



**Ombega v Nairobi Water & Sewerage Company (Cause 203 of 2018)  
[2023] KEELRC 501 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 501 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 203 OF 2018  
J RIKA, J  
FEBRUARY 28, 2023**

**BETWEEN**

**JOSEPH NYAMIRA OMBEGA ..... CLAIMANT**

**AND**

**NAIROBI WATER & SEWERAGE COMPANY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his Statement of Claim on March 2, 2018. There is on record an Amended Statement of Claim, indicated to have been received by the Court on October 23, 2018. The Amended Statement on record, is undated. The Claimant states that he was employed by the Respondent, as a Marketing Assistant in June 1998 on a monthly salary of Kshs. 15,000. His salary was gradually raised, to a sum of Kshs. 89,912, by the time he left employment, on January 29, 2016, when he states he was constructively dismissed.
2. He states that he was subjected by the Respondent to hostile and unsafe working conditions which were life-threatening compelling him to resign, in order to save his life.
3. He prays for Judgment against the Respondent for: -
  - a. Monthly salary from 2016 to 2022 at Kshs. 6,473,664.
  - b. Annual leave from 2016 to 2022 at Kshs. 377,630.
  - c. Yearly increment at Kshs. 16,800.
  - d. Lap trust at Kshs. 828,000.
  - e. Uniform at Kshs. 120,000.
  - f. Medical Cover at Kshs. 2,100,000.



Total... Kshs. 9,796,094.

- g. Costs.
- h. Interest.
- i. Certificate of Service to issue.

4. He explains that he was residing at Kariobangi Sewer Treatment Works, within land belonging to the Respondent. One Councillor Okuthe, an Employee of the Respondent, started selling the Respondent's land, including the piece where the Claimant lived, in the year 2009. The Claimant and other residents resisted the land-grabbing, and were consequently arrested and charged at Makadara Law Courts in Criminal Case Number 83360 of 2010, with the offence of malicious damage to property. At the same time the Claimant started to receive death threats from the land-grabbers.
5. The Claimant explains further that a colleague of his Martin Walubengo Shikuku had an affair with his wife. He reported his colleague to the Human Resource Manager who summoned Shikuku. The Human Resource Manager undertook to call Shikuku's parents, and report to them the misadventures of Shikuku. The Human Resource Manager was compromised, and no action was taken against Shikuku. The Claimant was left frustrated.
6. The Claimant escalated the matter to the local chief, who wrote to the Respondent demanding action against Shikuku. The Managing Director of the Respondent, undertook to take action, but took no action.
7. The Claimant asked for payment of his salary arrears on February 20, 2014 to enable him cater for his daughter's school fees. Payment was approved, but when he went to collect the cheque, he was told that the Human Resource Manager Rose Kariuki, had torn the payment voucher to pieces. The Claimant was advised by the Director of Human Resources to find other means to take his daughter to school.
8. In January 2009, the Claimant was transferred from Kariobangi to Pangani in Nairobi. He continued to reside at Kariobangi, and continued to receive threats from land-grabbers. In 2011, he was transferred further to Kibra. He was again transferred to Industrial area in 2014. He was not at any time consulted.
9. He continued to live at Kariobangi, and to receive threats. He met the Respondent's Managing Director and requested to move from Kariobangi. The Claimant asked for financial assistance from the Respondent, to enable him complete a house he was building, so that he could move and reside there, away from Kariobangi. He was not given financial assistance. He was however able to move his family to his new house at Ruai.
10. In 2015, he received a letter from the Respondent, transferring him to Kariobangi. The Respondent did this knowing well that the work environment at Kariobangi was intolerable. The Claimant wrote many times to the Managing Director asking for intervention. There was no assistance. The Claimant resigned on January 29, 2019, to save his life. He therefore asks the Court to find that he was constructively dismissed and allow the Claim.
11. The Respondent filed its Statement of Response on June 22, 2018. Its position is that the Claimant commenced employment on September 1, 2005, and voluntarily retired early, through his letter dated January 29, 2016. The Respondent's Human Resource Policy, allows Employees to retire early, upon attaining the age of 50 years. The Respondent accepted the Claimant's application. The allegations concerning hostile work environment, and forcible retirement, are denied. The Respondent prays the Court to dismiss the Claim with costs.



12. The Claimant and his Witness Stephen Mutie Ndolo, gave evidence on March 23, 2022, closing the Claim. Human Resource Co-ordinator George Otieno Oketch, gave evidence for the Respondent on July 29, 2022, when the hearing closed. The Claim was last mentioned on November 8, 2022, when the Parties confirmed filing and exchange of their Closing Submissions.
13. The Claimant adopted his Pleadings, Witness Statement, Original and Supplementary Documents, in his evidence-in-chief. He restated the contents of the Pleadings, as summarized above. He was in-charge of water meters. He could have been retransferred to any other area, not Kariobangi. Land-grabbers had said they would revenge against the Claimant. The Respondent was aware of these threats and had procured Advocates to represent the Claimant in the criminal proceedings.
14. Cross-examined, the Claimant told the Court that the charge sheet in the criminal proceedings indicates Fabian Ouma, not the Respondent, was the owner of the subject piece of land. The Claimant retired on 29<sup>th</sup> January 2016. He did not mention in his retirement letter, anything about hostile working environment. He thanked the Respondent, and said he wished to pursue other interests. The land-grabbers were outsiders, not workmates. The Claimant could work at any station. Transfer was at the discretion of the Respondent. The Claimant had worked in more than 10 regions. He asked for financial assistance to help him complete his house at Ruai. The Respondent was bound by the law and certain regulations, on advancing money to its Employees.
15. Ndolo did not have useful evidence to give to the Court. He worked with the Claimant. He did not know when the Claimant left employment, or whether he retired voluntarily. He left the Claimant working.
16. Oketch relied on his Witness Statement and Documents filed by the Respondent, in his evidence-in-chief. The Respondent did not create a hostile working environment for the Claimant. He voluntarily retired early, in accordance with the Respondent's Human Resource Policy.
17. Cross-examined, Oketch told the Court that the Claimant's contract did not have a provision for early retirement. Human Resource Policy was revised from time to time. He was a member of the Union. Policy and CBA applied to him. He told the Respondent he wished to pursue own interests. Transfer to various stations was normal. Criminal charges were not handled by the Respondent. He asked for financial assistance. It was not given. The Respondent paid all salary arrears to the Claimant.
18. The issues are whether the Claimant was constructively dismissed by the Respondent; and whether he merits the remedies pleaded.

### **The Court Findings**

19. The Claimant was initially employed by the Nairobi City Council as a Clerical Officer, on April 16, 1998. He was seconded to the Respondent, upon its formation, on September 16, 2004. He became a Marketing Assistant.
20. He tendered a Notice of Early Retirement to the Respondent, January 29, 2016. He notified that his last day at work would be April 30, 2016. He writes: -

“ I hereby give notice to take early retirement from service, effective from April 30, 2016, which will be my last date in service. I have attained the age of 54, having served the company for the last 18 years.

I wish to have a rest and take other responsibilities in the remaining years, however I feel honoured to have been given a chance to serve our customers in different sections of the company.



I sincerely thank the team leaders, my workmates for the support they have so far accorded me. Despite the challenges here and there, I thank God for every situation faced.

I hope sir, you will take my decision positively by facilitating my dues in time.

Thank you in advance.

Yours faithfully,

Joseph Nyamira Ombega.”

21. The Respondent replied on February 16, 2016: -

“ This refers to your letter dated January 29, 2016.

In line with the current Policy and Practice, we are glad to let you know that your request in relation to notice on early retirement has been granted. As such, we are regarding your letter dated 29<sup>th</sup> January 2016 as your notice of early retirement and consequently, 30<sup>th</sup> April 2016 shall be your last day of work.

You will be expected to have taken all your leave days and off-duty days before April 30, 2016. Please note that under no circumstances will payment be made for accumulated administrative leave and off-duty days.

In this regard and per Company Policies and Procedures, kindly note that upon receipt of a duly signed clearance form, the following payments will be made to you less any dues owed to the Company and statutory deductions:

1. Salary up to 30<sup>th</sup> April 2016.
2. Medallion.

We take this opportunity to thank you for the services you have rendered to the Institution, and to wish you all the best in your new assignment.

Yours Faithfully,

Eng. Phillip Gichuki,

Managing Director.”

22. The letter by the Claimant above, is titled “ Early Retirement from Service.” It has nothing to do with constructive dismissal. It does not allude to irregular transfers; threats by land-grabbers; or adulterous liaison involving the Claimant’s wife, and his colleague Shikuku. It has nothing to do with constructive dismissal.
23. Transfer of the Claimant to any station was at the discretion of the Respondent. He was transferred on all occasions within Nairobi. If any land-grabber wished to harm the Claimant, it is not clear how the Claimant would be safer in any other station away from Kariobangi, but within Nairobi. Even when the Claimant was transferred to Pangani, he continued to reside at Kariobangi. When he moved away to Ruai, he complains that he was transferred back to work at Kariobangi. The Court does not see how his residence or working at any corner of Nairobi, resulted in hostile work environment created by the Respondent, warranting the Claimant to resign.
24. The land he complains he was defending from the grabbers, was not even in the name of the Respondent; he told the Court it was in the name of Fabian Ouma.



25. The land-grabbing allegations were not attributed to the Respondent. They did not amount to an event, created by the Respondent. It was an activity entirely attributable to shadowy 3<sup>rd</sup> Parties, who were not within the purview of the employer-employee relationship. The Respondent could not be held to account for activities of 3<sup>rd</sup> Parties, who the Claimant had opted of his own volition, to fight resulting in charges of malicious damage to property levelled against the Claimant at Makadara Criminal Court.
26. The tryst between the Claimant's Wife and Shikuku, similarly cannot amount to a hostile working environment, created by the Respondent, justifying resignation of the Claimant. This was a matter concerning the Claimant, Shikuku and Mrs. Ombega. The Claimant reported the matter to the area Chief, and ought to have pursued a remedy there, instead of pursuing an unlikely claim for constructive dismissal, over his frustration concerning his adulterous Wife. The tryst was not arranged or facilitated by the Respondent, and would not be viewed as a hostile working environment, created by the Respondent against the Claimant.
27. How does an Employer's refusal, to assist an Employee's request for money, for the Employee to complete building his house, amount to creation of a hostile working environment? Loans, advances of salary to Employees by their Employers, are at the discretion of the Employers. The claim that the Claimant was treated unfairly and frustrated by the Respondent by being denied his request for money to complete construction of his house, is farfetched.
28. In *Coca Cola East and Central Africa v. Maria Kagai Ligaga* [2015] e-KLR, the Court of Appeal of Kenya set down the law, on the principle of constructive dismissal. The behaviour by the Employer to the Employee, must be so unreasonable that the Employee would not be expected to stay. None of the complaints by the Claimant above, amount to such unreasonable behaviour by the Respondent. The behaviour could be so grave, to constitute repudiatory breach of the contract. There was no behaviour by the Respondent established by the Claimant to have been so grave, as to amount to repudiatory breach of the contract. There is first a test of unreasonableness and secondly, a contractual test. The Notice of Early Retirement does not allude to any grave behaviour by the Respondent, that convinced the Claimant, that the Respondent was no longer willing to abide by the terms and conditions of service, leading the Claimant to consider his contract to have been terminated.
29. It is also a principle of constructive dismissal that the decision by the Employee, must be made in close proximity, to the actions by the Employer, which the Employee complains amount to creation of a hostile working environment. The Claimant complained about his Wife's adultery in 2013, 3 years before he retired. He complained about salary arrears in 2014. He asked for financial assistance to complete building in 2013. The charges relating to land-grabbing were presented in Court in 2010, 6 years before the Claimant retired. He waited for too long to retire and make his complaint about constructive dismissal. An Employee who believes he has been constructively dismissed, must resign in close proximity to the occurrence of the behaviour of the Employer, which the Employee alleges amounts to a hostile working environment. An Employee cannot wait for 6 years, to build a case for constructive dismissal, concerning various incidents, spread over a period of time, alleged to culminate in constructive dismissal.
30. The prayers for anticipatory benefits, calculated from the date the Claimant retired voluntarily to the year 2022, fall within the principle of unjust enrichment. The Claimant resigned in 2016 and did not work until the year 2022. On what basis should he be remunerated for services he has not rendered, over a period of 6 years?
31. The Claim on the whole, save for the prayer for Certificate of Service, lacks merit.



32. It is ordered:-

- a. The Claim is declined.
- b. Certificate of Service to issue.
- c. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, THIS  
28<sup>TH</sup> DAY OF FEBRUARY 2023.**

**JAMES RIKA**

**JUDGE**

