



**Ndung'u v Safaricom Kenya PLC Limited (Cause E6492 of 2020)
[2025] KEELRC 181 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 181 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6492 OF 2020
J RIKA, J
JANUARY 31, 2025**

BETWEEN

MARGARET WAIRIMU NDUNG'U CLAIMANT

AND

SAFARICOM KENYA PLC LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 24th November 2020.
2. She avers that she was formally employed by the Respondent, as a customer care representative, on 9th August 2010.
3. She had been in pre-employment training organized by the Respondent for the role, from 11th June 2010.
4. Her dispute with the Respondent arose on 6th February 2018, when the Respondent retired her on medical ground.
5. She avers that she worked as customer care representative for 7 years, during which she spent hours daily on headsets, attending to customers' calls. She developed occupational illnesses, called acoustic shock syndrome and rhinosinusitis.
6. This condition was confirmed by doctors who attended to her from June 2017, when she started developing ear pains.
7. Based on the doctors' opinion, the Respondent's own health advisor, recommended that the Claimant is redeployed to another department, where she would not be required to use the headsets.



8. A doctor from the work injury evaluation clinic, Ministry of Labour, examined her on 24th September 2017, and confirmed that she suffered acoustic shock syndrome, but that she was generally in good health, to continue working in other suitable departments.
9. She was temporarily moved to the marketing development department for 90 days, from 6th November 2017, to 5th February 2018, as the Respondent pondered where to place her.
10. However, through a letter dated 2nd February 2018, the Respondent terminated her contract on medical ground.
11. She was surprised because at the time, she had on the advice of the Respondent's human resource office, applied for a position as a customer experience executive, which did not require use of the headsets.
12. She appealed against the decision to retire her on 12th February 2018. She pleaded that she is allowed to continue working in the marketing development department, as she continued to pursue other suitable vacancies. Her appeal was declined without justification, on 7th March 2018.
13. Termination was unfair and unlawful, as no doctor recommended retirement on medical ground.
14. She avers that the Respondent subjected her to unfair labour practices. She needed an income to meet the costs of treating an illness /injury she sustained, in the service of the Respondent. She was discriminated against, in that she was not considered for other suitable roles.
15. She had an outstanding loan of Kshs. 1,272,813 with NCBA Bank. The loan had been insured against retirement on medical ground. It was incumbent upon the Respondent to pursue settlement of the loan amount by the relevant insurance company. There was no settlement and the amount outstanding, had risen to Kshs. 1,439,262 as at 22nd October 2020.
16. Her last salary was Kshs. 89,504 monthly.
17. She prays for Judgment against the Respondent for: -
 - a. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,074,054.
 - b. Damages for unfair labour practice at Kshs. 1,000,000.
 - c. Damages for discrimination at Kshs. 1,000,000.
 - d. Immediate settlement of NCBA loan by the Respondent, outstanding at Kshs. 1,439,262 as at 22nd October 2020.
Total... Kshs. 4,513,317.
 - e. Costs.
 - f. Interest on commercial rates of 20% from 6th February 2018.
 - g. Any other suitable order.
18. The Respondent filed its Statement of Response, dated 14th June 2021. It is admitted that the Claimant was employed by the Respondent, from 9th August 2010. She retired on medical ground, on 2nd February 2018.
19. There was a consultative meeting held between the Parties in November 2017. Redeployment of the Claimant was discussed. She was taken through the redeployment policy, and given the following options: -



- I. Temporary assignment to the marketing development department for 90 days.
 - II. Retirement on medical ground if she did not pursue the option above, or did not secure another opportunity within 90 days.
20. Following the discussion, the Claimant was redeployed to marketing development department for 90 days. This was to give her time to heal, and to enable the Respondent explore other suitable vacancies. She was encouraged to apply for suitable vacancies.
 21. Her health did not improve. She was retired after the Respondent's health advisor, recommended retirement. There were further consultative meetings between the Parties, before retirement.
 22. She was paid terminal benefits in accordance with clauses 3.0 and 6.0 of the Respondent's retirement on medical grounds policy. The benefits included: -
 - a. Salary for days worked in the month of retirement.
 - b. Notice at Kshs. 89,505.
 - c. Service at the rate of 15 days' salary for each complete year of service, at Kshs. 313,266.
 - d. 20 days of pending annual leave at Kshs. 74,587.
 - e. Ex-gratia amount Kshs. 685,630.
 23. The applicable policy on retirement for medical reasons, allowed the Respondent to retire an Employee on medical ground, if that Employee was shown through medical report, unlikely to recover.
 24. The Respondent made every effort to reasonably accommodate the Claimant.
 25. It is admitted that she appealed against the decision to retire her. The appeal was considered and declined.
 26. Due process was followed. There was no discrimination against the Claimant. The insurance company paid her loan for 6 months in accordance with the insurance policy. The Claimant was obligated to pay the difference. Her loan agreement and her contract of employment were separate contracts.
 27. The Respondent's policy on retirement for medical reasons, does not compel the Respondent to pay a retired Employee's unsecured, outstanding loan. The policy requires the Employee to liaise directly with the loan provider, on loan repayment. The Respondent's sole obligation, is to notify the loan provider, that an Employee has retired for medical reasons.
 28. The Respondent did not subject the Claimant to unfair labour practices. It is not true that she developed acoustic shock syndrome, from workplace exposure. She was reasonably accommodated, while she fell ill.
 29. She was validly, fairly and lawfully retired. Compensation for unfair termination is not merited. Her loan with NCBA has no relationship to her employment contract. She is not entitled to damages for discrimination or unfair labour practice.
 30. The Respondent urges the Court, in event any award is found due to the Claimant, to set off against the sum of Kshs. 998,896 already paid to the Claimant by the Respondent. Alternatively, the Respondent urges the Court to uphold the sum paid, as full and final settlement.
 31. The Respondent prays for dismissal of the Claim with costs.



32. The Claimant gave evidence, and closed her case, on 16th February 2023. Odhiambo Ooko, Senior Employee Labour Relations Manager, gave evidence for the Respondent on 29th November 2023 and 12th June 2024, when the hearing closed. The Claim was last mentioned on 7th November 2024, when Parties confirmed filing and exchange of their closing submissions.
33. The Claimant relied on her witness statement and documents [1-69], in her evidence-in-chief. She restated her employment history with the Respondent, her terms and conditions of service, from the date she joined the Respondent in 2010, to the date she was retired for medical reasons, in 2018.
34. She added that when called for the meeting of November 2017 by the Respondent, she was not advised on the agenda, or her right to be accompanied to the meeting. She applied for a suitable position and was temporarily redeployed to marketing department.
35. Cross-examined, she told the Court that she applied for other positions, after redeployment, through e-mail, but did not have copies of the e-mails. There were medical reports available to Parties, before the decision to retire the Claimant was arrived at. She held meetings with the Respondent's human resource department, prior to her 90-day redeployment.
36. The Claimant conceded that the Respondent had a policy on medical retirement. Clause 2.1 allowed the Respondent to retire an Employee on medical ground. There were medical reports saying the Claimant was unsuitable to continue serving at the call centre. Clause 3.4 of redeployment policy, limited redeployment period to 90 days. The Claimant's medical condition did not improve, after redeployment, and she was retired.
37. The letter of retirement refers to consent between the Parties. She was coerced, and appealed the decision. She did not agree with the decision. Retirement policy required an Employee with outstanding loan, to engage the lender directly, on redressing the loan. The Respondent was not liable, under this policy, to pay the loan.
38. The Claimant conceded that she was paid terminal dues, at Kshs. 1,162,988 before tax. She signed the letter of retirement. It indicated that redeployment option, had been exhausted.
39. Redirected, the Claimant told the Court that she made various applications for alternative work, within the Respondent, while on temporary redeployment. She was interested in customer care executive, a position that did not require use of headsets. She was not aware about the agenda, in the meeting leading to her retirement. She did not sign the letter of retirement voluntarily. She went to the meeting unaccompanied.
40. Odhiambo Ooko similarly adopted his witness statement and documents [1-24] in his evidence-in-chief.
41. Cross-examined, he told the Court that the Claimant was advised to apply for suitable job openings. She applied. Her medical condition did not improve. Doctors confirmed that she was not suited to serving at the call centre, but could perform other roles, which did not involve use of headsets. The Doctors did not recommend termination of her contract.
42. She was paid terminal dues, in accordance with the retirement policy. The letter of retirement has her handwritten comments. It was indicated that she would read, understand the letter, and return later to sign. The Claimant reiterated that, she signed the letter without prejudice.
43. Ooko agreed that the Claimant could perform other roles, outside the call centre. It is not true that the Respondent terminated the Claimant's contract without consulting her. She got sick while working at the call centre. Her case should have been considered under the work injury benefits regime. She was



paid service at the rate of 15 days' salary for each complete year of service. She was paid ex-gratia, which was not an obligation on the part of the Respondent to pay. She was pregnant when retired.

44. Redirected, Ooko told the Court that the Respondent did not receive a claim for work injury from the Claimant. Terminal dues paid, conformed to the existing retirement policy.
45. The issues are whether, the Claimant's contract of employment was terminated by the Respondent through medical retirement, unfairly and unlawfully; whether her constitutional right to fair labour practices, and right not be discriminated against at the workplace, were impaired by the Respondent; whether the Respondent is liable to meet her personal loan obligation; and whether her Claim was settled by the Respondent.

The Court Finds: -

46. The Claimant was employed by the Respondent Telco, as a customer care representative, through a letter of appointment, dated 9th August 2010.
47. She worked at the call centre, and like several other of her colleagues, was documented to have sustained work injuries or illnesses, resulting from constant use of headsets.
48. The Respondent exhibited an approval request for rotation of 9 call centre Employees, who are said to have been declared medically unfit, to discharge headset duties. The request is signed by Goldermier Opiyo Head of Customer Operations and Joseph Mokaya, Head of Talent Acquisition. The request was signed by these officers in November 2017. It is not in dispute that Employees of the Respondent, working at the call centre, sustained work injuries or illnesses.
49. The Claimant is named among the 9 Employees, in the request for rotation, who were declared medically unfit to continue working at the call centre.
50. There are medical reports underscoring that she sustained acoustic shock. This from the record, was a common occurrence at the Respondent. There is adequate evidence from both Parties, confirming that the Claimant, among others, suffered acoustic shock, and could not continue working at the call centre.
51. The Respondent first invoked its re-deployment policy, and later, its retirement on medical ground policy, in dealing with the Claimant's work injury or illness.
52. Through a letter dated 2nd November 2017 from Paul Kasimu, Director Human Resources, the Claimant was redeployed to the marketing and sales department.
53. The letter indicates that the Claimant was consulted, and made aware about the options open to her, under both the redeployment and medical retirement policies. She would be retired on medical ground, if she did not wish to be redeployed, or failed to secure a suitable alternative position, within the 90 days of limited redeployment. Her redeployment commenced on 6th November 2017, ending 5th February 2018.
54. She was not successful in her search for permanent redeployment, during the 90-day temporary redeployment. It is not disputed that her health did not improve, during the period of temporary redeployment.
55. She was retired through the letter dated 2nd February 2018. She appealed against retirement, in a letter addressed to the Director, Human Resources, dated 12th February 2018. The appeal was declined, and the unfortunate news communicated to the Claimant through a letter dated 7th March 2018, from the Respondent's Chief Executive Officer, Bob Collymore.



56. She was paid net terminal benefits at Kshs. 799,779 and pension dues at Kshs. 465,387.
57. Was retirement unfair and unlawful? The Court must first ask, whether there was valid ground warranting consideration of terminating the Claimant's contract, through medical retirement.
58. There is common evidence that the Claimant was unwell, and could not discharge her role at the call centre. She sustained injury to her ears, a condition medically characterized by multiple physicians, as acoustic shock syndrome. She was also found to be suffering from inflamed nasal cavity, a condition medically characterized as rhinosinusitis.
59. There were 2 workplace policies which addressed workplace incapacitation through illness. First, the Respondent was required to invoke its redeployment policy.
60. The redeployment policy defines the process to comprise finding an equivalent, or alternative job, for the stricken Employee. Incapacity would be confirmed by a certified medical practitioner.
61. These procedures on redeployment were all satisfied, after the Claimant had been certified medically, to be unfit to continue working at the call centre.
62. Once redeployed at the marketing and sales department for 90 days, the Claimant did not secure a suitable permanent redeployment position. Secondly, her health did not improve, even after she was taken outside the call centre.
63. The Respondent invoked its second policy, requiring that the Claimant is retired on medical grounds. The retirement on medical grounds policy, aims to reasonably accommodate incapacitated Employees, by assigning them suitable alternative duties, while giving them opportunity for recovery. The policy states, logically, that in event the Employee is unlikely to recover, the Respondent shall retire the Employee on medical ground. Retirement is again grounded on medical report, attesting to the infirmity. There is on record medical evidence, attesting to the Claimant's incapacity to continue working at the call centre.
64. The Court does not have any material to lead to a finding, that retirement of the Claimant on medical ground, was not based on valid ground. The Claimant's injury or illness was not in dispute. Her incapacity to continue working at the call centre, was well-documented. Her incapacitation was valid termination reason.
65. The Respondent invoked the prevailing workplace policies on redeployment and retirement for medical reasons. The Claimant was taken through each step, outlined in these policies.
66. Her protestations about being called to a meeting whose agenda she did not know, and being unaccompanied at the meetings, however, raise a fundamental question, whether she was granted a proper hearing before retirement, in accordance with Sections 41 and 45 of the *Employment Act*.
67. In Samuel Wanyonyi Wamalwa v. Wells Fargo Limited [2015] e-KLR, the Court emphasized the need for a hearing, in cases of retirement on medical grounds. Section 41 of the *Employment Act* 2007, specifically demands that an Employer who contemplates termination of an Employee's contract on various grounds, including physical incapacity, shall grant such an Employee a hearing, before termination.
68. The Respondent alluded to various meetings held between the Parties prior to retirement of the Claimant. But these are not meetings that met the minimum statutory standards of a fair hearing, under Section 41 and 45 of the *Employment Act*.



69. There is no record of the Claimant's invitation to any meeting, communicating the agenda in advance, and explaining to her, the right to be accompanied to such a meeting by a colleague of her choice or a trade union representative, if unionized.
70. There are no minutes of any meeting, recording the hearing of the Claimant, before she was retired. The Respondent appears to have just met the Claimant, and communicated its views and decisions, about the Claimant's medical condition and intended retirement.
71. The letter of retirement itself does not refer to a hearing. It refers to recommendations of health advisors and meetings between the Parties, where a consent was reached, to have the Claimant retired. There is no record of such a consent exhibited by the Respondent, and no record of such a meeting.
72. The letter dated 7th March 2018 from the late Bob Collymore [peace be upon him] to the Claimant, does not disclose if the Claimant's appeal was actually heard. It simply informs the Claimant, " please note that the process was fair and the outcome consistent in all the circumstances." It does not deal with any specific ground raised by the Claimant in her appeal. It does not suggest that there was any hearing on appeal whatsoever.
73. To this extent, retirement on medical ground was procedurally unfair. It did not satisfy the test of a fair hearing.
74. Constitutional rights. While it is the view of the Court that termination of the Claimant's contract did not satisfy the demands of Section 41 and 45 of the *Employment Act*, it was not shown to have been in violation of the Claimant's right to fair labour practices and right not to be discriminated at the workplace.
75. The Claimant did not establish that any of her colleagues who were similarly injured or diseased, were given more favourable treatment by the Respondent, than she was given. She did not establish that she applied for suitable, alternative redeployment, and was unreasonably denied such a position, while any of her colleague was granted such a position. She claims workplace discrimination, without placing before the Court, evidence of comparators.
76. The redeployment policy and the retirement on medical ground policy, were not shown to be contrary to the Law or any Articles of *the Constitution*.
77. In the Supreme Court of Kenya decision, *Gichuru v. Package Insurance Brokers Limited* [Petition 36 of 2019] [2021] KESC 12 [KLR] [22nd October 2021] [Judgment], discrimination was held to constitute failure to treat all persons equally, when no reasonable distinction could be found between those favoured, and those not favoured. This characterization would require that there are comparators. The Claimant alleges discrimination, without stating who her comparators were.
78. The Supreme Court, while holding that the *Employment Act*, does not specifically regulate retirement on medical ground, affirmed that the Act, recognizes termination of employment, on the ground of physical incapacity. Such termination must be preceded by medical investigation, and establishment of incapacity. It must be preceded by fair hearing. Medical assessment must be conducted, and conclusion made, that the Employee is incapacitated. The Respondent seems to have fulfilled the medical aspect, but did not accord the Claimant a fair hearing. This decision underlined the centrality of the right of hearing, in all termination of employment processes, including termination through retirement for medical reasons.
79. In E&LRC decisions, *Kennedy Nyanguncha Omanga v. Bob Morgan Services Limited* [2013] e-KLR; *Kenya Plantation & Agricultural Workers Union v. Rea Vipingo Plantations Limited* [2015] e-KLR;



Samuel Wanyonyi Wamalwa v. Wells Fargo Limited [2017] e-KLR; and Lucy Chepkemoi v. Sotik Tea Company Limited [2022] e-KLR, it was held that where an Employee becomes unwell, the Employer must: show support to the Employee, and encourage recovery and resumption of duty; subject the Employee to proper medical examination establishing incapacity; hear the Employee; and consider retirement on medical grounds, when it becomes clear that even after reasonable accommodation has been extended to the Employee, there is no possibility that the Employee will recover and resume normal service.

80. The Claimant was variously examined by certified medical practitioners and confirmed medically unfit to continue working as a customer care representative. She was offered temporary redeployment of 90 days, and advised to explore permanent job openings within the 90 days. She states she did so, but did not secure an alternative job. The Respondent invoked its retirement on medical grounds policy.
81. The Respondent took its decision to retire the Claimant, in conformity with its workplace policies, but failed to hear the Claimant, in accordance with Sections 41 and 45 of the *Employment Act*.
82. It is not correct as submitted by the Claimant, that she could have been deployed to other departments, because she was fully fit to serve in those departments, her incapacity being confined to the call centre. The redeployment policy was specific that the Claimant could only be redeployed permanently, to available positions.
83. The argument that she sustained acoustic shock syndrome, while serving the Respondent, and lost her job on account of her illness, rendering her financially constrained in funding her future medical care, is an argument that strikes a very sympathetic chord, but one that has no place, in the Claimant's chosen cause of action, for unfair and unlawful termination.
84. Work injury. It was argued by the Parties preliminarily, whether the Claim was presented pursuant to the work injury benefits regime. The Court made a ruling on record, date 11th June 2021, concurring with the Claimant, that she does not pursue damages for work injury, but for unfair and unlawful termination.
85. This Court has had the opportunity, to hear and determine different Claims by former Employees of the Respondent, who left employment under similar circumstances as the Claimant herein.
86. A majority of other cases were reassigned to other Judges, after this Court recused itself, for obvious reasons.
87. In *Deya v. Safaricom Limited* [Cause 630 of 2019] [2022] KEELRC 13561 [16th December 2022] [Judgment], the Claimant was, like the current Claimant, employed by the Respondent in 2010, as a customer experience assistant.
88. He worked at the call centre, and was diagnosed with acoustic shock syndrome. He claimed that he was redeployed in another department, but continued to endure pain while under the constant harassment of the Respondent's human resource manager. He would be asked to present himself for duty, even while in pain and on medication.
89. He resigned and claimed damages for constructive dismissal.
90. The Court disagreed with the Claimant, finding that he was likely running away from a proposed disciplinary process against him, rather than resigning because of a hostile work environment.
91. At the tail end of the Judgment, the Court observed that, " the Claimant should have sued for work-related illness against the Respondent, if he considered his medical condition was occasioned by the conditions at the workplace...he appears to have lost focus, presenting plenty of medical records, which



would have been most useful in pursuing damages for work-related illness...there was probably an alternative cause of action...”

92. Eva Bessy Kathambi, was another of the victims of the working conditions, employed by the Respondent at the call centre, in 2008. She lost her voice, a condition characterized by the doctors, as functional dysphonia, or vocal cord paralysis. Her social and family life was disrupted.
93. Unlike Deya and the Claimant herein, Kathambi pursued damages for work injury, pain, suffering and loss of amenities. She was successful, and was granted by the Court, in *Kathambi v. Safaricom Limited* [Cause 1986 of 2014] [2023] KEERC 1772 [KLR] [25th July 2023] [Judgment], general damages in the sum of Kshs. 2.5 million.
94. Ultimately, these were former Employees of the Respondent, who suffered debilitating work injuries or illnesses [ENT], while assigned work at the Respondent’s call centre. They identified different causes of action, and in the view of the Court the most appropriate cause of action, revolved around work injury. The different perspectives of the former Employees of the Respondent, on the appropriate cause of action, arising from a similar set of facts, appears to yield different outcomes.
95. Discharge Voucher executed by the Parties on 25th June 2018, cannot be relied upon by the Respondent, to deny the Claimant her right to bring this Claim. It was not unequivocal discharge. Ooko conceded that she wrote her reservations on the discharge, before execution. She indicated, by hand, that she signed without prejudice to her right to seek legal intervention. It was not an unequivocal discharge of the Respondent from further obligations. It is indicated that the Claimant did not sign the discharge immediately, but asked for time to ponder over it, and return later to sign. She appears to have returned later, and signed with reservations.
96. While discharge vouchers signed by Employees after termination, have been held to constitute valid and binding post-employment agreements, in decisions such as Court of Appeal’s *Coastal Bottlers Limited v. Kimathi Mithika* [2018] e-KLR, they must be shown to be voluntarily made, and unequivocal.
97. Retirement of the Claimant on medical ground, in the respectful view of the Court, was based on valid reason, but flawed in the manner of its execution. The flaw was not such as to involve the constitutional jurisdiction, there being an adequate remedy in the applicable legislation, the *Employment Act*.
98. The Claimant worked for the Respondent for about 8 years. The circumstances leading to her retirement, were not created by her. She did not cause or contribute to her work injury or illness. It is not clear from her evidence, if she secured another job outside the Respondent, after retirement. She was found by the doctors who attended to her, to have been otherwise healthy, to continue working elsewhere. She was paid terminal benefits shown in her February 2018 pay slip at a net sum of Kshs. 799,779 and pension dues at Kshs. 465,387. Her gross monthly pay was Kshs. 89,504. She is granted equivalent of 5 ½ months’ gross salary, in compensation for unfair termination, at Kshs. 492,272.
99. Loan repayment. The retirement on medical grounds policy, states that, “where an Existing Employee was participating in any of the Safaricom negotiated loan schemes [personal unsecured loans and mortgage scheme] the Employee will have to liaise directly, with the loan provider, on how the difference of the outstanding loans will be recovered. Safaricom will not be liable for any outstanding loan amounts or penalties arising from non-payment.”
100. This policy does not support the prayer for immediate settlement by the Respondent, of any loan amount owed by the Claimant, to NCBA.
101. No order on the costs.



102. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

It Is Orderd: -

- a. It is declared that the Claimant was retired by the Respondent on valid ground, but through a flawed procedure.
- b. The Respondent shall pay to the Claimant, equivalent of 5 ½ months' salary in compensation for unfair termination at Kshs. 492,272.
- c. No order on the costs.
- d. Interest allowed at court rate, from the date of Judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2025.

JAMES RIKA

JUDGE

