



**Ngei v Teachers Service Commission (Constitutional Petition E007 of 2024)
[2025] KEELRC 3732 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3732 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CONSTITUTIONAL PETITION E007 OF 2024**

JW KELI, J

DECEMBER 17, 2025

**IN THE MATTER OF ARTICLES 2(1), 3(1), 10,19, 21,22,23,28,35,41,47,
162 (2), 258, & 259 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 5 (1), (2), (3), (5), (6),
(7) AND 17 (1) OF THE EMPLOYMENT ACT 2007**

AND

**IN THE MATTER OF SECTIONS 12 (1) AND (3) OF THE
EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2022**

AND

**IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT
AND LABOUR RELATIONS (PROCEDURE) RULES, 2026**

AND

**IN THE MATTER OF THE INFRINGEMENT OF FUNDAMENTAL
FREEDOMS AND RIGHTS OF THE PETITIONER UNDER
ARTICLES 27 (1), (2), (4) AND (5) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ILLEGAL COMPULSORY
LEAVE IMPOSED ON THE PETITIONER**

BETWEEN

GLADYS NDUNGWA NGEI PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT



JUDGMENT

Introduction

1. The Petitioner commenced this cause of action vide a Petition dated 1st October 2024 seeking for the following orders:-
 - a. A declaration that the Petitioner's fundamental rights and freedoms under 41(1)(2) (a) & (b), 47 and 50 of the Constitution of Kenya have been and were grossly violated by the Respondent.
 - b. A declaration that the decision to send the Petitioner on transfer to Makueni County was illegal, unlawful, unconstitutional and hence null and void.
 - c. A declaration be and is hereby made to the effect that the Petitioner was constructively dismissed illegally which dismissal is unlawful and unjustified as the same is not within the ambits of the Employment Act and other employment laws.
 - d. That general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya, for the unconstitutional conduct of the Respondents, be awarded to the Petitioner.
 - e. That an order for payment of all terminal dues and benefits owed and full compensation for wrongful constructive dismissal from employment as particularized hereunder;
 - i. 12 months' pay as compensation for unlawful dismissal
 - ii. Pay in lieu of salary up to the age of 65 years due to the Petitioner's disability as provided for under section 15-(6) of the Persons with disabilities Act No.14 of 2003.
 - iii. Compensation for medical expenses.
 - f. A declaration that the Petitioner was subjected to physiological torture and mental anguish and such compensation for such inhuman treatment to the tune of Kshs.10,000,000/-.
 - g. Costs this Petition be awarded to the Petitioner in either case.
 - h) Any further Orders, writs, directions as this Honourable Court may consider be granted to the Petitioner.
2. The Petition was filed alongside the Supporting Affidavit of the Petitioner, sworn on 1st October 2024, and a list of documents of even date with the bundle of documents in support of the Petition attached.
3. In response to the said Petition, the Respondent filed a Replying Affidavit sworn by Anne Kihara, who described herself as the Principal Human Resources Officer of the Respondent, on 4th July 2025.
4. To counter the Respondent's averments, the Petitioner filed Further Affidavits: one sworn on 14th May 2025; and another filed on 12th September 2025.

Hearing and evidence

5. The petition was canvassed by way of written submissions. Both parties complied. The petitioner's written submissions drawn and filed by B.N Kiptoo & Company advocates were dated 8th August 2025 and those of the respondent drawn and filed by Rachier & Omollo LLP Advocates were dated 2nd September 2025.



The Petitioner's case in summary

6. The Petitioner's case is that she was employed by the Respondent in 1991 to the position of a clerk and posted to the Headquarters at Co-operative House Nairobi. The Petitioner secured promotions resting at the position of Principal Human Resource Officer grade 7 on 11th September 2019, due to her exemplary performance and willingness to advance her education.
7. In 1998, while the Petitioner was performing her duties at the Respondent's offices, the Petitioner became a victim of the terrorist attack on Co-Operative House Nairobi, and sustained severe injuries. As a result of the injuries, the Petitioner developed a blood disorder caused by the emissions which occasioned frequent admissions of the Petitioner to the ICU due to low oxygen saturation at times up to 75% thereof. The Petitioner sought further treatment in India where surgery was recommended but the operation was ruled out since it was too risky and very expensive. Instead, the Petitioner was put on medication costing approximately Kshs. 140,000/= per month, and instructed to utilize a mandatory oxygen concentrator which the Petitioner refills at Kshs 330,000/=per month. The Petitioner utilizes the oxygen concentrator on a day to day basis and carries it whenever she travels. As a result of the ailment, the Petitioner later developed heart failure since her lungs were not operating optimally putting strain on the left ventricle of her heart.
8. Owing to her medical condition, in 2017 the Petitioner applied through the Ministry of labour and was granted a disability card by the National Council for Persons living with disabilities, evidencing her disabled status.
9. Despite being well aware of the Petitioner's medical condition, the Respondent transferred the Petitioner to Kilungu Sub-County in Makueni County in 2014, an area that is hilly, which made it difficult for the Petitioner to work. The Respondent only rescinded the transfer in 2016 upon recommendation from the Petitioner's physician. However, in 2022, the Petitioner was again transferred by the Respondent back to Makueni County. The Petitioner was unable to report due to her ailment and the Respondent cancelled the transfer, on appeal. For a third time, in the year 2023, the Respondent transferred the Petitioner to Malili Sub-County in Makueni County. Despite the Petitioner's request to the Respondent for reconsideration, the Respondent refused, neglected and / or failed to reverse it. The Petitioner thus reported for duty at Makueni County office on 7th June 2023. The Petitioner made every efforts to work in Makueni County, but it proved difficult due to the terrain which adversely affected and aggravated the Petitioner's medical condition. On 16th October 2023, the Petitioner, left with no other option, went on early retirement to save her life.
10. It is the Petitioner's case that she was constructively dismissed from employment by the Respondent, in that, she was transferred in 2014 to Kilungu sub-county despite the Respondent having knowledge of the medical condition of the Petitioner; she was transferred to Makueni county by the Respondent who had full knowledge of the unfavourable terrain of the work station to the Petitioner, and only cancelled the transfer once the Petitioner's physician intervened; she was transferred to again to Makueni County, Malili Sub-County even after the earlier recommendation of her physician; and the Respondent failed to safeguard the Petitioner's right to fair labour practices, and provide reasonable working conditions.
11. Upon further consideration, the Petitioner rescinded her voluntary retirement and vide her letters dated 6th December 2023 and 12th January 2024, she wrote to the Head of Civil Service requesting for intervention with a view to be reinstated back to her employment with the Respondent. The Head of Civil Service asked the Respondent to reconsider reinstating the Petitioner. However, the Respondent, vide its letter dated 29th January 2024 declined the Petitioner's request despite the recommendations of the Head of Public Service.



12. Consequently, the Petitioner made a complaint to the Commission on Administrative Justice "Office of the Ombudsman" which determined the complaint and found that the Respondents actions were in contravention of Article 47 of *the Constitution* of Kenya, Section 4 of the *Fair Administrative Action Act* No. 4 of 2015 and amounted to unfair treatment and unfair official conduct as set out in section 8(b) of the *Commission on Administrative Justice Act*.
13. The Petitioner complains that the actions of the Respondents have violated the Petitioner's human dignity and rights as enshrined in Articles 27, 28, 41 47 and 50 of *the Constitution*. She states that the sending of the Petitioner on transfers was actuated by apparent malice and ill-will on the part of the Respondent contrary to the provision of the law. The actions of the Respondent clearly indicate that it has no respect for the spirit of *the Constitution* and the rule of law, and its actions were absurd, unreasonable, oppressive and vindictive.
14. In particular, it is averred that the Respondents have infringed on the Petitioners freedom against discrimination, right to fair administrative action, right to fair labour practices, and all the national values and principles of governance by refusing to grant her the opportunity to work in a station where her life was not endangered; by the sending the Petitioner on transfer arbitrarily, whimsically and without following due process; by constructively dismissing her from employment. The Petitioner states that she held a legitimate expectation that, barring any calamity, she would serve her full term unless removed through known and established due process.

Respondent's case in in brief

15. That the Teachers Service Commission is established under Article 237 of *the Constitution* with its primary functions being: a) To register trained teachers; b) To recruit and employ registered teachers; c) To assign teachers in its service to teach in various public schools; d) To promote and transfer teachers; e) To exercise disciplinary control over teachers; and f) To terminate the employment of teachers. THAT under Article 252(1)(d) of *the Constitution*, the Respondent is empowered to perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by *the Constitution*. THAT under the *Teachers Service Commission Act*, the Commission is mandated to: a) formulate policies to achieve its mandate; b) provide strategic direction, leadership and oversight to the secretarial; c) ensure that teachers comply with the teaching standards prescribed by the Commission under this Act; d) e) f) manage the payroll of teachers in its employment; facilitate career progression and professional development for teachers in the teaching service including the appointment of head teachers and principals; monitor the conduct and performance of teachers in the teaching service; and g) do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers. THAT pursuant to section 47 of the *Teachers Service Commission Act*, the Respondent promulgated the Teachers Service Commission Code of Regulations of 2015. THAT under Regulation 67, the Respondent has the discretion to transfer a teacher whether or not the teacher has applied for a transfer or decline to transfer a teacher upon application. THAT under Regulation 68, the Respondent has the authority to, for purposes of providing competent administrators for all educational institutions, deploy a teacher for any administrative position or in any other capacity through a transparent process. The Respondent may deploy a teacher by appointment to an administrative position; appointment to a higher administrative position; appointment to the Commission's secretarial; appointment to perform administrative duties; posting from a primary to a post-primary institution; withdrawal of administrative duties. or THAT from the foregoing, the Respondent has constitutional and statutory power and authority to deploy and transfer teachers. THAT the Petitioner and the petition herein seek to impede the functions of the Respondent's independent office as particularized above, contrary established law and precedence. THAT it is trite



that the office of the Respondent is established as an independent constitutional office that cannot be subject to any other body or entity or agent or authority in exercise of the powers of its office. The only restraint or limitation to the exercise of those powers is that interests of the administration of justice and the need to prevent and avoid abuse of the legal process is upheld. THAT under *the Constitution*, the Respondent should be allowed to operate without interference with the principle, therefore, being that the court should not interfere with the functions of such an independent office except where it is demonstrated that the Respondent has violated *the Constitution*. THAT the Petitioner has not demonstrated in any way that the Respondent has violated *the Constitution* in the actions taken by the Respondent. THAT the Petitioner was an employee of the Commission on contract basis with effect from 18th August 1991 which was converted to permanent and pensionable terms on 26th May 1995 and had served in various capacities until her voluntary retirement on or about 15th January, 2024. Annexed hereto and marked [AK-1] is a copy of the letter of appointment dated 26th May 1995. THAT I understand that the Petitioner instituted the Petition dated 1st October 2024 before this Honourable Court (hereinafter the petition), alleging constructive dismissal and violation of constitutional rights, including fair administrative action, freedom from discrimination and fair labour relations and practices. THAT it was upon the Petitioner to clearly demonstrate how the said rights as particularized above were violated by the Respondent in the action complained of, that is, the transfer of the Petitioner to Makueni County and in her voluntary early retirement from the Respondent's employment. THAT the Respondent avers that the Petitioner has failed to demonstrate any violation of her rights, and in any event denies in toto every allegation as contained in the petition filed. THAT the Respondent categorically denies the allegations of constructive dismissal as set out in paragraph 2. The Petitioner's administrative transfer from Nairobi to Makueni was lawful, procedural, and consistent with the provisions of *the Constitution*, the *Employment Act*, and the Human Resource Policies and Procedures Manual for Secretariat Staff, 2018. The Respondent further avers that the Petitioner voluntarily tendered her application for early retirement, which was accepted. THAT as a public officer, the Petitioner was well aware and was at all times bound by the terms and conditions of service, which included the obligation to work anywhere within the Republic of Kenya. THAT contrary to the Petitioner's allegations, since the Petitioner communicated her medical condition to the Respondent, she has successfully worked outside Nairobi, specifically in Kilungu within Makueni County. Annexed hereto and marked as [AK-2] are copies of correspondence demonstrating that the Petitioner has worked outside Nairobi before. THAT the Petitioner worked in Makueni County between the years 2014 to 2016. Annexed hereto and marked as [AK-3] is a letter dated 28th January 2016 transferring the Petitioner from Makueni to Nairobi. THAT while in Kilungu within Makueni County, the Petitioner was promoted to the position of Chief Human Resource Officer, TSC Grade 9. Annexed hereto and marked as [AK-4] is a copy of the letter dated 15th October 2014. THAT it is not factual that the impugned transfer to Makueni County was actuated by malice or ill-will as it has been established that the Petitioner has previously successfully worked in Makueni County prior to the now impugned transfer. THAT further, the Petitioner's transfer to Makueni County was an administrative action made in good faith and in compliance with the Respondent's human resource procedures and the law. THAT the transfer did not in any way impose upon the Petitioner any additional responsibility which would be contrary to the medical requirements provided by the Petitioner. On the contrary, the transfer was to provide the Petitioner with a lighter workload and relieve her from the strenuous working conditions at the headquarters in Nairobi considering her documented medical history. THAT it was upon the Petitioner to demonstrate that the transfer to Makueni County, where she has previously worked, was a violation of her rights as particularized in the petition, which the Petitioner has failed to do. THAT the Commission, has for over 24 years, accorded the Petitioner the necessary support in balancing her contractual obligations under the employment contract and her medical condition to ensure that the Petitioner's work and life balance was well



maintained. This includes the leave granted to the Petitioner to have flexible working hours. THAT contrary to the Petitioner's allegations, the Commission acted with utmost consideration by not only offering financial support but also relaxed its Human Resource policies and procedures in terms of working hours, schedule of duties, extra leave days specifically to the Petitioner to enable her manage her medical condition. THAT the transfer, therefore, did not amount to constructive dismissal as it was well within the Respondent's administrative powers and was carried in accordance with due process. THAT upon the transfer, the Petitioner reported to the working station, demonstrating that she was ready to work at the station to which she was transferred to. Annexed hereto and marked as [AK-5] is a copy of the letter dated 23rd May 2023 transferring the Petitioner to Makueni County and a letter of 7th June 2023 proving that the Petitioner reported to work on the 7th June 2023. THAT the transfer to Makueni County took consideration of the Petitioner's condition as the Respondent is aware that Makueni County has a Level 5 hospital where the Petitioner can manage and have her medical condition attended to. Additionally, this is a station where the Petitioner has successfully worked in before. THAT after the transfer to Makueni County, the Petitioner tendered her Voluntary Retirement Notice on 16th October, 2023 giving the Commission three months' notice period of her intention to exit service. Annexed hereto and marked [AK-6] is a copy of the Petitioner's Voluntary Retirement letter dated 16th October 2023. THAT in her said letter, the Petitioner alleged that her condition worsens while in Makueni County, while there was no medical evidence to support the same. THAT it was upon the Petitioner to appeal the said transfer and table medical record and evidence before the Respondent to demonstrate that her medical condition worsened while she was in Makueni County. THAT by failing to make her appeal and instead opting for voluntary early retirement, the Petitioner made a conscientious choice to exit the employment of the Respondent. THAT in compliance with its Human Resource, Policies and Procedure Manual for Secretariat Staff, 2018, the [Employment Act](#) and practice, the Respondent accepted the Petitioner's request via a letter dated 26th October 2023 and commenced processing of her pension emoluments. Annexed hereto and marked [AK-7] is a copy of the Respondent's letter dated 26th October 2023. THAT upon the lapse of the notice period on or about 17th January 2024, the Petitioner stopped working and was thereafter exited from service. The separation, therefore, took effect as from 17th January 2024. Annexed hereto and marked [AK-8] is a copy of the Clearance form dated 17th January 2024. THAT on or about 23rd January 2024, the Petitioner wrote a letter withdrawing her earlier decision to voluntarily retire and requesting for reinstatement. Annexed hereto and marked [AK-9] is a copy of the Petitioner's letter dated 23rd January 2024. THAT the Commission considered the Petitioner's said letter of 23rd January 2024 but noted that her resignation had already taken full legal effect upon expiry of the notice period, and her position had been substantively declared vacant and a replacement process initiated in accordance with the Public Service Commission guidelines. Annexed hereto and marked [AK-10] is a copy of the letter by the Respondent dated 29th January 2024. THAT the Respondent avers that the determination by the Ombudsman, while noted, is not binding on this Honourable Court, which retains the exclusive jurisdiction to adjudicate employment disputes. THAT I am advised by the advocates on record for the Respondent, who advise me, verily believe to be true, that once the employer has considered the merits of the application for early retirement and accepted, the matter is sealed. The only issue that may arise is the retirement package and not reversal of the separation. THAT I am also advised by the advocates on record for the Respondent which advise I verily believe to be true that even if a request for early retirement was on the alleged basis of hostile or miserable working conditions created by the employer, the employee cannot sue for constructive dismissal, as he would have done had he resigned. An employee cannot sustain a cause of action for unlawful dismissal but can sue for damages related to the retirement package. THAT the application for early retirement was made by the Petitioner voluntarily on the basis of her health and upon acceptance by the Respondent, the matter was sealed. A claim for constructive dismissal can, therefore, not lie. THAT the allegations of violation of the



Petitioner's constitutional and fundamental rights and freedoms under Articles 27, 41 and 47 are devoid of merit, unfounded and unsubstantiated. THAT in the contrary, the Respondent avers that at all material times, it acted fairly and within its constitutional and statutory mandate. THAT further, the Respondent avers that due process and the principles entrenched in *the Constitution* were fully adhered to. The decision by the Commission was, therefore, expeditious, efficient, lawful, procedurally fair and reasonable in the circumstance thus compliant with the law. THAT the Respondent denies that the Petitioner was subjected to compulsory leave. The Petitioner chose to retire voluntarily, and no coercion was applied by the Respondent. THAT the Respondent avers that the transfer was neither punitive nor oppressive, but it was in consideration of the Petitioner's medical condition. THAT the actions of the Respondent were lawful and the Petitioner has not provided any evidence to substantiate the claims that the Respondent violated her constitutional rights or statutory provisions. THAT based on the foregoing, it is evident that the Petition is an abuse of the court process, lacks merit and the allegations against the Respondent are unsubstantiated and the Petitioner is not entitled to the orders sought.

Determination

16. Following directions by the court that it would determine the Petition through written submissions, both parties filed their respective submissions.

Issues for determination

17. In her submissions dated 8th August 2025, the Petitioner identified the following issues for determination:
 - i. Whether the actions of the Respondent amounted to constructive dismissal;
 - ii. Whether the Respondent violated the Petitioner's constitutional rights; and
 - iii. What remedies are available to the Petitioner.
18. The Respondents filed submissions dated 2nd September 2025, where they submitted generally on the Petition.
19. The court was of the considered opinion that the issues outlined by the petitioner captured the essence of the dispute and proceeded on them as follows-
 - i. Whether the actions of the Respondent amounted to constructive dismissal;
 - ii. Whether the Respondent violated the Petitioner's constitutional rights; and
 - iii. What remedies are available to the Petitioner.

Whether the actions of the Respondent amounted to constructive dismissal;

20. The claim of damages under Article 41 of *the Constitution* in this petition is based on the common law doctrine of constructive dismissal, which has not been legislated by Kenyan statute but is now accepted in our jurisdiction. The concept was restated by the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR relied on by both parties where the Court found that the Claimant was constructively dismissed from employment and held at para 39 as follows: "Based on our independent re-evaluation of the evidence and the context in which the letter dated 16th June, 2009 was written we are satisfied that the letter of termination by the Respondent was not voluntary. In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the contract with notice, or no



notice the departure must be within a reasonable time and the employer's conduct must be effective cause of leaving or termination..." The Court of Appeal further set out the applicable legal principles in constructive dismissal claims 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. i. Facts giving rise to repudiatory breach or constructive dismissal are varied.'" A key factor in the doctrine of constructive dismissal is that the employer's conduct must be an effective cause of the leaving or termination of employment. In the instant case, the petitioner proceeded on early retirement vide letter dated 16th October 2023 with 3 months' notice. She stated that the retirement was not voluntary as it was prompted by repeated transfers to a harsh and medically unsuitable environment which endangered her health. The Petitioner stated that while still in service on the 19th June 2023 she petitioned the CAJ(Ombudsman) and on 13th May 2024 and the CAJ determined the transfers were in contravention of article 47 of [the constitution](#) and section 4 of FAAA and amounted to unfair treatment and unfair conduct as set out in section 8(b) of CAJ Act. The CAJ added that the transfer 3 times to a region which exacerbates her medical condition is unreasonable and arbitrary. That appeal against the CAJ decision was dismissed on the 9th January 2025. The failure to accommodate the petitioner's medical condition led to the early retirement.

21. The respondent in submission relied on the above-cited Coca-Cola decision and submitted that the petitioner had not proved constructive dismissal. In exercise of its constitutional, statutory, and regulatory mandate, the Respondent lawfully transferred the Petitioner to Makueni County. This is a power that the Respondent possesses, which cannot be taken away. In transferring the Petitioner, the Respondent was not acting whimsically, but took into account her previous successful service in the same place, the availability of a Level 5 hospital to cater for the Petitioner's medical needs, and the operational requirements of the Commission. The Respondent contended that the Petitioner has not placed before this Honourable Court any evidence to suggest that the Respondent acted without jurisdiction or with ill-motive. What the Petitioner contends is that the Respondent did not consider her medical condition on the basis that she had to be attended to at Kenyatta National Hospital. However, the Respondent has referred to Makueni Level 5 hospital which was within the Petitioner's access. At no point prior to tendering her voluntary retirement did the Petitioner allege that the said hospital was inadequate or too far to meet her medical needs. It is, therefore, the Respondent's submission that the administrative transfer of the Petitioner from Nairobi to Makueni was lawful, procedural and consistent with the provisions of [the Constitution](#), the Employment Act, the [Teachers Service Commission Act](#) and the Human Resource Policies and Procedures Manual for Secretariat Staff, 2018. The transfer was neither arbitrary nor punitive and does not amount to a repudiatory breach of the employment contract as contemplated in the case of Maria Kagai Ligaga (supra). Second, the Claimant purported to rescind her letter of voluntary retirement on or about 23rd January 2024. By doing so, she indicated that she could go on working for the Respondent. She, therefore, ceased to believe that the working condition was so intolerable and irredeemably hostile that she could not go on working. By rescinding her decision, she no longer could sustain the argument that the Respondent was in repudiatory breach of the contract of employment. In the case of Edwin



Beiti Kipchumba v National Bank of Kenya Limited [2018] KEELRC 2393 (KLR) (page [59] of the Respondent's authorities), the court held that for resignation from employment to amount to constructive dismissal, it must be unequivocal. An employee cannot rescind his or her resignation decision and sustain a claim for constructive dismissal. Third, the claim of unfair termination cannot be sustained where there is voluntary resignation from employment. In the case of Kenya Union of Domestic Workers, Hotels, Education Institutions, Hotels and Allied Workers (Kudheidha) v United Kenya Club [2024] KEELRC 761 (KLR), this court held as follows (page [69] of the Respondent's authorities): An employee who voluntarily resigns from employment cannot plead unfair termination of his contract. Fourth, nothing has been placed before the Court to show that the Petitioner appealed the transfer of 23rd May 2023. By failing to make her appeal and instead opting for voluntary early retirement, the Petitioner made a conscientious choice to exit the employment of the Respondent. In the Petitioner's voluntary retirement letter, the Petitioner alleged that her condition worsened while in Makueni County but did not table any evidence in support of the same as at the time of resignation. It is the Respondent's submission that the application for early retirement was made by the Petitioner voluntarily on the basis of her health and upon acceptance by the Respondent, the matter was sealed. A claim for constructive dismissal can, therefore, not lie. Fifth, in determining whether there was constructive dismissal, an objective test must be applied in evaluating the employer's conduct. In this case, the Commission had for over 24 years, accorded the Petitioner of necessary support in balancing her contractual obligations under the employment contract under medical condition to ensure that the Petitioner's work and life balance was well maintained. The commission acted with utmost consideration by not only offering financial support but also relaxed its Human Resource Policies and procedures in terms of working hours, schedule of duties, extra leave days specifically to the Petitioner to enable her manage her medical condition. From the foregoing, it is evident that far from acting in a manner that could be deemed hostile, unreasonable or repudiatory of the employment contract, the Respondent consistently demonstrated flexibility and compassion towards the Petitioner. It is, therefore, the Respondent's submission that the totality of all the foregoing is that its conduct cannot by any measure be deemed to amount constructive dismissal.

22. The court noted that the petitioner, on 28th April 2014, was transferred to Makueni Kilungu and transferred back to the headquarters of TSC on 28th January 2016. On 22nd March 2022 she was transfer back to Makueni County and vide letter of 31st march 2022 but deployed back to headquarters. on 23rd May 2023 she was transferred again to Makueni county of which she reported on 7th June 2023 and was deployed to an area called Mukaa. The petitioner produced her letter of early retirement dated 12th January 2024. The letter of voluntary retirement was dated 16th October 2023 (GNN1C)gave the reasons for termination as follows- "I got transferred to Makueni county three times in a row where I read malice on the transfers.... the geographical terrain of Makueni county is hilly and my condition worsens as I go to my work station daily . I have had several attacks within the three months at the current work station which endangers my life, and yet my health is paramount. This has necessitated my early retirement." The respondent stated that the petitioner did not raise issue with the last transfer but opted to voluntarily retire and the same was accepted. The court noted that the respondent was aware of what looks to the court like acute health challenge of the petitioner as per their response of having taken care of her medical condition for 24 years and reasons why a year earlier the petitioner was moved back to Headquarters from the same Makueni County she failed to report on transfer in 2022 due to the illness condition. The genesis of the sickness was the tragic 1998 bomb blast while at employment of the respondent.
23. The court agreed with the respondent that it had management prerogative to transfer the petitioner. The court holds that while it is a management prerogative the transfer ought to be fair and humane. The respondent is a national organization, and agreed with the petitioner on the transfer of the



petitioner to the remote place of Mukaa in Makueni county, which is a distant place from the said Makueni level 5, endangered the life of the petitioner, who relies on supplemental oxygen to survive. The very act threatens the right to life of the petitioner. The petitioner averred that in 2014 she was moved to Nairobi from Kilingu Makueni due to health challenges. The petitioner produced medical notes by her doctors to effect she was to avoid strenuous activity, she be posted in location with easy access of specialty doctors (letters by Dr Irimu dated 14th April 2022 and 5th July 2023 among others). The court finds that the repeat transfer to the Makueni while the petitioner was in the same ill health condition was unfair and inhumane. The claim that the petitioner did not complain against the last transfer was superfluous taking into consideration are return to Nairobi from same location in 2016, and the stalled in 2022 for same condition. The court noted that the issue of fairness of the transfer has already been determined with finality by the CAJ in decision dated 13th may 2024 where it was held that the transfer of the petitioner was in contravention of Article 47 of *the Constitution* of Kenya, section 4 of FAA and amounts to unfair treatment and unfair official conduct as set out on section 8(b) of CAJ Act. Article 159 (2) obliges this court to respect decisions of alternative dispute resolution disputes. The appeal by TSC was unsuccessful. The Respondent submitted that Petitioner had a right to appeal the decision to transfer. This right was not exercised and the CAJ acted in error in entertaining the complaint by the Petitioner. The finding by the CAJ is, therefore, per incuriam and should not be relied on by this Honourable Court. The court found the respondent in its appeal dated 1st July 2024 did not raise the issue of per- incuriam decision. The decision is final and not per- incuriam having been concluded on appeal. The court will respect the decision of CAJ. The Court, on its own evaluation of the evidence by the petitioner, found that the petitioner had proved a case of constructive dismissal on a balance of probability.

Whether the Respondent violated the Petitioner’s constitutional rights;

The petitioner’s submissions

24. Article 41 of *the Constitution* provides: 1) every person has the right to fair labour practices. 2) Every worker has the right— a) to fair remuneration; b) to reasonable working conditions; c) to form, join or participate in the activities and programmes of a trade union; and d) to go on strike.” The Respondent failed to consider the Petitioner’s medical condition, thereby exposing her to unsafe working environments and violating her right to fair labour practices. The right to fair administrative action is articulated in Article 47 of the 2010 Constitution, which is to the effect that; Every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration. Article 47 of *the Constitution* guarantees every person the right to fair administrative action. The Respondent contravened this provision when it unlawfully and unfairly dismissed the Petitioner without according her an opportunity to be heard. Further the Respondent despite being full aware of the Petitioner’s health, failed to provide written reasons for her repeated transfers. The actions were not only unfair, but procedurally and substantively improper violating her right under Article 47. In *Lewis Moses Odhiambo & another v Mahanaim International High School & another* [2021] eKLR quoted the case of *Geoffrey Oduor Sijeny v Kenyatta University* [2018] eKLR which stated that; The right to fair administrative action is not only an integral part of the Bill of Rights but also an essential feature of our Constitution and the soul of a democratic society without which democracy and the rule of law cannot be maintained. This right is now firmly entrenched in our Constitution as a way of ensuring that administrative actions



meet the standards set by *the Constitution*. He further stated that From the provision of Article 47 of *the Constitution*, it is clear that *the Constitution* now imposes a control on administrative bodies by requiring them to employ constitutional standards of legality, reasonableness and procedural fairness in any administrative actions. Under the said standards, the administrative bodies are also required to accord the person to be affected by such actions a hearing before taking the action. Where the actions would have adverse effects on the persons' right(s), the administrative body is required to give the persons written reasons for its actions. The right to fair administrative action is a right that must not be abrogated or compromised. The Respondent's failure to act within this standard renders her transfers illegal and unconstitutional. The Commission on Administrative Justice (the office of the ombudsman) investigated the matter and determined that indeed the Respondent violated *the constitution*. The Petitioner has adduced in her evidence the determination of the Commission on Administrative Justice which will be of great help to this honourable court in determining the petition.

The Respondent's submissions

25. The Respondent submits that the Petitioner having failed to prove constructive dismissal or violation of any right is not entitled to any of the remedies sought. It is trite that remedies flow from rights violated or contractual/ statutory breaches proved. In this case, the reliefs sought by the Petitioner, including declarations of violation of constitutional rights, compensation for alleged unfair labour practices, and damages for constructive dismissal are untenable in law.

Decision

26. The court held that the transfer in 2023 was inhumane and unfair and in breach of articles 28, 41, and 47 of *the Constitution*. The court found the transfer threatened the right to life of the petitioner, taking into account the medical treatment notes which warned against her transfer to a location without access to specialty doctors and where she could strain.

Whether the petitioner was entitled to relief sought

27. On relief sought of General Damages- the petitioner submitted that Section 49 of the *Employment Act* provides remedies for wrongful dismissal and unfair termination. The petitioner is entitled to maximum compensation under Section 49(1)(c) of the Act. The petitioner seeks general damages for loss of employment equivalent to 12 months' pay amounting to Kshs 1,589,796/= (132,483 x 12 months) We rely on the following authorities a) Kenya Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023) [2024] KEELRC 843 (KLR) (18 April 2024) (Judgment) b) Otieno v Mutsimoto Motor Company Limited (Petition E003 of 2022) [2024] KEELRC 1663 (KLR) (26 June 2024) (Judgment) 2) Exemplary and Aggravated Damages Aggravated damages are awarded to compensate for distress, humiliation or damage of reputation caused while exemplary damages are punitive in nature aimed to punish and deter similar actions in future. The respondent were fully aware of the petitioner's serious medical condition at the time of her repeated transfers. Instead of making reasonable accommodation as required by the law, the respondent transferred the petitioner to an environment that was not compatible with her health condition. The respondent failed to act with empathy causing her distress, emotional suffering and career disruption. Under this head the Petitioner seeks an award of kshs 5,000,000/= The petitioner relies in the following cases a) Regeru v Nation Media Group Limited (Civil Case 433 of 2006) [2022] KEHC 13528 (KLR) (Civ) (7 October 2022) (Judgment) court awarded Aggravated damages of Kshs 1,000,000/=and Exemplary damages Kshs 1,200,000/= b) Kenyatta National Hospital v Dorcas Odongo & another [2021] eKLR Court awarded Aggravated damages of Kshs. 850,000/) Compensation for physiological torture and mental anguish The petitioner was forced to choose between resigning and her serious medical condition which caused



the petitioner both physiological torture and mental anguish. The Respondent failure to accommodate the Petitioner's disability caused avoidable psychological trauma. She deserves a compensation of kshs 10,000,000/= 4) Payment in lieu up to 65 years under Persons With Disability Act, 2025 Section 21(6) of the persons with disability act, 2025 states that; 'For the purpose of subsection (5) the age of retirement for persons with disability shall be five years above the mandatory age of retirement set by the government' Due to the medical condition of the petitioner she applied to the National Council for Persons with Disability and was duly issued with a disability Card Reg; NCPWD/P/424927. This position was well known by the Respondent. The Petitioner was also issued with income tax exemption Certificate as person with disability. In *Macharia v Safaricom PLC* (Petition 434 of 2019) [2021] KEHC 462 (KLR) (Constitutional and Human Rights) (8 July 2021) the court stated that According to article 27 of the Convention on the Rights of Persons with Disabilities; it is stated; 1. States parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia: a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions; Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;" Being a person with disability, the Petitioner was entitled to reasonable as safe working environment taking due consideration to her medical condition and protection from discrimination, including the right to continue working up to the extended retirement age of 65 years as provided by law. The Respondent failed to uphold this legal duty and instead subjected her to constructive dismissal, effectively denying her the right to fully realize her economic potential. The Petitioner was compelled to leave employment prematurely at the age of 51 years due to constructive dismissal, despite being capable and willing to work until her lawful retirement age of 65 years. She is, therefore, entitled to full compensation for the lost years of employment. Loss of earnings calculation: Kshs 132,483 x 12 months x 14 years = Kshs 22,257,144/= 5) Compensation for medical expenses The Petitioner has incurred and continues to incur, substantial medical expenses. As a person living with a serious medical condition, the petitioner has been forced to spend significant amount of money since she does not have an insurance or medical cover to cater for her medical expenses after her dismissal. We urge this court to exercise its discretion and award the Petitioner kshs 5,000,000/= We urge this Court to award the Petitioner a global sum of kshs 42,257,144/= plus cost and interest of the petition.

28. Conversely, the Respondent submits that the Petitioner having failed to prove constructive dismissal or violation of any right is not entitled to any of the remedies sought. It is trite that remedies flow from rights violated or contractual/ statutory breaches proved. 59. In this case, the reliefs sought by the Petitioner, including declarations of violation of constitutional rights, compensation for alleged unfair labour practices, and damages for constructive dismissal are untenable in law. The prayer for KES 10,000,000 as compensation for inhuman treatment and related declaration that the Petitioner was subjected to physiological torture and mental anguish cannot be granted as it is a prayer not based on any pleading in the body of the petition. Nowhere has the Petitioner alleged violation of the right to protection from inhuman or degrading treatment. 61. Importantly, the Petitioner's pension entitlements have already been secured under the relevant law. To grant her additional compensation would amount to double enrichment which is contrary to public policy. 62. In light of the foregoing, the Respondent submits that the Petitioner is not entitled to any of the remedies prayed for in the petition



Decision

29. The court was persuaded and concluded the petitioner’s right to fair labour practice under article 41(1) and 47 were violated to wit- ‘a)Every person has the right to fair labour practices.(2)Every worker has the right to reasonable working conditions and fair administrative action.’ Article (47)’Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.’ The court held that there was a violation. The conditions in the station of transfer threatened the health and life of the petitioner, and the respondent made the decision with knowledge of the frail health condition of the petitioner as evidenced by the medical notes. The petitioner was also personally certified as living with disability. The petitioner sought general damages, exemplary damages, and tort damages. I agreed with the respondent that there was no pleading of torture.
30. On finding violation of a constitutional right the court is obliged to consider and award as per section 12 of the ELRC Act to wit- ‘3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following interim preservation orders including injunctions in cases of urgency; a prohibitory order; an order for specific performance; a declaratory order; an award of compensation in any circumstances contemplated under this Act or any written law; an award of damages in any circumstances contemplated under this Act or any written law; an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or any other appropriate relief as the Court may deem fit to grant. ’The court, taking into consideration the circumstances of the transfer and exposure of the petitioner to a lack of medical care post-termination, awards general damages for violation of her constitutional rights leading to the constructive dismissal in the figure of Kshs. Two million (2,000,000) which amount is approximately the equivalent of 12 months’ gross salary as per pay slip of December 2023 which indicated gross salary of Kshs. 172983./-.
31. On the prayer for compensation under section 15(6) of the *Persons with Disabilities Act* to wit – “The minimum retirement age for persons with a disability shall be sixty years”; The Act does not provide for compensation in event of unfair termination. The court is not aware of any law which gives such jurisdiction. The compensation by way of general damages is deemed adequate.
32. The petition is allowed. A declaration is issued that the voluntary retirement amounted to constructive dismissal. A declaration is issued that the transfer to Makueni, Mukaa was an unfair labour practice and unfair administrative action in violation of articles 28, 41 and 47 of *the Constitution*. The petitioner is awarded general damages for the constructive dismissal and for the violation of articles 41 and 47 of *the Constitution*, in the amount of Kshs. 2 million, with interest at the court rate from the judgment date, and the Costs of the petition.
33. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Petitioner: Kiptoo

Respondent: absent

