

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT KERICHO

ELRC CLAIM NO. E030 OF 2023
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ROSE CHEPKIRUI TOWETT.....
.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....
.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 28th December 2023 seeking the following reliefs:
 - i. A declaration that the Claimant was subjected to unfair employment practices***
 - ii. A declaration that the Claimant was constructively, wrongfully, unfairly and/or unlawfully terminated from employment***
 - iii. Compensation for unlawful termination***
 - iv. Payment of severance pay/gratuity and/or the requested retirement benefits.***
 - v. Punitive damages for unfair labour practices***

vi. Presentation of the Claimant's TSC file in full

vii. A certificate of service as per section 51 of the Employment Act

viii. Costs and interest of this suit from the time of filing until its payment in full.

Claimant's case

2. The Claimant avers that she was employed by the Respondent in 1992 as an English/Literature teacher deployed at Kipsigis Girls High School and later transferred and deployed as Head of Department at Kericho Teachers Training College, earning a gross salary of Kshs.113,242/=.
3. The Claimant avers that she applied for early retirement on medical grounds in February 2016 due to deteriorating health as she was suffering from lymphoedema, hypertension, and diabetes, supported by medical reports from Dr. G. Lule of Nairobi Hospital and Dr. Obiero of Kericho District Hospital
4. Despite submitting medical reports, the Claimant avers that her retirement application was never formally

processed by the Respondent, leaving her in limbo while her duties were reassigned.

5. The Claimant avers that she continued to receive salary until December 2020, but in June 2022, the Respondent demanded a refund of Kshs.4,391,309.90, claiming overpayment.
6. The Claimant avers that she discovered her personal files at both the Respondent's Branch in Kericho and Kericho Teachers Training College were missing, and later her SACCO account was targeted for recovery of the alleged overpayment.
7. The Claimant avers that the Respondent unjustifiably withheld her salary from January 2021, failed to issue a termination notice, denied her terminal dues, and never accorded her a fair hearing, contrary to ***Sections 35, 36, 41, 43, and 45 of the Employment Act.***
8. The Claimant therefore claims her termination amounted to constructive dismissal, which was unlawful, malicious, and procedurally unfair.

Respondent's response to Memorandum of Claim and counterclaim

9. The Respondent, through its in-house counsel, Patrick Maluka, filed a Response to Memorandum of Claim and Counterclaim dated 15th April 2025.
10. In response to the Memorandum of Claim, the Respondent avers that it was established under Article 237 of the Constitution, which empowers it to register, recruit, employ, assign, promote, transfer, discipline, and terminate teachers.
11. The Respondent emphasizes that the Claimant, as its employee, was subject to the Teachers Service Commission Act, the Employment Act, the Code of Regulations for Teachers (2015), the Code of Conduct and Ethics, and administrative circulars.
12. Upon receiving the Claimant's request for retirement on medical grounds in March 2016, the Respondent avers that it required compliance with Regulation 162(2) of the Code of Regulations for Teachers (2015), which mandates appearance before a medical board constituted by the Director of Medical Services to issue a medical report. However, despite being asked to provide this report, the Claimant failed or refused to do so, preventing the Respondent from proceeding with the retirement process.

13. The Respondent avers that instead of pursuing retirement on medical grounds as initially requested, the Claimant opted for sick leave, which was approved until 13th July 2016. However, she failed to provide the required medical report to justify retirement and did not return to work after her leave expired, thereby deserting her post and effectively terminating her employment voluntarily.
14. The Respondent maintains that without the medical report, it could not ascertain the nature or onset of her illness, and it was legally obliged to recover any undue salary payments made during that period. It argues that the Claimant's claims of constructive dismissal and harassment are unfounded, reiterating that her desertion warranted disciplinary action and that the Respondent acted within the law, requiring strict proof of any alleged violations.
15. In the Counterclaim, the Respondent prays for the following orders:
- a. The Claimant's case be dismissed***
 - b. Judgment be entered in favour of the Respondent as per the Counterclaim in the sum of Kshs.4,391,309.90***

- c. Interest on (b) from 14th July 2016 till payment in full.***
- d. Costs of the suit plus interest from date of judgment till payment in full***
- e. Such other relief that the Honourable court may deem just and fit to grant.***

16. The Respondent in the Counterclaim avers that after the Claimant deserted duty in July 2016, she continued to unlawfully receive full salary and allowances totalling Kshs.4,391,309.90 without performing her teaching duties. The Respondent claims this amount as an overpayment and government liability irregularly earned, and despite formal demands and reminders, the Claimant has failed or refused to refund the money.

Claimant's reply to response to the Memorandum of Claim and Defence to Counterclaim

17. The Claimant filed a reply to response to the Memorandum of Claim and Defence to counterclaim dated 28th May 2024. The Claimant reiterated the averments in the Memorandum of Claim. She avers, inter alia, that the Respondent, as her employer, was obligated to maintain proper employment records,

and since it failed to dispute her claim that those records were lost, it cannot now allege that she never submitted a medical report or that she absconded from duty. She maintains that she did submit the report as requested, and although she went on leave without permission, the Respondent had the opportunity to demand compliance or take disciplinary action after 14 working days from the alleged date of abscondment, 13th July 2016.

18. In the Defence to Counterclaim, the Claimant refutes the counterclaim, asserting that she has not deserted duty since July 2016 despite continuing to receive salary and allowances totalling Kshs.4,391,309.90. The Claimant explains that her absence has been due to being on leave while awaiting the Respondent's decision on her application for early retirement on medical grounds, which has remained unresolved. The Claimant emphasizes that the Respondent's failure to take any disciplinary action against her during this period supports her position.

19. The Claimant prays that the Counterclaim be dismissed and judgment be entered in her favour.

Claimant's evidence in court

20. CW1, the Claimant, adopted his witness statement dated 20th February 2024 as her evidence in chief and produced the list of documents of even date marked as exhibits 1 to 19 respectively.
21. CW1 testified that she was constructively dismissed while on prolonged sick leave, during which she consistently submitted medical sick off sheets from 2002 to 2016 and eventually sought early retirement on medical grounds. She explained that she wrote to the Respondent in August 2015 and again in February 2016, requesting retirement, but received no response until April 2016, when she was asked to provide a comprehensive medical report from Kericho District Hospital and Nairobi, which she submitted confidentially. She stated that the Respondent never referred her case to the medical board and continued paying her salary until December 2020 without issuing any termination notice or taking disciplinary action. Although the Respondent later demanded a refund of Kshs.4,391,309 for salaries paid during her absence, CW1 maintained that she was legitimately on sick leave, had submitted the required

documentation, and therefore does not owe the Respondent any money.

22. In cross-examination, CW1 stated that her employment was governed by the Teachers' Code of Regulations, which sets out procedures for sick leave and early retirement on medical grounds. She explained that the Code allows three months of sick leave with full pay, followed by three months with half pay, and thereafter without pay, all subject to approval by the Respondent and a medical board report, which she never submitted. CW1 admitted she stopped reporting to work from July 2016 but continued to receive her salary until December 2020, during which she submitted sick-off sheets. In October 2020, she applied for early retirement, citing family reasons, not sickness, but her request was denied. She acknowledged awareness of a letter alleging salary overpayment, which she has not repaid, and confirmed she was eventually dismissed. She maintained that her prolonged absence was due to the Respondent's failure to grant her sick leave.

23. In re-examination, CW1 reiterated that she had requested early retirement in August 2015 but got no response.

Respondent's evidence in court

24. RW1, Jane Kemunto, the Respondent's Assistant Deputy Director working in the Department of Human Resources, adopted her written statement dated 9th April 2024 as her evidence in chief.
25. RW1 testified that although CW1 claimed to have submitted sick-off records from July 2016, the Respondent did not have such documents, and the medical reports provided lacked the Respondent's official stamp, raising doubts about their receipt. She stated that teachers can only be formally released when the head of their institution writes to the Respondent, and a teacher not domiciled at a school cannot be released. RW1 further stated that the Claimant was asked to refund salary paid during her absence from the workstation, as she was not entitled to receive pay while not on duty.
26. In cross-examination, RW1 stated that the Respondent should have taken disciplinary action

against CW1 after 14 days of absence between 2016 and 2020. She noted that CW1 requested early retirement, but under Regulation 162(2) of the Code, only the Respondent could convene a medical board, not the teacher. Although CW1 submitted a medical report, she failed to respond to a June 2016 letter requesting a doctor's letter and was required to file sick-off sheets with the County Director, which RW1 said she did not. RW1 added that CW1's early retirement request was never processed, and her 2020 application was rejected for not being submitted through the head of the institution. The Respondent later demanded repayment of salary for the period July 2016 to June 2022, referencing letters from November 2020 and June 2022, and noted correspondence from Kericho Teachers Training College about CW1's absence, though that letter was not before the court.

27. In re-examination, RW1 stated that the principal, in response to the letter dated 12th November 2020, reported that CW1 had not been at her workstation since January 2016. She explained that CW1's voluntary retirement request was not processed

because she failed to comply with the requirements outlined in that letter. RW1 further stated that CW1 did not provide the necessary medical report, which was essential for the Respondent to convene a medical board.

28. Parties were directed to put in their written submissions.

Claimant's submissions

29. The Claimant submitted that both parties acknowledged her request for early retirement and that she submitted the required medical reports through her doctors, Dr. Obiero and Dr. Lule, following the Respondent's letter of 11th March 2016. While the Respondent's witness disputed receipt of the reports, she admitted no reminder or follow-up was ever issued. The Claimant maintained she was on intermittent sick leave, though the Respondent claimed her last sick leave ended on 13th July 2016, a point she contested. Both sides agreed a medical board was necessary to process the retirement request, but it was the Respondent's duty to convene

it. RW1 further admitted that sick-off and attendance records were kept by the Principal of Kericho Teachers Training College, who was not called to testify, and no such records were produced. Importantly, the Respondent never issued a notice to show cause or initiated disciplinary action against the Claimant despite alleging she deserted duty.

30. The Claimant relied on **section 44(4)(a) of the Employment Act** which provides for summary dismissal and one of the reasons for one to be summarily dismissed is absenteeism from work without leave amounts to gross misconduct. The Claimant submitted that if she had absconded or deserted duty as alleged, disciplinary action would have been taken against her. The Claimant argued that she applied for sick leave which was granted the entire time she was away from work. The Claimant relied on the case of **Simon Ngugi Kamau V Silpack Industries Limited [2015] KEELRC 1361 (KLR)** the court stated as follows:

“Thus there are parameters set on the enjoyment of sick off. Where the employee is sick and requires medical attention, such as

employee is entitled to take time off with full pay to seek such medical attention. Such an employee must however produce a certificate of any incapacity/sickness/illness to the employer, which certificate should be signed by a qualified medical practitioner. Such a medical certificate should as of necessity note the nature of illness/sickness that the employee is being treated for or with regard to the privacy of such an employee, the certificate notes as appropriate.”

31. The Claimant argued that her employment records, including sick leave and attendance, were under the custody of the Respondent and Kericho Teachers Training College, but had gone missing. She emphasized that the Respondent failed to address the issue of the missing files and did not produce any attendance records to support its claim that she had absconded from duty. The Claimant relied on **section 107(1) of the Evidence Act**; she asserted that the burden of proof lies with the party making the allegation in this case, the Respondent. Additionally, under **section 74 of the Employment Act**, the

employer is responsible for maintaining employment records, meaning the Claimant should not bear the burden of disproving absenteeism. Therefore, without presenting any supporting evidence, the Respondent's claim of desertion lacks merit.

32. The Claimant submitted that she sought resignation on medical grounds in February 2016, which the Respondent acknowledged in March 2016, and that she duly submitted medical reports through her doctors. Despite this, the Respondent neither issued reminders nor processed her request, instead continuing to pay her salary until December 2020, showing she remained an employee on intermittent sick leave. She later applied for early retirement at age fifty, further demonstrating her intent to formally separate rather than draw a salary without working. The Respondent's cessation of salary payments in January 2021 effectively marked an unfair and unlawful termination, amounting to a unilateral breach of the employment contract and its fundamental terms.

33. The Claimant relied on the case of **Geoffrey Muriithi Muthee V XPLICO Insurance Co. Limited [2022] KEELRC 595 (KLR)**, where the court held:

“From the onset, it is imperative to state that constructive dismissal does not have any statutory anchorage within the Employment Act, 2007 or any of our statutes. It is a creature of Common Law. It is trite law that where an employer’s conduct evinces an intention no longer to be bound by the contract of employment, a path gets available to the employee to either accept the conduct or changes made by the employer or treat the conduct or changes as a repudiation of the contract by the employer and sue for wrongful dismissal.”

34. In **Leena Apparels (EPZ) Limited V Nyevu Juma Ndokolani [2018] KECA 308 (KLR)**, the Court of Appeal held as follows:

“..... Whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a

repudiatory breach of the contract of employment. The employer's conduct does not have to be intentional or in bad faith before it can be repudiatory....."

"In order for a claim for constructive dismissal to succeed where the Court applies the contractual test, it must be concluded that the employer's conduct or unilateral change, constitute a breach of the contract of employment, and second if it is constitutes such a breach, it must be found to substantially alter an essential term of the contract."

35. The Claimant submitted that the Respondent failed to provide any evidence to dispute her account of unpaid salaries, thereby violating **section 17 of the Employment Act**, which mandates employers to pay wages when due. By withholding her salary without formally terminating her employment, the Respondent breached both contractual and statutory obligations, reinforcing the Claimant's assertion of unfair treatment and constructive dismissal. In **Geoffrey Muriithi Muthee V XPLICO Insurance Co.**

Limited(supra) the court stated that remuneration is a fundamental right in employment, protected under the Employment Act, 2007. It asserts that any significant change to an employee's compensation, such as a reduction or altered payment method, without their consent, constitutes a breach of contract. Such a breach may justify a claim for constructive dismissal, where the employee treats the employer's conduct as a repudiation of the employment agreement.

36. The Claimant submitted that termination was unfair and unlawful, arguing that the Respondent failed to address the Claimant's application for early retirement and accordingly process her terminal dues. The Claimant also argued that her salary was unjustifiably withheld from January 2021 without a formal termination notice as required by **sections 35(1)(c) and 36 of the Employment Act**. She asserts that the Respondent failed to follow due process under **sections 15 and 41 of the Employment Act**, did not validate the termination reasons per **sections 43 and 45 of the Employment Act**, and refused to pay her terminal dues amounting to a repudiation of the

employment contract. Additionally, she was denied a fair hearing as mandated by **sections 41 and 44 of the Employment Act**, and the Respondent acted contrary to justice and equity, violating **section 45(2) of the Employment Act**.

37. The Claimant relied on the case of **Otieno V United Millers Ltd [2022] KEELRC 1428 (KLR)**, where the court found that stopping an employee's salary without notice or explanation amounts to termination. Also, in **Kennedy Nyanguncha Omanga V Bob Morgan Services Limited [2013] KEELRC 810 (KLR)** the court held that termination on medical grounds requires due care, medical examination, and notice; failure to follow this procedure amounts to unfair termination.

38. For the relief sought, the Claimant is entitled to Kshs.113,242 together with the retirement benefits.

39. The Claimant urged this Honourable Court to allow the claim as prayed and dismiss the counterclaim with costs.

Respondent's submissions

40. In its submissions, the Respondent submitted that the Claimant was not constructively dismissed but instead voluntarily terminated her employment by failing to submit the required medical report and absconding duty after her sick leave expired on 13th July 2016.

Regulation 162 of the Code of Regulations for Teachers (2015) empowers the Commission to retire a teacher on medical grounds upon the receipt of a report by the Director of Medical Services recommending such retirement.

41. The Respondent maintains that it neither dismissed the Claimant unlawfully nor denied her any right, and in the case **Pius Machafu Isindu V Lavington Security Guards Ltd [2017] KECA 225 (KLR)**, the Court of Appeal held that an employee who voluntarily leaves employment cannot claim constructive dismissal.

42. The Respondent submitted that the Claimant failed to return to work and did not offer any satisfactory reason for her absence, thereby engaging in desertion of duty a serious violation under both the Code of Regulations for Teachers and the Employment Act. In **Seabolo V Belgravia Hotel (1997) 6 BLLR**, the

South African court stated as follows: “Desertion is distinguishable from absence without leave in that the employee has no intention of returning to work.”

43. The Respondent submitted that in the instant suit, the Claimant voluntarily terminated her employment by failing to report back after 13th July 2016 and cannot claim constructive dismissal. The Claimant has never had the desire to come back to employment. The Claimant’s allegation of constructive dismissal cannot hold water. Constructive dismissal arises only where an employer’s conduct renders continued employment intolerable, not where an employee fails to perform contractual obligations. In ***Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga [2015] eKLR***, which outlines the legal elements of constructive dismissal including breach of contract and resignation in response to intolerable conduct.
44. In support of its counterclaim, the Respondent invoked ***Regulation 120 of the Code of Regulations for Teachers (2015)*** together with Government Financial Regulations, which require recovery of public funds irregularly disbursed to an officer. It emphasized the established legal principle

that wages cannot be paid for work not performed. Since the Claimant did not resume duty but continued to draw a salary, she is liable to refund the amounts received as a government obligation. Accordingly, the Respondent maintains that its counterclaim is merited,

45. The Respondent relied on the case of ***Herman Musabi V Teachers Service Commission & Attorney-General [2018] KEELRC 182 (KLR)***, where the court upheld the Commission's right to recover irregular salary payments. The Respondent maintains that its actions were lawful, procedural, and consistent with its duty to safeguard public funds under ***Article 226(5) of the Constitution***.
46. In conclusion, the Respondent urged this court to dismiss the Claimant's memorandum and allow the counterclaim as prayed with costs.

Analysis and determination

47. The court has considered the pleadings on the record together with the rival submissions by both counsel; the issue for determination is as follows:
- i. Whether the Respondent breached its contract with the Claimant;

- ii. Whether the Claimant deserted or abandoned her work;
- iii. If (i) above is in the affirmative, whether the Claimant is entitled to the relief sought
- iv. Whether the counterclaim is merited

48. In ***Pius Kimaiyo Langat V Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR)***, the Court of Appeal cited the case of ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd [2002]2 EA 503*** where it is not the business of courts to rewrite contracts between parties.

49. In this instant case, the Claimant was employed by the Respondent as an English/Literature teacher deployed at Kipsigis Girls High School and later transferred and deployed as Head of Department at Kericho Teachers Training College, earning a gross salary of Kshs.113,242/= . The Claimant applied for early retirement vide a letter dated 15th February 2016 and received by 16th February 2016. The Respondent responded vide a letter dated 11th March 2016. In ***Charo v Kenya Airways Limited [2025] KECA 1700 (KLR)*** the Court of Appeal cited

sections 107, 108 and 109 of the Evidence Act,
whoever alleges must prove as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

50. The court is of the view that both parties breached their obligation to one another because the Claimant was required to furnish the Respondent with the medical reports of her two doctors, and yet the

Respondent took time to respond despite her being seriously prompted for an early retirement. According to **Regulation 162(2) of the Code of Regulations for Teachers (2015)**, a specific procedure was required, yet both parties failed to adhere to it. The idea that a government institution can delay processing such critical matters should not be accepted, especially where health is concerned, since health is the foundation of productivity without it, work cannot be performed.

51. **Section 44(4)(a) of the Employment Act**

provides that gross misconduct justifying summary dismissal of an employee may arise in several situations, including: absence from work without leave or lawful cause. In this instant case, the Respondent stated that the principal of Kericho Teachers Training College wrote to it stating that the Claimant was absent from work after sick leave. The court is of the view that the Respondent did not provide sufficient evidence.

52. It is noted by the court that the Claimant was not working consistently from around 2016 to 2022 and yet the Principal of the College Kericho Teachers

College never took any steps whatsoever to find out why the Claimant was not working and if she had been given early retirement as per her request vide her letters dated 13th February 2016. After she requested for early retirement the Respondent vide Teachers Service Commission Secretary wrote to her on 11th March 2016 instructing her to furnish a medical report from her doctor to enable the Director of Medical Services to convene a medical board to advise on her request for early retirement.

53. The Claimant responded vide her letter dated 14th March 2016 and she stated she had visited the Commission's office and had confirmed the panel had been forwarded her letters to assess her. She said she was told they were preparing on their sitting for Medical Board to deliberate her request.

54. From hence, the court has no other communication in the file neither from the Claimant nor from the Respondent. It is very strange that for all those years the Respondent did not know the whereabouts of the Claimant but continued to pay her salaries.

55. In October 2020 the Claimant requested for early retirement and got a response from Secretary of Teachers service Commission on 12th November 2020 asking her to forward her request through the Principal of her institution and TSC County Director. She had made her request directly to the Teachers Service Commission.
56. Once again, the respective parties went mute until 6th June 2022 when she got a letter from Teachers Service Commission asking her to refund amounts paid to her from 14th July 2016 to 31st December 2020 amounting to Kshs.4,391,309.90. She got another letter dated 6th February 2023 demanding the aforesaid refund.
57. The history of this case show glaring negligence on the part of the Respondent who failed to follow the Claimant's request for early retirement. The Respondent did not bother to write to the Claimant to follow up on her lengthy absence from duty. Yet they continued to pay her.
58. Cases of abscondment must be proved by the employer communicating to the employee about the

said desertion. The employer must inform the employee they intend to take him/her through disciplinary hearing due to desertion which could lead to his/her termination of employment.

The court only finds silence and over reaction on the part of the Respondent at the tail end when they demanded refund of the salaries paid to the Claimant in the years they claim she did not work.

59. There is no evidence from the college that the Claimant did not work those years. Actually, the college should have informed Teachers Service Commission of the Claimant's absence from work immediately. Clearly somebody slept on the job and did not do due diligence to keep good records of their employee.

Further, the Respondent should have convened a board to deal with the Claimant's request for retirement on medical ground since 2016. None of that was done.

60. In the case of ***Moi Teaching & Referral Hospital - VS- James Kipkonga Kendagor 2019 KECA 833(KLR)*** involved dismissal of a clinical officer for alleged desertion of duty. The trial court found the

termination unfair awarding him 24 months compensation. On appeal, the Court of Appeal agreed the dismissal was procedurally unfair since Respondent was not properly heard but found award of 24 months was excessive.

In the case of ***Nancy Cheptanui -VS- Rift Valley Bottlers 2022 JELR 113861(CA) - Civil Appeal 49 of 2018*** confirm that merely claiming desertion is not enough as employers must show proof of contact attempts and procedural fairness otherwise the termination can be ruled to be unfair leading to compensation.

61. The Claimant was not informed of any disciplinary action on the reason of desertion upto date. The reason for desertion cannot be raised at this stage and the court will not entertain it. As it is, the court is not aware of any termination letter served on the Claimant upto now save to demand refund of salary paid to her between 2016 - 2020.

As a casual observation part of that period covered the period when the world was on shut-down due to COVID Pandemic. The same should also be taken into consideration even as refund is being demanded.

62. The law on termination of an employee is clear as per Sections 41, 43 and 45 among others of Employment Act. In Section 45 the law makes it mandatory for the employer to give a valid reason for termination of an employee. The employee must also be given an opportunity to defend himself before a witness of his choice as stipulated in Section 41(1) of the said Act. Section 41 of the Employment Act states: -

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds

of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

63. Numerous case laws provide that an employer must satisfy the twin test of procedural and substantive fairness before terminating the employee.

The court held in the case of ***Walter Ogal Onuro - VS- Teachers Service Commission Cause 955 of 2011*** that “for termination to pass the fairness test it ought to be shown that there was not only substantive justification for the termination but also procedural fairness.”

64. The Respondents did not prove in this particular case - neither substantive justification nor procedural fairness. Infact, the employer in failing to engage the employee on her request for early retirement as well breached her right to fair administrative action.

Section 4(1) of the Fair Administrative Action provides as follows: -

“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”

65. The court having critically considered the pleadings of the respective parties and their submissions, *viva voce* evidence and case laws finds the Respondent slept on the job for over four years and refused or neglected to respond to the Claimant's request for retirement on medical grounds. The court finds the Claimant was constructively terminated from her employment by the sheer silence and inaction by the Respondents.
66. The demand for refund of money paid as salary to the Claimant those four years is unfair. The respondent paid the money knowing the Claimant was on sick leave and so it is estopped from demanding the same.
67. Having found no proof of desertion of duty by the Claimant and having found there was constructive dismissal by the Respondent the court holds proof of unlawful termination by the Respondent. The court will order the part of salary paid to the Claimant taking into consideration the COVID period be commuted to cover compensation for unfair termination and to cover fully prayers 26(iii), (iv) & (v) of the Statement of Claim.

68. That being the case, the Claimant has no obligation to pay any money to the Respondent as a counterclaim as same is not deserved.

69. The Claimant is to be presented her TSC file and certificate of service within 45 days from today's date.

70. Costs of this suit will be paid to the Claimant

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 16th Day of
December, 2025.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered

through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE