



Ronoh v Kenya Electricity Generating Company PLC (Kengen) & another (Employment and Labour Relations Petition E014 of 2023) [2024] KEELRC 1880 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1880 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS PETITION E014 OF 2023**

**HS WASILWA, J
JULY 18, 2024**

BETWEEN

GLADYS RONOH PETITIONER

AND

**KENYA ELECTRICITY GENERATING COMPANY PLC (Kengen) 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. This suit was commenced by a Petition dated 14th July, 2023, seeking for the following reliefs; -
 - a. A declaration that the petitioner’s fundamental rights and freedoms under Article 27(1) & (2) and 41(1), (2)(a)&(b) of the Constitution of Kenya have been and were grossly violated by the 1st Respondent.
 - b. A declaration that the stoppage, withholding and refusal to pay the petitioner her salary and allowance is unlawful and unjustified.
 - c. Declaration be and is hereby made to the effect that the petitioner’s constructive dismissal is unlawful and unjustified as the same is not within the ambits of the Employment Act and other employment laws.
 - d. A Court Order for payment of all claims emanating from non-payment of salaries and benefits that remain unpaid to the petitioner.
 - e. That the general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya, for the unconstitutional conduct of the Respondent, be awarded to the Petitioner.



Alternatively;

- f. The petitioner be paid 12 months' salary for unfair dismissal.
 - g. The Petitioner be paid 3 months' salary in lieu of Notice.
 - h. The Petitioner be paid salary arrears and pending leave days to date.
 - i. The Petitioner be paid salary for the remaining years till retirement.
 - j. The general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya, for the unconstitutional conduct of the Respondent, be awarded to the Petitioner.
 - k. The petitioner be issued with a certificate of service.
 - l. Costs of the Petition be awarded to the Petitioner in either case.
 - m. Any other Orders, writs, directions as this Honourable Court may consider be granted to the petitioner.
2. The legal foundation of the petition is based on Articles 2(1), 3(1), 10, 21, 22(1), 23(1), 41, 258, and 259 of the Constitution of Kenya.

Petitioner's Case

3. The facts of this case are that the petitioner at all material times was an employee of the 1st Respondent for over 10 years, working as a Civil Engineer. Notwithstanding the fact that the Petitioner is ailing from type 1 diabetes and on four insulin injections daily and also that she is Asthmatic and on 2 types of inhalers and Antihistamine.
4. It is stated that the Petitioner has been suffering from these illnesses even before she was employed by the 1st Respondent and the 1st Respondent was well informed of the same during employment.
5. It is averred that the Petitioner worked well with the Respondent until early 2020 on the onset of Covid-19 Pandemic, when the petitioner sought for permission to work from home to mitigate her chances of getting the illness considering the condition she is suffering from and conforming to the Government guidelines requiring those with pre-existing condition to work from home.
6. She stated that she was allowed to work from home but was not given any work, causing her to write an email on 2/2/2022 to one Alfred Abiero, complaining of being relegated to the periphery. In response, the Respondent on 16th June, 2022 transferred the petitioner from Sondu Miriu on western region to Olkaria power station in Naivasha.
7. That considering the change of weather of Naivasha being windy, the petitioner requested for her transfer to be deferred due to her exiting condition and that of her children who were also Asthmatic and living in Uasin Gishu County. She requested the Respondent to place her transfer on hold until March, 2023 to effectively plan herself and her family.
8. It is averred that the Respondent did not respond to her request, prompting her to write another letter of 16th June, 2022 addressed to the General manager, Western region and another letter of 28th June, 2022 addressed to the General manager, Human Resource and Administration and another reminder on 4th July, 2022.



9. It is her case that that the Respondent did not respond to any of her letter but on 22nd July, 2022, she was asked to take a two weeks leave to enable the management deliberate on her case. On 28th August, 2022, she was sent for intensive medical treatment at the 1st Respondent's appointed facility, which later turned out that she had been sent to a mental facility for mental treatment.
10. She stated that the 1st Respondent did not have any right to send her to a medical facility for assessment and treatment and therefore that the 1st Respondent violated her rights to dignity guaranteed under Article 28 of the Constitution.
11. Prior, to this, the petitioner had intimated to the 1st Respondent that she is willing to attend to any mental assessment, which was done by Dr. A.T Feksi, who confirmed that the petitioner was fit to discharge her duties.
12. It is averred that after being asked to attend to a psychiatrist, soon thereafter, her salary was stopped without any cause when she had not been subjected to any disciplinary process, causing her more financial hardship when she has loans and mortgages running in arrears due to the 1st Respondent's actions.
13. She stated that if the Orders sought are not granted the 1st Respondent will continue pushing for the narrative that she is "insane" and eventually retire her on medical grounds without any basis.
14. The Petitioner urged this court in line with the factual basis herein to come to her rescue in line with Article 23 of the Constitution.
15. She avers that the 1st Respondent's managing director has urged her to keep off work until she is subjected to a psychiatric assessment. Hence, she has been subjected to torture, inhuman and degrading treatment.
16. That the 2nd Respondent has failed to advice the 1st Respondent in line with Article 10 and 156 of the Constitution.
17. It is averred that to the extent that the Petitioner was sideline and not given work, then later her salary was stopped without subjecting her to disciplinary process was in violation of her rights under Article 47 of the Constitution.
18. That in stopping the petitioner's salary without any cause was in violation of the petitioner right under Article 41 of the Constitution and in subjecting the petitioner to mental assessment without her consent violated her right to equality and freedom from discrimination and right to dignity under Article 27 and 28 of the Constitution.
19. The Petitioner stated that the general manner in which she was handled is inhuman and urged this Court to allow the claim as prayed.
20. The Petition is opposed by the 1st Respondent who filed a replying affidavit sworn by Beatrice Kandie, the Respondent's Human Resource Manager, sworn on 17th April, 2024.
21. The deponent stated that the Petitioner was employed by the Respondent as a Civil engineer with effect from 1st September, 2006 on permanent and pensionable terms.
22. She stated that soon after employment, the petitioner began absenting herself intermittently from work on account of sickness having been diagnosed with Diabetes, Asthma and Bi-polar disorder. That the frequencies of her sick-off increased significantly from the year 2016 so that between 2016 to 2022, her sick off days were 460 days.



23. It is averred that the absenteeism from work compromised the petitioner overall productivity, causing concern in the Respondent's management.
24. It is averred that the Petitioner on various occasions presented suspect sick off sheets. The first one was issued by Moi Teaching and Referral Hospital of 30 days with effect from 7th March to 7th April, 2017. On 29th May, 2016, she presented another sick off sheet from Eldoret Hospital for 7 days from 29th May to 6th June, 2016 and another sick off sheet of 30 days from Moi Teaching and Referral Hospital running with effect from 10th April, 2017 to 10th May, 2017.
25. That Investigations were carried out and the Respondent established that the Petitioner had forged the 7 days' sick off sheet, causing the Respondent to be more concerned and subjected her to disciplinary process where the disciplinary panel recommended that the petitioner be subjected to mental assessment to ascertain her mental and emotional state and her ability to make independent decisions.
26. Guided by the above recommendation, the petitioner was referred to Dr. Wahome(a psychiatrist) for assessment and on 10th August, 2018. That the petitioner willingly attended to the said doctor and the doctor advised the Respondent to impress upon the employee to comply with her medication before resuming work and take further test with Prof. Doctor Lukoye Atwoli .
27. Subsequently, and in line with the recommendation by Dr. Wahome, the petitioner consented to be assessed and or reviewed by Dr. Prof.Lukoye Atwoli who prepared a report dated 26th November, 2018, stating that the petitioner was suffering from a major depressive disorder on top of the already existing diabetes and Asthma. The Doctor recommended that with continuous treatment, she should be able to resume work.
28. The affiant stated that having considered the recommendation of Prof. Lukoye Atwoli and considering the number of absenteeism that had affected her work, the Respondent referred the petitioner to the National Medical Board for assessment of her suitability to continue working.
29. That the petitioner willingly appeared before the medical board on 29th November, 2018 and after assessment, the board diagnosed the petitioner to be suffering from diabetes, asthma, and major depression. The Board then recommended that she be given a period of 6 months to continue with treatment and appear for assessment with a medical report from her attending psychiatrist.
30. It is stated that after the lapse of 6 months, the 1st Respondent requested for a second assessment on 5th March, 2020, however that the assessment did not proceed as planned owing to the emergence of the Covid-19 pandemic. the petitioner was therefore allowed to work under close monitoring.
31. Subsequently, as part of work rotation, the petitioner was transferred from Sondu Mirui power station to Olkaria. In response the petitioner started writing several emails and sending short text messages to the General Manager and Human Resource & Administration manager in unprofessional manner and even threatened the General manager in one of her email that she will commit suicide.
32. Following the transfer, the petitioner began submitting several sick off sheets, causing the Respondent to halt her transfer pending review of her medical condition.
33. It is averred that the 1st Respondent's Human Resource manual provide for 3 months sick off with full pay and subsequent 3 months sick off with half pay in a leave year, which the petitioner manipulated by taking sick off and reporting towards the end of the the third month and proceeding on sick off soon thereafter.



34. The affiant states that the petitioner lacks good faith and is hell bent in defrauding the Respondent of man hours, when the Respondent is a state corporation fully funded by taxpayer's money, therefore the act of the petitioner getting paid without working is not only inimical to the public interest but contrary to the requirement of prudent and responsible use of public money codified under Article 201 of the *Constitution*.
35. The deponent stated that due to the Petitioner's reaction to her transfer and adamancy thereof, the Respondent advised the petitioner to seek treatment from the company appointed Doctor, which the Respondent was catering for transport, treatment and logistics, however the Petitioner refused to be reviewed.
36. This move, caused the Respondent to seek further advice from the National Medical board on the suitability of the petitioner in discharging her duties in line with clause 7.7.1(i) of the Respondent's Human Resource Policy Manual.
37. By the letter of 17th January, 2023, the acting Director General of Health, Ministry of Health, directed the Chairman of the Medical Board, National Spinal Injury Hospital to convene the medical Board as requested by the 1st Respondent. Consequently, the petitioner appeared before the board willingly for assessment on 23rd February, 2023, however, the board advised that the petitioner be assessed by an independent psychiatrist before they compile their final report.
38. Following this directive, the Respondent advised the Petitioner to see a psychiatrist and went ahead to book several appointments, which the Petitioner turned all down and refused to also report back to work. In staying at home without leave and or permission, the Employer considered her to have deserted work and stopped her salary in line with clause 7.4(b) of the Respondent's Human Resource Policy manual.
39. From the foregoing, the deponent stated that it is evident that the Respondent has accorded the petitioner all the support she needed throughout the years and has been very patient with her.
40. On being sidelined, the affiant stated that the petitioner was mostly absent from work, therefore it was impossible to get her to receive work. In any event that the work performed by the Petitioner as a civil engineer was mostly entail visting various sites.
41. On the transfer issue, the Affiant stated that the Respondent accorded her all the necessary supported she need including haltering her transfer until her medical issue was addressed.
42. It is also stated that since the Court directed the petitioner's salary to be reinstated and considering that the petition herein was based on the prayer for reinstatement of her salary, the prayers sought in the Petition are overtaken by events and the Petition is moot since the Petitioner's salary was reinstated in full. On that basis, the deponent, urged this Court to dismiss the petition with costs for lacking in merit.
43. The Petition herein was canvassed by written submissions.

Petitioner's Submissions

44. The Petitioner submitted that all the other prayers are spent save for prayer on declaration of her rights to have been infringed, payment of damages and award of costs.
45. On whether the whether the Petitioner's constitutional rights have been violated, it was submitted that the Respondent discriminated against the Petitioner contrary to Article 27 of the *Constitution*. It was argued that when the petitioner sought to work from home in the year 2020 at the onset of Covid-19



pandemic, the Respondent allowed the request but sidelined her by failing to give her work, which acts amount to direct discrimination on the basis of her health condition. In support of this, the Petitioner relied on the case of *Gichuru v Packages Insurance Brokers Ltd*[2021] eklr, where the Court held that;-

“Direct discrimination involved treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances. Indirect or subtle discrimination involved setting a condition or requirement which was a smaller proportion of those with the attribute were able to comply with, without a reasonable justification.”

46. It was also submitted that the Respondent discriminated upon the Petitioner by directing her to keep off employment until she undergoes psychiatric treatment, a condition that none of the other employee were subjected to. Further in subjecting the Petitioner to several medical examinations, the Respondent subjected her to torture, inhuman and degrading treatment which is in violation of her rights under Article 28 of the Constitution. In support of this, the Petitioner relied on the case of *WK & another v Attorney General & 4 others; Independent Medical Legal Unit (IMLU) (Interested Party); The Redress Trust (Amicus Curiae)*, where the Court held that to determine whether the dignity of the first petitioner was impaired, the question that should be asked is whether the conduct diminished the feelings if her self-worth.

47. It was also submitted that the Article 50 of the *Constitution* provides for the right to fair hearing and the principle of natural justice is that no person should be condemned unheard, therefore that in stopping the Petitioner’s salary without notice and or hearing was in violation of her right to be heard. In support of this, the Petitioner cited the case of *Justice Amraphael Mbogholi Msagha V Chief Justice Of The Republic Of Kenya & 7 Others* [2006] Eklr, where the Court of Appeal held that;-

“We observe firstly that the rules of natural justice “audi alteram partem” hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonisation of the globe during the hey-days we of the British Empire... a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision... If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.”

48. It was argued that in withholding the petitioner salary, the Respondent violated on the petitioner right to fair labour practices.

49. On damages sought, it was submitted that having violated the Petitioner rights, the law requires that such a party is compensated in line with Article 23(3) of the *Constitution*. In support of this, the Petitioner relied on the case of *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County*[2018] eklr ,, where the Court held that;-

“The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes V Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.”



50. Also in *Miguna Miguna v The Standard Group Ltd & 4 others* [2017] eKLR, the court cited the case of *John v MG Limited* [1997] QB 586, where it was held that:-

“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flimsy defence of justification or failure to apologize”

51. Based on the foregoing, the Petitioner urged this Court to award damages and relied on the case of *VMK v CUEA* [2013] eKLR where the Court awarded the Claimant Kshs. 5,000,000 as exemplary damages for discrimination on the basis of her HIV status and gross violation of her dignity.

52. Similarly, the Petitioner proposed payment of the sum of Kshs 6,000,000 for the trouble caused to her.

1st Respondent’s Submissions

53. The Respondent submitted on two issues; whether the petitioner’s constitutional rights have been violated by the 1st Respondent and whether the petitioner is entitled to the reliefs sought.

54. On the first issue, the Respondent cited the case of *Charles Muturi Macharia v Standard Group & 4 Others* [2017] eKLR, where the Court held that:-

“Court has over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights, they must not only state the Provisions of the *Constitution* allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury suffered (if any).”

55. Similarly, that the petitioner herein must prove the particular rights violated and the injury suffered and not merely stating them as was done in this case. In support of this, the Respondent relied on the case of *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others* [2018] eKLR where the Court defined what discrimination is by citing the case of *Peter K. Waweru v Republic* [2006] eKLR as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions...whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

56. Similarly, the Supreme Court in *Petition 4 of 2019; The Law Society of Kenya v Attorney General and COTU*, defined discrimination as it entails the unjust or prejudicial treatment of different categories of people in the same circumstances.

57. Accordingly, it was argued that the Petitioner alleged to have been sidelined during the Covid 19 pandemic by the Respondent failing to give her work, ostensibly, because of her conditions. It was argued that these allegations have not been justified as is required under section 107 of the *Evidence Act*. Further that the allegations of being discriminated upon have not been demonstrated by any evidence, especially the alleged discrimination on the basis of her medical condition.



58. It was argued further that the nature of the Petitioner’s work being an engineer, is required to be done on site. Further that all the days the claimant was off work was prompted by her sick off or leave that she requested as such, the Respondent cannot be said to have caused the Petitioner to stay away from work.
59. On alleged violation of her right to fair labour practices, it was submitted that the basis of this prayer was because of the salary stoppage, which this Court directed the Respondent to reinstate and as it stands the claim is moot.
60. On alleged violation of her right to dignity, it was submitted that all the medical assessment was carried out by consent of the Petitioner and at no point did the Respondent force the petitioner to seek medical examination. In any event that the recommendation to send the petitioner to a psychiatrist was prompted by the National Medical Board and was also justified as it was done in line with Clause 7.7.1 of the Respondent’s Human Resource Policy Manual. Further that the assessment was for the wellbeing of the Petitioner.
61. On the reliefs sought, it was submitted that the petitioner has not demonstrated any violation of her constitutional right as such is not entitled to any damages as sought in the Petition. In any case that for a party to be granted damages, he/she must demonstrate that they have suffered damage as a result of the alleged breaches of their rights under the *Constitution*. In support of this, the Respondent relied on the case of *Charles Muturi Macharia v Standard Group & 4 Other* [2017] eKLR where the Court held that;-

“In my view, the petitioners are obliged to place evidence of damage/loss suffered because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice developed in constitutional matters is to award damages for violation of constitutional rights, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the petitioners can be compensated. It has not been demonstrated the nature, extent or loss whether physical or psychological that the petitioners suffered as a result of the publication. Close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake. I find guidance in the following words expressed in *Romauld James v The Attorney General of Trinidad and Tobago*[1] where citing previous decisions it was held:-

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation.....”

The key words in the above passage is “If the person wronged has suffered damage, the court may award him compensation.” Thus, the person alleging breach of constitutional rights must prove the loss suffered. The evidence tendered on behalf the petitioners in my view did not demonstrate the alleged loss to the required standard. A report by the relevant professional could have assisted the court to show if at all the girls in question suffered mental or physiological or physical harm and if so to what extent if at all it affected their lives or



academic standards. No school report forms prior to the incident or after were tendered or any reports on their conduct or behaviour after and before the incident were produced.”

62. The Respondent also relied on the case of *Gitobu Imanyara & 2 Others V s Attorney General* [2016] eKLR, where the Court held that;-

“he fact that the respondent admitted liability ab initio does not in any way shift the burden of proof from the appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. see *Mwangi Muriithi* (supra) and *Mumbi M’Nabea v. David Wachira* Civil Appeal No. 299 of 2012. In *Romauld James v. AGT* [2010] UKPC Lord Kerat paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said: [28]. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated.”

63. Accordingly, that the petitioner has not proved any damages she suffered as a result of the alleged violation, therefore that the claim is not merited. Moreover, that the issue of withheld salary was dealt with and the Petitioner paid her salary as usual thus the claim has been overtaken by events and is no longer tenable as any harm that might have been visited on the petitioner has been rectified.
64. In conclusion, it was submitted that the Respondent is a government entity run by tax payers’ money and considering also the number of days, the Petitioner has been away from duty with full pay balances the issue herein and thus no Order for payment of any damages and or costs should issue.
65. I have examined all the evidence and submissions of the parties herein. The Petitioner herein vide her evidence had indicated that her rights under the *Constitution* had been violated by the Respondent and that she had been treated in a discriminatory and degrading manner by the Respondent. She sought various remedies at the point of filing this petition.,
66. At the point of filing this petition, the Petitioner also filed an application under Certificate of Urgency. Interim orders were granted allowing the Petitioner to resume duty and she be paid salary that had been withheld.
67. There are 2 issues for this court’s determination
- (1) Whether the Petitioner’s Constitutional rights have been violated.



(2) Whether the Petitioner is entitled to the remedies sought.

Issue No. 1

68. The Petitioner has averred that her rights under the Constitution were breached to wit - Article 27, 28 and 41 of the Constitution.
69. The Petitioner averred that by the Respondent declining to allow her to work from home during the Covid period due to her pre-existing medical condition of asthma and diabetes whilst allowing others to keep working from home, she was treated in a discriminatory manner.
70. The Respondents on their part have denied treating the Petitioner in a discriminatory manner. They have averred that the Petitioner soon after employment started absenting herself from work intermittently on account of sickness being diabetes, asthma and bi polar disease and that the frequency of her sick off increased significantly from 2016 so that from 2016 to 2022 her sick off days were 460 days.
71. The Respondents deny the discrimination and aver that due to her illness, she was examined by several doctors and she was diagnosed with major depressive disorder, on top of the existing diabetes and asthma.
72. From the exchanges between the Petitioner and Respondents herein, the Petitioner was indeed sick. She was also subjected to several medical examinations and also appeared before the medical board whose report is before court. The board's report dated 25/2/2019 indicated that she had major depression which was work related and with poor social support.
73. The Petitioner was expected to undergo a further medical check after 6 months from 25/2/2019 which was to end on 30/9/2019.
74. Indeed she was requested to appear before the board again on 5/3/2020 but this was never done due to the emergence of Covid 19 Pandemic. The Petitioner was allowed to continue working under close monitoring.
75. The complaint by the Petitioner is that she was discriminated against by the Respondents who declined to allow her to work from home. The Respondents have averred that the Petitioner is a Civil Engineer and her work involved visiting work sites and so the practicability of working from home was not viable.
76. Indeed the work of a civil engineer is more practicable than theoretical and indeed the assertion that the Respondents discriminated against her by not assigning her work to work from home cannot be said to be discriminatory as submitted by the Petitioner.
77. In the circumstances I find no evidence that the Petitioner was treated in a discriminatory manner under Article 27 of the Constitution.
78. The Petitioner also averred that Article 28 of the Constitution was flaunted by the Respondents because she was treated in an indignified manner by the Respondents who declined her an opportunity to work until she underwent a medical examination.,
79. In considering these submissions, it is true that the Petitioner had a medical condition. It is true that she was diabetic and also asthmatic. The medical board also found she had a major depression condition. What was a reasonable employer to do in the circumstances of the case of the Petitioner?



80. The Respondent's Human Resource manual at Article 7.3 states as follows:

“Procedure for retirement on medical grounds.....

Employer investigated

“where it appears to the head of HR & Administration that an employee is unfit for continued services on medical grounds he/she shall forward the case to the Director of Medical Services to constitute a medical board of Directors.

7. All retirement on medical grounds requests shall be forwarded to
3.1. the medical examination board for ratification.

7. upon receipt of the medical examination board report, the head of
3.2. HR & Administration shall forward and seek approval to retire the employee on medical grounds from the MD & C.E.O.

7. Feedback to the employee shall be issued by the head of HR &
3.3. Administration in writing.

7. where approval has been granted to retire, the employee on medical
3.4. grounds steps 11 – iv in part 7 (normal retirement) above shall apply
.....”

81. This is the procedure the Respondents followed and the Respondent indeed had the prerogative to follow this procedure given the frequent absenteeism of the Petitioner.

82. In this court's view, the Respondents had not exhausted this procedure but went ahead to suspend payment of the Petitioner's salary which in this court's view was inhuman given the medical state of the Petitioner as exemplified in the report from the medical board which showed that the Petitioner was suffering from depression and which depression was work related.

83. It is therefore true and my finding that the action of the Respondents of stopping the Petitioner's salary was inhuman and against Article 28 of the Constitution and also against Article 41 of the Constitution on Labour rights

Issue No 2. Remedies

84. Having found as above, I find that the Petitioner is entitled to damages for breach of her rights under Article 28 and 41 of the Constitution and I accordingly award her damages of Khs 1 million with costs.

JUDGMENT DELIVERED VIRTUALLY THIS 18TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Njogu holding brief Kipkoech for Petitioner - present

Muugo holding brief for Mr. Mbaabu for 1st Respondent – Present

Court Assistant - Fred

