



REPUBLIC OF KENYA



KENYA LAW
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**Ndunda v National Social Security Fund (Cause 860 of 2019)
[2025] KEELRC 1309 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1309 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 860 OF 2019**

CN BAARI, J

MAY 8, 2025

BETWEEN

RITAH NDUNGE NDUNDA CLAIMANT

AND

NATIONAL SOCIAL SECURITY FUND RESPONDENT

JUDGMENT

Introduction

1. This suit was lodged vide a Memorandum of Claim dated 16th December, 2019 and filed before Court on 19th December, 2019. Under the Claim, the Claimant seeks the following reliefs: -
 - a. A declaration that she was unfairly, wrongfully and unlawfully terminated.
 - b. An order for payment of pecuniary loss suffered as a result of the wrongful termination from the date of such termination to the date of determination of her cause
 - c. A declaration that she is entitled to be compensated for violation of her Constitutional rights envisaged under Article 27,4 1[1], 47 and 50(1) of *the Constitution* of Kenya.
 - d. An order for the payment of interest
 - e. An order for general damages.
 - f. An Order for payment of legal costs.
 - g. An order for payment of other costs and any other relief the Honorable Court may deem fair and fit to grant



2. The Respondent filed a Response to the Memorandum of Claim dated 5th February, 2020, wholly denying the Claimant's claim and further stating that the Claimant terminated her services on her own volition and cannot now be heard to blame the Respondent.
3. Both the Claimant's and the Respondent's cases were heard on 16th October, 2024. The Claimant testified in support of her case, adopted her witness statement and produced documents filed as exhibits in the matter. The Respondent presented the evidence of Ms. Reginah Mua, their Senior Human Resources Officer in support of their case.
4. Submissions were filed for both parties.

The Claimant's Case

5. The Claimant states that she was employed by the Respondent on 1st February, 1996 as a security warden and that she diligently served the fund in different capacities and at various designations including internal ISO Auditor, with her last position being as a Security Officer in Management level grade 6. She further avers that she served the Respondent for 21 years with a good employment record and received accolades for the long service.
6. It is the Claimant's case that on 19th December 2016, she sought to be considered for a Voluntary Early Retirement (VERs) and contemporaneously issued a notice of resignation. She avers that the resignation was pegged on the Respondent extending of VERs benefits to her, and equally in compliance with the directive dated 1st December 2016 by the Chief of Staff and Head of Public Service to the effect that Public Servants seeking elective posts in the year 2017 General Elections were to resign from public office at least six months before the date of elections.
7. The Claimant states that on 11th January 2017 the Fund without any reasons declined her request for VERS and that she appealed against the decision on 18th January 2017.
8. It is her case that while still in lawful employment awaiting a response on the appeal, and serving the notice period, she was unlawfully terminated without any reasons and without any hearing and/or any lawful process on the 1st February 2017, and forced to leave employment.
9. She avers that while declining the VERs application, the Respondent did not reject the resignation based on the request for VERs and in compliance with the [Elections Act](#) 2011.
10. It is her case that she had indicated clearly in her letter that she was to leave employment in February, 2017 and that she was to serve two months' notice from the 1st January 2017 while in employment which fact was not declined by the letter dated the 11th January 2017. She avers further that on the 31st January 2019, the Respondent in blatant breach of the Human Resource Manual and the prevailing Employment and Related laws and the notice pursuant to the [Elections Act](#) 2007, terminated her employment without any reasons at all.
11. It is her case that on 31st January 2017, she was issued with a letter of termination from service indicating the last day of employment, and which letter was titled 'termination'.
12. That the purported termination has not only caused her anxiety and pain, but also psychological torture and stress.
13. On cross-examination, the Claimant confirmed that she was 38 years old when she sought to retire early, and further that the Respondent's Policy only allowed for early retirement at the age of 50 years, and had no other provision for early retirement.



14. The Claimant also confirmed that for either party to terminate the contract, 6 months' notice was a requirement and that she only issued one month notice and her request to retire early was declined.
15. She states that her notice to exit was accepted by the Respondent after giving a resignation notice. She further confirmed that her terminal dues were calculated and paid, and was also issued with a certificate of service.
16. It is the Claimant's case that she did not report to work after February, 2017, and that she sought to be reinstated vide her letter of December, 2017 after she lost elections, having run for the position of Machakos Women Representative.
17. The Claimant confirmed to Court that she filed the instant suit even after she had resigned from the service of the Respondent.
18. It is her prayer that her claim be allowed as prayed.

The Respondent's Case

19. The Respondent's case is that the Claimant has no cause of action, that her claim is frivolous and vexatious, and does not lie in law, is misconceived and should be dismissed with costs.
20. The Respondent admits that the Claimant was its employee, but denies that it summarily forcefully terminated her employment before attainment of the retirement age. The Respondent further avers that her letter of appointment dated 19.12.1996 provided for termination, thus her employment was terminable by either party upon giving notice.
21. The Respondent avers that it is not a requirement for an employee to give reasons for resigning, but the Claimant stated in her notice that she wanted to pursue other interests in building the nation, and that she is estopped from giving other reasons.
22. The Respondent avers that the Claimant terminated her employment on her own volition and cannot blame the Respondent. The Respondent further denies that the Claimant's resignation was pegged on the Respondent extending Voluntary Early Retirement benefits to her, but in compliance with the directive dated 1.12.2016 by the Chief of Staff and Head of Public Service.
23. The Respondent avers that it declined the Claimant's request for Early Retirement and communicated the decision to her on 11th January, 2017. It states further that it was not bound to accept the request.
24. It is the Respondent's case that the Claimant on 18th January, 2017 wrote an appeal reiterating the same reasons, and stated that she will exit on 8th February, 2017 and that her letter dated 1st December, 2016 suffices as notice to exit.
25. The Respondent states that the Claimant was emphatic that she will exit with effect from 8th February, 2017. It states that in its letter dated 27th January, 2017, it clearly informed the Claimant that she will be deemed to have terminated her services with effect from 7th February, 2017, and further in its letter of 31st January, 2017, it accepted the Claimant's notice of resignation, and that she worked up to 7th February, 2017 and left.
26. It is the Respondent's case that the Claimant in her letter of 3rd April, 2019 wrote to it stating "in the aforesaid appeal letter I requested that the Fund presume my letter dated 1.12.2016 (appendix iii) to serve as effective date of notice for my resignation from service." That in the same letter, she states she had tendered notice of resignation, and is therefore estopped from claiming that the Respondent terminated her employment as she could not have resigned and voluntarily retired at the same time.



27. The Respondent states that to its surprise, on 21st December, 2017, after more than 11 months since resigning, the Claimant requested to be reinstated for reason that she had unsuccessfully contested a political seat (Women Representative), citing a circular by the Government and a judgment in Kericho ELCR Petition No. 1 of 2017. The Respondent states that in a letter dated 8th January, 2019 it declined the request for reinstatement and gave reasons.
28. The Respondent avers that the Claimant was not entitled to reinstatement as she resigned and her request for reinstatement was an afterthought. It further avers that the Claimant did not qualify for Early Retirement as she was less than 50 years of age, and its Human Resource Manual chapter 11.2 (iii) provides that Early Retirement is available when an employee attains 50 years and has to give six months' notice.
29. The Respondent denies that it terminated the Claimant's employment and states that it only accepted her notice to terminate/ exit/quit their employ.
30. The Respondent denies having violated Articles 27, 41, 47 and 50 of *the Constitution* of Kenya and the particulars pleaded by the Claimant.
31. The Respondent avers that in Kericho Petition No. 1 of 2017, the court declared that public officers can only leave office to participate in the election process on nomination for the General Election or on conclusion of the nomination process for the said election. It avers that the Claimant did not only go through the nomination, but also contested in the 2017 General Elections.
32. The Respondent states that even if the Claimant resigned to contest a political seat, reinstatement would have been available only if she went back after nominations and not after unsuccessfully vying.
33. The Respondent avers that the claim herein is unjustified, a total misconception and the Claimant is not entitled to any of the reliefs, and that granting them would be a miscarriage of justice and unjust enrichment from public funds.
34. On cross-examination the Respondent's witness indicated that the employees who left and had indicated that they were going to run for elective office were accepted back, but the Claimant did not indicate that she was leaving to run for political office. She further confirmed that the Claimant in her letter notified the Respondent that she was to leave their employ on 5th February, 2017.
35. The Respondent prays that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

36. The Claimant submits that she was condemned unheard and was unlawfully terminated without being subjected to disciplinary process as required by law. She placed reliance in *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR for the holding that: -

“The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in *Ridge v Baldwin* (supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the later encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, effectively and by fair procedure refers, to procedural justice.”



37. It is the Claimant's submissions that the Respondents violated the statutory and Constitutional tenets of fair process in her termination, as she was not accorded an opportunity to defend herself or respond to the allegations that brought about her wrongful, unfair and unlawful termination. She sought to rely in *Onyango Oloo v Attorney General (1986-1989) EA 456*, to support this position.
38. It is the Claimant's submissions that the reasons for the request to be considered for voluntary early retirement was because she wanted to vie for an elective position in the 2017 general elections, and it was never her intention to leave the Respondent's employ within such short notice. She submits that the decision was further informed by the directive issued regarding civil servants who intended to vie for elective posts in 2017 general elections.
39. The Claimant further submits that her letter intimated her desire to exit the Fund, but submits that the choice was pegged on the Respondent extending the benefits of the voluntary early retirement.
40. It is the Claimant's submissions that the relationship between the Respondent and herself had not broken down, hence her reinstatement would not have caused any friction between the Respondent, its employees and herself. She further submits that there was no indication that the position she previously held had already been filled, as the Respondent never said so while declining her request for reinstatement. She had reliance in the Court of Appeal's decision in *Joshua Rodney Marimbah v Kenya Revenue Authority [2021] eKLR* to buttress this position.
41. The Claimant submits that the Respondent unfairly and in contradiction of the provisions of *the Constitution* denied and withheld her voluntary early retirement dues.
42. The Claimant submits further that the Respondents breached her legitimate expectation to serve the remainder of her contract years until retirement age, and subjected her to unfair, unlawful and unprocedural termination.

The Respondent's Submissions

43. It is the Respondent's submission that the totality of the facts and evidence before this Court demonstrates that the Claimant voluntarily resigned from the Respondent's employment with effect from 8th February 2017.
44. The Respondent further submits that it is the Claimant who terminated her employment, and which fact is supported by her letter 3rd April, 2019, where she indicated that she had requested the Respondent to take her letter dated 1st December, 2016 as her notice of resignation. It placed reliance in *Moses Kimanzi Katii v H. Young & Co. (E.A.) limited [2018] eKLR*, to support this assertion.
45. The Respondent further submits that it is trite law that an employment contract can be terminated by either party, and that in this case, it is the employee - the Claimant who terminated the employment contract. That there was nothing wrong with the Respondent using the word termination in its letter and clearance, since resignation is termination by an employee.
46. It is the Respondent's submission that the Claimant did not state either expressly or impliedly that her resignation was conditional upon the Respondent extending VER benefits to her. That she did not state she would not resign if the VER benefits are not extended to her. To the contrary, she was very clear that she will be leaving the Respondent's employment with effect from 8th February 2017.
47. It is Respondent's submission that the VER package/benefits being referred to by the Claimant, are not contained anywhere either in her letter of appointment or the Respondent's Human Resource



Policy. That the HR policy which provides for early retirement does not provide any benefits being extended to an employee who goes for early retirement.

48. It submits further, that the Claimant did not qualify for early retirement under the aforementioned clause as early retirement is only available once an employee attains the age of 50 years, yet the Claimant testified before this Court that in 2016 she was 38 years old. The Respondent submits that employee is required to give a six months' notice of intention to go for early retirement.
49. It is the Respondent's submission that the Claimant made an informed and well thought out decision to resign to pursue other interests in building the Nation, and which later turned out that she was actually contesting an elective post, and cannot now turn around and blame the Respondent. It had reliance in the finding of the Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal I 19 & 139 of 2017 (Consolidated))* [2022] KECA 15 (KLR) to support this position.
50. It submits that it rightfully declined the Claimant's request for reinstatement as the court order clearly stipulated that reinstatement was only available to public servants who failed "to secure nomination certificates and those who opted not to run as independent candidates". The Respondent submits that the Claimant proceeded beyond nomination and unsuccessfully contested for a political seat (Woman Representative), and that reinstatement would only have been available to the Claimant under the order, if she went back after nominations and not after unsuccessfully vying. The Respondent therefore submits that on this account, the Claimant was not eligible for reinstatement.
51. It is the Respondent's submission that the issue of reinstatement is not pleaded anywhere in the Claimant's pleadings, and that the Claimant has not sought for reinstatement. It submits that reinstatement should not be considered as it is trite law that parties are bound by their pleadings. It sought to rely in the case of *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR, where the learned Judge held as follows: -

'It is indeed a well settled principle of law that parties are bound by their pleadings and that unless amended the evidence adduced shall not deviate from the pleadings.'

52. The Respondent finally submits that the Claimant's suit, which is based on a claim of unfair termination despite her having voluntarily resigned from employment, is baseless and amounts to an abuse of the court process, and prays that the same be dismissed with costs.

Analysis and Determination

53. The issues that present for my determination are:
- i. Whether the Claimant was unfairly terminated
 - ii. Whether she deserves the remedies sought.

Whether the Claimant was unfairly terminated

54. The Claimant's position is that she made a request to the Respondent to be considered for voluntary early retirement (VER) and contemporaneously issued a notice in line with the directives of the Chief of Staff and the Head of Public Service and Sections 43(5) and 43(6) of the *Elections Act* 2011.
55. It is her position that her letter dated 1st December, 2016 intimated her desire to exit the service of the Respondent. She further asserts that her exit was pegged on the Respondent extending to her the benefits of the voluntary early retirement package. It is her case that the request was declined and her appeal to the Respondent's against the decision declining her request garnered no response from the



Respondent, and that she was instead, wrongfully, unfairly and unlawfully terminated on 31st January, 2017.

56. The Respondent on its part asserts that it is the Claimant who terminated her employment. It avers that this position is supported by the Claimant's letter of 3rd April 2019, where she indicated that she had requested the Respondent to take her letter dated 1st December, 2016 as her notice of resignation, which letter reads in part: -

“in the aforesaid appeal letter I requested that the Fund presume my letter dated 1.12.2016 (appendix iii) to serve as effective date of notice for my resignation from service.”

57. The Respondent further states that it just accepted the Claimant's resignation notice, hence her argument that she was terminated without notice is absurd, being the one who initiated the termination. The Respondent states that it was not required to give the Claimant any notice of termination as the termination was initiated her.

58. The Claimant's letter to the Respondent dated 19th December, 2016, states: -

“.....Having diligently and faithfully served the Fund for 21 years, I wish to request to be considered for a voluntary early retirement (VER) package to take up on my 21st anniversary at the Fund.

I do wish to take this opportunity, to appreciate the Board of Trustees, Management and the entire NSSF fraternity for the opportunity and support given to me this far.

In view of the above, I wish to be considered for an early retirement package and be released to pursue other interests in building the nation. I look forward to your favourable consideration and wish to exit the Fund in February 2017.”

59. The Respondent in a letter dated 11th January, 2017, informed the Claimant that her request to be considered for an early retirement was declined, and in a further letter dated 31st January, 2017, referenced “Termination of Service”, the Respondent notified the Claimant that her resignation pursuant to her notice of 1st December, 2016, had been accepted, and that her last day of duty was 7th February, 2017.

60. On cross-examination, the Claimant confirmed to this Court that she was 38 years old when she sought to retire early, and further confirmed being aware that the Respondent's Policy only allowed for early retirement at the age of 50 years.

61. The Claimant further told court on cross-exam that her notice to exit was accepted by the Respondent after giving a resignation notice. She further confirmed that her terminal dues were calculated and paid, and was issued with a certificate of service.

62. The Claimant further confirmed that she did not report to work after February, 2017, and that she sought to be reinstated vide her letter of December, 2017 after losing elections having run for the position of Machakos Women Representative.

63. The Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal I19 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) had this to say on resignation: -

“A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The Black's Law Dictionary (tenth Edition) defines resignation as follows: “The act or an instance of surrender or relinquishing an



office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, in the form of a written statement."

There was no evidence placed before the trial judge to show that the resignation by the 2nd to 4th respondents was involuntary. The 2nd to 4th respondents resigned voluntarily in compliance with a section of the law that was in force at the time. The 2nd to 4th respondents having resigned, their resignations having been formally accepted. their dues paid. and their respective positions filled, meant that their resignation notices had already crystallized. There was nothing to go back to. The employee employer relationship between the 2nd to 4th respondents and the County Government of Embu had already come to an end.....'

64. The Claimant maintains that by reason of the Court decision in Kericho ELCR Petition No. 1 of 2017, she was entitled to be reinstated to the service of the Respondent. The Respondent's position is that she was not, owing to the fact that she did not indicate her reason for resigning as being to run for political office, couple with the fact that the order in the said case, only applied to employees who returned to work after losing in the party nominations.
65. I note from the Claimant's request for early retirement which was also her resignation notice, that the reason for her exit was 'to pursue other interests in building the nation'. Nothing suggested that she was leaving to run for political office. I am however in agreement with the Claimant that she did not have to expressly state so to be entitled to reinstatement under the said court order.
66. I however further note that the Court order in Kericho ELCR Petition No. 1 of 2017 only ordered the reinstatement of public officers who lost at the nomination stage and returned back to work, and not those that ran the full hog to the general elections like the Claimant did.
67. It is also not disputed that the Claimant sought reinstatement 11 months after her exit from the service of the Respondent, which I can only consider an afterthought and a clear indication that she was purely trying her luck premised on the court order referred to herein above.
68. On the assertion by the Claimant that for reason that the letter by the Respondent accepting her resignation was referenced termination, meant that she was terminated, and unfairly so, the court holds a contrary view, which is that the term termination means separation between an employer and an employee for whatever reason including resignation by an employee. The contract between the parties herein, provides that each party reserved the right to terminate the contract by giving the other party one month's notice or paying one month's salary in lieu of notice.
69. The Claimant by her letter dated 19th December, 2016, issued notice to exit the Respondent's service, and which notice she reiterated in her appeal letter of 18th January, 2017, which in effect terminated her employ with the Respondent, and all the Respondent needed to do is accept the notice, which it did.
70. The Court of Appeal in *Joel v Tirgaga Tea factory Company Limited*. (Civil Appeal IO of 2018) [2022] KECA 65 I (KLR) held that: -

'The appellant having voluntarily resigned from employment; his services were not terminated and the issue of unlawful or unfair termination does not arise. In the circumstances, the appellant was not entitled to any salary in lieu of notice nor was he entitled to payment of compensation or damages under section 49 of the *Employment Act*.'



71. In the circumstances, I find and hold that the Respondent did not terminate the Claimant. The Claimant instead, resigned, or to put it more plainly, she terminated herself and cannot thus claim to have been unfairly terminated.

Whether the Claimant deserves the remedies Sought

72. Under the Claim, the Claimant seeks a declaration that she was unfairly, wrongfully and unlawfully terminated, an order for payment of pecuniary loss suffered as a result of the wrongful termination from the date of such termination to the date of determination of her cause, a declaration that she is entitled to be compensated for violation of her Constitutional rights as envisaged under Article 27,41, 47 and 50(1) of *the Constitution* of Kenya, an order for the payment of interest, an order for general damages, an Order for payment of legal costs and an order for payment of other costs and any other relief the Honorable Court may deem fair and fit to grant.

73. The Claimant’s prayers are without exception, only tenable upon a finding of an unfair termination. The Claimant has not proved a case of an unfair or wrongful termination, leading me to the finding that she does not deserve any of the reliefs listed herein.

74. In whole, the Claimant’s suit must then fail in its entirety. It is dismissed with costs to the Respondent.

75. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 8TH DAY OF MAY, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Ochieng h/b for Mr. Onyony for the Claimant

Mr. Muuo present for the Respondent

Ms. Esther S- C/A

