

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. E037 OF 2022

NICHOLAS ONGIRI ORINA.....CLAIMANT

VERSUS

MOMBASA WATER SUPPLY & SANITATION

COMPANY LIMITED.....RESPONDENT

JUDGMENT

Background

1. By a Statement of Claim dated 6th June, 2022, the Claimant sued the Respondent and sought the following orders against it, thus;
 - a. A declaration that the Claimant is the Respondent's employee and that the Respondent's action of withholding the Claimant's salaries and hardship allowance is illegal and unlawful.

- b. An order directing the Respondent to release the Claimant's salaries from July 2019 to date, currently at KShs. 6,413,757.90 and hardship allowances from January 2013 to date, Kshs. 702,000.00
 - c. Costs of the suit.
 - d. Interest on (b) and (c) above at Court rates.
 - e. Any further relief this Honourable court deems fit and just to so grant.
2. The Respondent resisted the Claimant's claim through a Memorandum of Reply dated 13th July, 2022. Though the Respondent admits that the Claimant was its employee, it denied that he is still its employee. Further, the Claimant has a cause of action against it and is entitled to the relief sought.

Claimant's case

3. The Claimant, Nicholas Ongiri Orina, stated that he was initially employed by the then Ministry of Water on 1st September 1989 and was subsequently deployed to the

Respondent on or about 25th July 2005, where he has continued to render services to date.

4. He avers that in or about January 2013, he was deployed to the Kipevu Sewage Treatment Plant. By virtue of the working environment, which involved handling raw sewage, he contends that he became entitled to a hardship allowance of KShs. 6,500 per month, similar to that received by other employees working under the same conditions. Despite his repeated requests, the Respondent failed to, ignored, and/or neglected to release the hardship allowance, thereby aggrieving him.
5. The Claimant further states that on 8th March 2019, he applied for annual leave, which was approved on 12th March 2019, allowing him to proceed on leave from 26th March 2019 to 15th July 2019.
6. He contended that, while on leave, he requested early retirement by his letter dated 3rd July, 2019, to the Respondent. The letter elicited no response.

7. He contends that upon resuming duty, he continued working at the Kipevu Sewage Treatment Plant. However, he avers that, without any written or justifiable reason, the Respondent withheld his salary from July 2019 to date. At the time, he was earning a consolidated monthly salary of KShs. 97,178.15.
8. The Claimant asserts that, despite numerous efforts to resolve the matter through the Human Resource Department and the Directors, and notwithstanding assurances that the issue would be addressed, the Respondent failed to regularise his salary or to disburse the hardship allowance.
9. As a result, he seeks payment of withheld salaries from July 2019 to date, amounting to Kshs. 6,413,757.90, and of hardship allowance from January 2013 to date, amounting to Kshs. 702,000.00, together with costs and interest.

Respondent's case

10. The Respondent acknowledges that the Claimant was its employee after being deployed from the now-defunct Coast

Water Services Board. However, it argues that, after being assigned to the Kipevu Sewerage Plant, the Claimant provided poor service, marked by absenteeism, insubordination, lateness, and refusal to perform duties, despite receiving both verbal and written warnings.

11. It contends that the Claimant was not eligible for the hardship allowance, as he was classified within Job Group 5, which was not included under the relevant Collective Bargaining Agreement (CBA).
12. Despite being granted annual leave from 25th March 2019 to 15th July 2019, the Claimant failed to resume work, applied for early retirement during the leave period, and did not serve notice of termination. The Respondent considered his actions as desertion of duty, thereby justifying the withholding of his salary. Furthermore, the Respondent states that his subsequent request to return to work in January 2022 was denied due to the absence of available vacancies.

13. It was further contended that, upon taking leave, the Claimant travelled to the USA, where he remained until 2022 without resuming his duties, only to subsequently emerge and write the aforementioned letter seeking approval to resume his duties.

14. He maintains that the Claimant did not give notice of termination or pay in lieu of notice, and that his failure to report back amounted to desertion of duty. On that basis, the Respondent justifies the withholding of his salary and contends that he is not entitled to any pay.

Consent

15. On 16th January 2025, the parties recorded a consent which had the effect of disposing of the dispute partially and narrowing the issues for determination. The consent was recorded thus;

“By consent of both parties, the respondent does pay the claimant for terminal dues as tabulated below:

(a) Madallin for 14 years and service Ksh.50,000 as per the CBA.

(b) Taken one month's salary Ksh.69,185.15 as per the respondent's ledger.

(c) Transport from Mombasa County to Nyamira County Ksh.55,000 as per the Respondent's HR policy.

(d) Health risk allowance with effect from November 2011 to July 2019, Ksh. 324,000 as per the CBA.

2. The Court to hear and determine whether the Claimant's letter dated 3rd July 2019 requesting early retirement amounts to Separation from Employment with the respondent.

3. The Court to hear and determine whether the Claimant is entitled to the salary and/or allowance from July 2019 to date, or if separation

from employment occurred following the said letter from the Claimant.

4. The Court to hear and determine whether there is any interest payable to the Claimant on the health risk allowance.”

Analysis and determination

16. By reason of the foregoing premises, it becomes imperative to state at this point that the outstanding questions this Court is left to determine are;

1) Whether the Claimant’s letter dated 3rd July 2019 requesting early retirement amounted to separation from employment.

2) Whether the Claimant is entitled to salary and or allowances from July 2019 to date.

3) Whether the Claimant is entitled to interest on the risk allowance.

4) Who should bear the costs of this suit?

Whether the letter dated 3rd July 2019 amounted to a separation from employment

17. It is not in dispute that the Claimant was employed by the Respondent. While on approved leave, the Claimant wrote a letter dated 3rd July 2019 requesting early retirement. The Respondent did not approve the request.
18. An application for early retirement that has neither been expressly approved nor implicitly accepted by the employer cannot, by any stretch of legal interpretation, constitute a valid basis for separation from service. Retirement, being a matter that requires the employer's concurrence when invoked prior to the appointed retirement age or date, does not become effective by the unilateral act of the employee.
19. Accordingly, in the absence of a clear and unequivocal acceptance by the employer, the employment relationship subsists in full force and effect. An employee who, on the strength of an unacted -upon letter of early retirement, absents himself from work does so at his own peril. Such absence, if prolonged without lawful justification, may be

properly construed as abandonment of employment, desertion, or constructive resignation, depending on the facts and duration.

20. In **Gedeon Ikengu Ng'ang'a v Hon Attorney General [2013] KEELRC 673 (KLR)**, the Court held that early retirement must be mutually agreed.

“An application for early retirement, as stated above, is a mutual process that involves an employee and employer. Each party to this process must work in good faith; otherwise, it defeats the very purpose of the voluntary aspect of this early retirement process. In this case, I find, and out of the claimant’s own admission that his application for early retirement was not approved, he only came to learn of this in October 2006, when he was already out of the country and therefore in any event he was not in a position to report back to work to finalise on the process. This effectively made him absent from his duty station as and when his approved annual leave ended on 11th September 2006...”

I therefore find that the claimant effectively was absent from duty, this was without notice to the respondent/employer and cannot claim any dues as owing, having frustrated his own contract of employment with his absence. However, I note the claimant was on his annual leave with the permission and approval of the respondent and whatever dues were owing as of 11th September 2006 are payable to him. This court is only asked to grant payment in lieu of notice, which is declined; severance pay, which is not payable in a case where the claimant frustrated his own contract; and the golden handshake, which is discretionary upon terms agreed by mutual consent of the parties.”

21. The Court therefore holds that until an application for early retirement is duly accepted, the employee remains bound by the obligations of his office, and any unilateral cessation of work predicated solely on an unresponded request cannot be sanctioned as a lawful separation.

22. The Claimant asserted that at the lapse of his leave period, and noting that the Respondent had not responded to his application for early retirement, he resumed duty and continued working dutifully and diligently; however, the Respondent decided unilaterally withhold his salary and allowances. I am not persuaded that this version of the Claimant is candid and truthful.

23. His letter dated 8th January 2022, produced in evidence by the Respondent, is unambiguous. The Claimant was in the United States from the time he took leave until on or about the date of the letter. It is clear that he had not communicated with the Respondent prior to 8th January 2022. The prolonged absence of the Claimant from work, for a period of almost two and a half years, without communicating with the Respondent, evinced his intention to no longer be bound by the contract of employment. I find that he constructively resigned.

Whether the Claimant is entitled to salary and or allowances to date.

24. Having found that the Claimant constructively resigned from his employment, I have no basis for granting the relief. He rendered no service. He cannot be paid for no services rendered.

Whether Interest Should be paid on the consented amount of the health risk allowance.

25. The parties recorded a consent award of a health risk allowance from November 2011 to July 2019 in the sum of Kshs. 324,000 for the claimant. In my view, this was an amount the claimant was entitled to monthly. It was withheld from him when it was not paid and when it fell due, unjustifiably so.

26. An award of interest on sums adjudged to be due and payable is not a matter of indulgence but compensation. Where a party has unjustifiably and unlawfully withheld monies rightfully belonging to another, the resulting deprivation necessarily occasions loss. Interest is therefore awarded to compensate the aggrieved party for the loss of

the use of those funds during the period of wrongful withholding. It restores, as nearly as possible, the position that would have occupied had payment been made when due. Accordingly, once wrongful withholding is established, the award of interest follows as a necessary and equitable consequence.

27. On the strength of the foregoing, I hold that the Claimant is entitled to interest risk allowance from the date it first fell due, to the date of full payment.

28. Costs of this suit shall be in favour of the Claimant.

**Read Signed and Delivered this 19th Day of February
2026.**

OCHARO KEBIRA

JUDGE