



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mwagwabi v County Assembly of Mombasa & another (Cause E118 of 2023) [2025] KEELRC 108 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 108 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E118 OF 2023
AK NZEI, J
JANUARY 24, 2025

BETWEEN

AGNES LILIAN MWAGWABI CLAIMANT

AND

COUNTY ASSEMBLY OF MOMBASA 1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents vide a Memorandum of Claim dated 29th October 2023, and sought the following reliefs:-
 - a. A declaration that the Claimant is legally entitled to apply and to proceed on Early Retirement.
 - b. A declaration that the Respondents' refusal to process the Claimant's application for Early Retirement is a breach of the Claimant's right to fair labour practices and protection against forced labour.
 - c. An order directing the Respondents to process the Claimant's application for Early Retirement.
 - d. An order directing the Respondents to pay the Claimant all the dues that she is entitled to on Early Retirement.
 - e. General damages for violation [of] fair labour practices and protection against forced labour.
 - f. Costs of the suit and interest.
2. The Claimant pleaded that she was born on 14th November, 1971, and that she was 51 years old at the time of filing the suit herein. It was the Claimant's pleading that she was first employed by the Municipal Council of Mombasa, the predecessor of the 1st and 2nd Respondents, on 14th August 1992,



and that her designation at the time of filing the suit herein was Public Relations Officer III, a post she held since 18th May, 2011.

3. The Claimant further pleaded that upon the Municipal Council of Mombasa being succeeded by the 1st and 2nd Respondents [upon promulgation] of *the Constitution* of Kenya 2010, the Claimant was, in or about 2013, transitioned from the Municipal Council of Mombasa to the County Assembly of Mombasa where she served diligently. The Claimant further pleaded:-
 - a. that she applied, and was on 6th January, 2022 accepted to take a Public Relations Course at St. Paul College in Minnesota, United States of America, and that on 9th February, 2022, she applied for a study leave from her employer, the 1st Respondent.
 - b. that the 1st Respondent approved the Claimant's application on 10th May, 2022, but granted her unpaid leave for Training, instead of Study Leave, the implication being that the employer (the 1st Respondent) would not pay the Claimant's salary during the period of study; which was May 2022 to October 2023. That accordingly, the Claimant proceeded to the United States of America.
 - c. that while away on study leave, the Claimant learnt that the 1st Respondent had, on 3rd February, 2023, vide a letter that was not even addressed to the Claimant or brought to her attention, transferred the Claimant to the County Government of Mombasa (the 2nd Respondent).
 - d. that the Claimant, who had worked for 31 years and was [aged] over 50 years, wrote a letter on 23rd February, 2023 requesting for Early Retirement for personal reasons.
 - e. that on 20th March, 2023, the 1st Respondent wrote to the Claimant advising her to seek approval from the relevant Chief Officer at the County Government of Mombasa (the 2nd Respondent).
 - f. that since the Claimant was in the United States of America at the time of her purported transfer from the 1st Respondent to the 2nd Respondent, the Claimant's status as to where she belonged became unclear, as she was not in a position to report to the 2nd Respondent for duty allocation and to know her Chief Officer.
 - g. that the Claimant had never been personally addressed on her transfer, which specific office she had been transferred to, and the effective date of the transfer. That the 1st Respondent's actions were unlawful.
 - h. that the Claimant had been left in limbo, not knowing where she exactly belonged, hence institution of the suit herein against both the 1st and the 2nd Respondents.
 - i. that on 25th September, 2023, the Claimant again wrote to the County Assembly of Mombasa and the County Government of Mombasa (the 1st and 2nd Respondents) in follow up of her request for Early Retirement, but the letter did not elicit any response.
 - j. that aged 51 years old and having worked for 31 years, the Claimant was qualified for Early Retirement, which the Respondents allow; and that the Respondents should proceed to process the Claimant's request for Early Retirement, with full benefits.
 - k. that the Respondents' refusal to process the Claimant's request for Early Retirement was unfair, unjust, and subjected the Claimant to mental torture and servitude, as she would be forced to work under compulsion and against her free will.



4. The 1st and 2nd Respondents filed a joint Memorandum of defence, largely admitting the averments made in the Claimant's Memorandum of Claim, but disputing the averments made in paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the Memorandum of Claim; and in that regard pleaded:-
 - a. that the Claimant was granted study leave, and was enrolled for, and attained a business management course at St. Paul Community College for 18 months (one year and six months).
 - b. that the Claimant was to be bonded for 2 years as per the guidelines on Bond for Training for Public Servants and the Respondents' Human Resource Manual, July 2018 Section 2.1(b).
 - c. that the Claimant was to resume service with the Respondents for a minimum period of 2 years upon completion of her studies.
 - d. that the Claimant requested for voluntary early retirement, but her request was not granted and she was [asked] to seek approval from [her] Chief Officer.
 - e. that the Respondents did not receive the letter dated 25th September, 2023.
 - f. that the Claimant was bound to start serving her bond term as from November 2023 till November 2025 upon expiry of her study leave.
5. Trial opened before me on 10th July, 2024. The Claimant adopted her filed witness statement dated 29th October, 2023 as her testimony in the suit. The Claimant also produced in evidence copies of documents listed on her list of documents dated 29th October, 2023. The documents included the 1st Respondent's letter dated 10th May, 2022 communicating to the Claimant the approval of a one year six months unpaid leave (from May 2022 to October 2023). Also produced in evidence were copies of the 1st Respondent's letter to the County Public Service Board Mombasa dated 3rd February, 2023 purportedly transferring the Claimant from the 1st Respondent to the 2nd Respondent; the Claimant's letter dated 23rd February, 2023 requesting for early retirement, the 1st Respondent's letter to the Claimant dated 20th March, 2023 advising the Claimant to seek approval from her Chief Officer, and the Claimant's letter to the Respondents dated 25th September, 2023 requesting for early retirement.
6. The Claimant further testified:-
 - a. that the Respondents did not bond her when she travelled for further studies; and that the Claimant did not sign any bond.
 - b. that the Claimant was on unpaid leave, was not paid any salary during the study leave, and that the Respondents did not pay the Claimant's fees and did not incur any expense regarding the Claimant's studies. That there existed no reason for the Respondents to bond the Claimant.
 - c. that the Claimant had not reported back to work as at the time of the hearing herein, and had not absconded duty as she had written a letter requesting for early retirement before the end of her study leave; but the Respondents had not responded to her letters.
 - d. that the letter (of purported transfer) dated 3rd February, 2023 was not sent to the Claimant; that the Claimant while in the USA sent his brother to make a follow up on her request for early retirement as her letters to the Respondents had not been responded to. That it was then that a copy of the said letter (dated 3rd February 2023) was given to the Claimant's brother who then sent it to the Claimant by WhatsApp.
 - e. that there was no way that the Claimant could have reported at the 2nd Respondent as she was in the USA attending classes.



- f. that the Claimant did not understand how she could be transferred while away on study leave, that the Respondent should have waited and transferred her once she reported back to the office.
- g. that the Claimant wrote two letters to the Respondents, dated 23rd February, 2023 and 25th September, 2023 respectively, and that both letters were duly received by the Respondents.
7. The Respondents closed their case without calling any evidence. It is trite that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact on record since in so doing, the party fails to substantiate the averments and/or allegations made in his pleadings. It was stated as follows in the case of *Chispine Otieno Caleb – vs – Attorney General* [2014] eKLR:-
- “Although the defendant has denied liability in an amended defence and Counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged, but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
8. In view of the Respondents' failure to adduce evidence in defence of the Claimant's claim, the Claimant's evidence stands unchallenged. The Respondents' Statement of Response filed in court and referred to in paragraph 4 of this Judgment remains a mere unsubstantiated statement of fact.
9. The Respondents did not rebut the Claimant's evidence that having worked for the Respondents for 31 years, and having attained 51 years of age, the Claimant was qualified for voluntary early retirement and payment of all her dues/benefits thereupon.
10. The Respondents did not also rebut the Claimant's evidence that she was purportedly “transferred” from the 1st Respondent to the 2nd Respondent while on study leave and out of the country. The Respondents did not also rebut the Claimant's evidence that the purported transfer letter (dated 3rd February, 2023) was not addressed to her and was never sent to her by the Respondents; and that the effective date of the purported transfer was not communicated to the Claimant. The Claimant was, no doubt, a victim of unfair labour practice by the Respondents.
11. Further, the Respondents did not rebut the Claimant's evidence that she had not been bonded by the Respondents to serve for any period post her study leave, as the Claimant was not paid any salary during her study leave, and the Respondents did not incur any cost or expense regarding the Claimant's study leave/studies in issue.
12. Having failed to adduce any evidence in court, the Respondents did not give any explanation as to why they failed to process the Claimant's early retirement and to pay her the relevant dues, despite having received her written requests in that regard in form of the Claimant's letters dated 23rd February, 2023 and 25th September, 2023 respectively. This, in my view, amounted to an unfair administrative act by the Respondents against the Claimant.
13. Section 2 of the *Fair Administrative Action Act* defines an administrative act as:-
- “(a) the powers, functions and duties exercised by authorities or quasi judicial tribunals, or
- (b) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”



14. The single issue for determination in this matter is whether the reliefs sought by the Claimant are merited. In my view, the reliefs sought by the Claimant are merited, save for the claim for general damages, in view of what is already stated in this Judgment. The Claimant did not justify the claim for general damages.
15. Judgment is hereby entered for the Claimant against the Respondents, jointly and severally, in the following terms:-
 - a. It is hereby declared that the Claimant was entitled to apply for early retirement, and to have his application considered and processed by the Respondents within a reasonable time.
 - b. It is hereby declared that the Respondents' refusal to consider and to process the Claimant's application for early retirement amounted to a breach of the Claimant's right to fair labour practices.
 - c. The Respondents shall process the Claimant's application for early retirement within ninety (90) days of this Judgment, and shall pay to the Claimant such dues as she is entitled to upon early retirement within the said period.
 - d. The Claimant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Njeru for the Claimant

Miss Omboga for the Respondent

