hospital, or at any other station to which the County Government might have deployed him, there having been no approval for extension of his study leave. His failure to do so amounted to absconding duty, and he was therefore not entitled to payment of salary for the period in question. In the circumstances, the salary already paid to the appellant for the period between October 2017 and November 2018 sufficiently remedies the violation of his right to fair administrative action no further relief is warranted.

**[72]** In the end, we find that the appellant is not entitled to any other damages.

### *v. What order(s) should issue?*

**[73]** The totality of the foregoing is that we agree with the findings of the superior courts below save that we find that the appellant's right to fair administrative action was violated for failure to issue notice or show cause letter to the appellant prior to stoppage of payment of his salary.

## E. COSTS

**[74]** As regards the award of costs, we reiterate the principles enunciated in ***Rai & 3 Others Vs Rai & 4 Others*** [2014] KESC 31 (KLR). Considering this is a matter that involves an employee and employer who are still engaged in a relationship, we are inclined to order each party to bear their own costs.

## F. ORDERS

**[75]** In the premise, we issue the following orders:

***i. This Court has jurisdiction to entertain the instant appeal.***

***ii. This Court declines to pronounce itself on issues which were neither raised nor considered in the superior courts below.***

***iii. The appeal dated 10th December, 2024 and filed on 7th March, 2025 is allowed to the extent that –***

***a) While the respondents' administrative action of stopping payment of the appellant's salary due to his absence from duty without leave or reasonable grounds was lawful, the respondents failed to adhere to due process by failing to issue the appellant with notice or show cause letter before taking the impugned action.***

***b) The salary paid to the appellant for the period from 21st October 2017, when his study leave lapsed, to November 2018, when his salary was stopped, sufficiently vindicated***

***the violation of the appellant's right to fair administrative action, and no further monetary relief is warranted.***

iv. ***The judgment of the Court of Appeal dated 11th October, 2024 is hereby upheld save to the extent set out in Order iii.***

v. ***The parties herein being in subsisting employer/employee relationship, each party shall bear their own costs so as to preserve this relationship.***

vi. ***We hereby direct that the sum of Kshs 6,000 deposited as security for costs upon lodging of this Appeal be refunded to the appellant.***

It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **30th** day of **January**, 2026.

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**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT**

**OF THE SUPREME COURT**

| | |
|---|---|
| ..... | ..... |
| **S. C. WANJALA** | **NJOKI NDUNGU** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |
| ..... | ..... |
| **I. LENAOLA** | **W. OUKO** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |

**I certify that this is a true copy**
**of the original**

**REGISTRAR**
**SUPREME COURT OF KENYA**