



**Moraa v County Government of Nakuru & another (Cause E006 of 2020) [2022] KEELRC 1626 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1626 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E006 OF 2020  
HS WASILWA, J  
MAY 31, 2022**

**BETWEEN**

**ANNAH MORAA ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF NAKURU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE BOARD NAKURU COUNTY .. 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant filed this case on the 8<sup>th</sup> October, 2020 *vide* a memorandum of claim of even date seeking the following Reliefs;
  - a. A declaration that the withholding of the claimants salary amidst the existence of her health conditions was and remain unfair, unprocedural, unlawful, untimely and unconstitutional
  - b. An order directing the Respondent to remit the claimants salary as from September, 2018 to date.
  - c. General damages for withholding the claimants salary unlawfully, for failing to support the claimant in her ill health and for failing to put the claimant to early retirement as requested.
  - d. An Order directed to the respondent to put the claimant to early retirement and pension as required by law.
  - e. Any other relief that this Honourable court may deem fit, just and expedient to grant.
  - f. Cost of the sit and interests.
2. The facts of this case is that the claimant was employed by the then municipal council of Nakuru on the 16<sup>th</sup> June, 1989 as a general laborer and later rose through the rank to the position of Clerical officer.



3. When the county government was inaugurated after the 2010 constitution, the claimant was absorbed by the now County Government of Nakuru in the same position, and her employment was maintained under permanent and pensionable terms.
4. The claimant avers that sometimes in the year 2010 she started feeling unwell which sickness affected her effective discharge of duties, nevertheless that she continued working for the Respondent.
5. She stated that she has been in and out of the hospital due to the illness from the year 2010, a fact which was within the knowledge of the Respondents. Despite knowing the claimant's condition, the Respondent stopped her salary in September, 2018 without Notice or explanation and at that time she was earning a gross salary of Kshs 88,344.
6. The claimant avers that her Doctor had on the 21<sup>st</sup> May, 2019 informed the Respondent of her inability to work productively and suggested for the Respondent to grant the claimant early retirement considering her long service at the Respondent and her age which she was now about retire. This request however was never met by the Respondent.
7. She then followed up the issue of her stopped salary to no avail and a year later on 13<sup>th</sup> May, 2020, she petitioned the Respondents seeking to be reinstated to employment and payroll which was neither honoured.
8. It is the stoppage of her salary that the claimant assumed that she had been terminated though she never received any official communication either verbal or otherwise terminating her services.
9. The non-remittance of the claimant's salary led her to default on her loan obligation which led her to be preferred for listing by the Credit reference bureau (CRB) an act that has exposed her to more difficulties in accessing any loan facility. Further that the stoppage of her salary was contrary to the provisions of Human resource Manual and the refusal by the Respondent to retire the claimant on medical grounds were contrary to Regulations L8 of the County Public Service Human resource Manual 2013 and D23 of the Public Service Commission, Human Resource Policies and Procedures manual for the Public service May, 2016.
10. The claimant contends that the Respondent was always aware of her condition and on every occasions she reported back to work from her sick offs, she was posted in different departments that took her longer to adjust in light of the fact that she was no longer able to walk unaided.
11. She then stated that the Respondents have never supported her in her treatment as envisaged under Section 34 of the Employment Act and urged this Court to allow the claimant and direct the Respondents to retire her under medical grounds.
12. The Respondent entered appearance and filed a response to claim dated 11<sup>th</sup> December, 2020 on the 18<sup>th</sup> January, 2021 denying all the contends of the claim and putting the Respondent to strict proof thereof.
13. The respondent admitted that the clamant was employed by the defunct Municipal council of Nakuru and later absorbed by it under the same terms in the position of clerical officer however that her salary was Kshs. 52,200.
14. The Respondent stated that sometimes on the 14<sup>th</sup> October, 2013, the claimant sought for permission to attends her son's graduation from Military in the United States of America from 1<sup>st</sup> November, 2013 to 14<sup>th</sup> November, 2013, which was granted by the Respondents through the County Secretary on the 15<sup>th</sup> October, 2013.



15. Upon the expiry of the permission sought, the claimant remained in the United States of America without any further permission and never reported back to work to date. Subsequently a Human resource Audit was carried out in August, 2019 and it was at that point that the respondent discovered that the claimant had been absent from work since October, 2013. Consequently, her salary was immediately stopped in accordance with section k.8(1)-(5) of the Human resource policies and Procedures Manual for public service, 2016, which provides for stoppage for salary for an absent officer for more than 10 days without leave or permission.
16. Despite her salary being stopped, the claimant has never reported back to work, neither has she given any explanation as to her whereabouts or her absence from work for 7 years. Her salary was therefore stopped due to absenteeism from work without any excuse or lawful course.
17. The Respondents maintain that they were never made aware of any illness if at all that the claimant was suffering from and as far as they are concerned the claimant deserted duty in the year 2013 and as such liable to summary dismissal in accordance with section 44(4)9a) of the Employment Act, 2007.
18. It is alleged that while the claimant was absent from work and probably in the USA, her husband fraudulently obtained a loan facility from Family bank after presenting forged documents.
19. The Respondent also avers that the claimant never at any point informed them that she was laboring under a medical condition neither did she request for the early retirement as pleaded. Further that the retirement request sought at this stage cannot be granted because the claimant is under disciplinary action and to do so would be in contravention of section K.8(1)-(5) of the Human resource Policies and Procedures manual for the Public service, 2016.
20. The Respondent then stated that the claimant is liable for surcharge of Kshs 2,267,990 in view of days paid and not worked.
21. This cause proceeded for hearing on the 9<sup>th</sup> November, 2021 and on the 8<sup>th</sup> December, 2021.
22. The claimant testified as CW-1 and adopted her witness statement dated 8.10.2020 and produced the list of document filed on even date as claimant Exhibits. In addition the claimant testified that she worked for the Respondent till 2018 when her salary was stopped without any reason or explanation thereof. She avers that the Respondent was aware of her condition and that she could report at times to work and go back home during days she could not work. She stated that she followed up her stopped salary and the Respondent always intimated that the board was yet to meet and that she could be paid soon thereafter. She then stated that her doctor had informed the Respondent of her need to be retired on medical ground which they have failed even when she had attained age of 50 and legible for early retirement.
23. Upon cross examination by Kinuthia Advocate, the witness testified that she became ill in the year 2010 and in 2013 she sought permission to go to the USA however that she did not obtain VISA and remained in Kenya and even returned to work however she did not have any evidence to confirm that she returned to work in 2013. She testified that she later sought permission from the Respondent in the year 2015 to go to USA which was granted and she travelled to the USA, she added that her documents evidencing the same got lost.
24. On further cross examination the witness testified that when her salary was stopped in 2018 she was still in the USA for medical treatment. She stated also that she petitioned the county assembly for reinstatement of her salary and that she has been following up the reinstatement of her salary from then to date. The witness testified that she sought for sick off from her employer as appearing as Exhibits 9, 10 and 11 however that she could not give any evidence affirming that the same were served upon



- her employer. On the letter for early retirement the witness testified that she served the letter from her doctor recommending her to be placed on early retirement upon the county secretary on the 2/5/2019, however that it was not approved. On the loan issue the claimant testified that she applied for the loan and received approval from the HR officer sometimes in March, 2018.
25. On re-examination the witness testified that when she could not obtain visa to travel to USA, she returned to work. She also testified that she travelled for medical treatment in 2015 and it took her longer than anticipated and that she always informed the Respondent of her whereabouts. On the retirement request, she stated that there are forms which are normally filed which she was not given by the Respondents.
  26. The Respondent, called its Assistant director in the Human Resource department, Charity Wambwa, as its RW-1 who adopted her witness statement dated 9.11.2021 and produced the documents appearing in the list of documents as Respondent's exhibits. In addition the witness testified that the claimant sought for 2 weeks leave in 2013 and did not work during that time, she also testified that the claimant did not seek for permission to travel in 2015 and if she did she was doing so without authority of the Respondents. RW-1 testified that it was discovered in the Biometrics that the claimant was absent from work since 2013 as per the HR audit carried out in August, 2018. She added that 73 employees were found absent and their salaries stopped on 13.9.2018 and only 9 gave explanation of their whereabouts and reinstated back to employment and pay.
  27. RW-1 further stated that the claimant never appealed the decision of the Respondent stopping her salary when she was well aware of the appeal procedure. She also stated that the claimant obtained a loan without following due procedure, an issue which was discovered when the claimant's salary was stopped. She then stated that the claimant never requested for the early retirement as alleged and the letter to the county secretary contained untruths.
  28. Upon cross examination by Orina Advocate, the witness testified that the Respondent's employees were supervised in various department and that the claimant's supervisor never reported the alleged absenteeism. She avers that the claimant was given notice of stoppage of salary in 2018 however she admitted that no Notice to show cause was served since the claimant was nowhere to be seen. She then stated that their last communication with the claimant was in 2013 and that is why she was never subjected to disciplinary hearing. With regard to the loan advance, the witness testified that the same was obtained fraudulently. She also stated that during this period of being absent from work, the claimant earned her salary in full which was Kshs 52, 200. She added that the claimant's pay slip showing that she was earning Kshs 88,344 is based on leave allowance pay which was only payable once a year. She then testified that the claimant owes the Respondent Kshs 2,267,990 being money paid to her but not worked.
  29. On re-examination the witness testified that the claimant has never contacted them even after the stoppage of her salary and that only her husband visited their office to inquire on the stopped salary. She also testified that disciplinary process had commenced against all employees who had absconded duty and the claimant never appeared.

#### **Claimants Submissions.**

30. It was submitted for the claimant that the claimant was constructively terminated when her salary was stopped without notice in September, 2018. It was argued that section 36 of the *Employment Act* provides for termination without notice only upon payment of Salary *in lieu* of Notice. In support of this argument the claimant relied on the case of *Coca Cola East and central Africa Limited V Maria Kagai Ligaga* [2015] eklr.



31. It was then submitted that the claimant was unfairly terminated and ought to be paid for the duration within which her salary was stopped and in this they relied on the case of *Dr. Magere Gikenyi J Benjamin V County Government of Nakuru* [2019] eklr.
32. On the reliefs sought the claimant submitted that since she was not given notice of termination, she ought to be paid one months salary in lieu of Notice. She also prayed for compensation for loss earnings and in this she relied on the case of *Eunice Mwikali Munyao V Elys Chemical industries Limited* cause No. 74 of 2015. the claimant also prayed for service pay and leave pay for the 29 years worked.

### **Respondents submissions.**

33. The Respondent on the other hand submitted that the claimant deserted duty as such they were right to stop her salary having been enable by the provisions of K.8 of the Human Resource policies and procedures manual for the public service 2016 and provisions of section 12(a) &(b0 of part 11 of the Public service commission disciplinary procedure manual. It was further submitted that when the claimant salary was stopped she did not bother to present herself to the Respondent for disciplinary proceedings.
34. The Respondent submitted that the claimant absconded duty without any lawful excuse and even admitted having travelled to the USA for medical treatment without giving any evidence of that authorization, therefore that the claimant was acting with impunity and they therefore urge this Court not to entertain the claimant's illegalities. In this they cited the case of *Five Forty Aviation Limited V Erwan Lanoë* [2019] eklr.
35. It was further submitted that the instant suit is premature and an abuse of the court process and the doctrine of exhaustion precludes the Honourable Court from entertaining the same, it was argued that the claimant salary having stopped, ought to have appealed the Respondent decisions in accordance with the section K10 as read with section K11 of the Human Resource policies and procedure manual for the public service of 2016. In further support of their case the Respondents relied on the case *Speaker of the National assembly V James Njenga Karume* [1992] eklr and the case of *Umoja Innercore Tena Matatu Owners Sacco society Limited and another V Commissioner for cooperative Development & 25 other* [2017] eklr.
36. The Respondent submitted that the claimant acted in a lethargic manner when she failed to follow due procedure in seeking for leave when she had been in the system for about 30 years and quite conversant with the procedure at the Respondent's employ.
37. On whether the case herein is merited, it was argued that the claimant has failed to prove her case to the required standard and in fact that the claimant's salary was merely stopped to prompt her to appear before the respondent to give an explanation for her absenteeism. It was then argued that the claimant was never terminated as alleged rather that she absconded duty.
38. The Respondent then urged this Court to find in its favour and dismiss the claim herein with costs.
39. I have considered the evidence and submissions of the parties herein. The claimants contends that she was unfairly removed from the payroll by the respondents when she was unwell.
40. She contends that this act by the respondent was unfair as she was unwell a fact that was known by the respondents.
41. She avers that she even sought for early retirement on account of being unwell which fact the respondents also ignored.



42. The claimant relied on her exhibit 9, 10 & 11. The said exhibits are documents from Dr. Babu Bora dated 13 March 2010, from the Rift Valley Provincial Hospital dated 18/8/2010 and from Que Bee Health Care Centre dated 10/2/2010.
43. There is no evidence that these had been served upon the respondents. In any case the issues in relation to this case were from 2018 when the claimant's salary was stopped.
44. The respondents aver that they were never aware of the claimant's illness at all.
45. The claimant also averred that she sought for early retirement and was denied the same. There is also no evidence that the claimant sought to be retired early and her request was rejected.
46. At the moment the claimant has not been terminated by the respondent but has not been paid salary since 2018.
47. Despite the fact that the respondent aver that the claimants salary was stopped due to absenteeism, the respondents have failed to adhere to their own HR Manual which states as follows at Section 12(a) & (b) of part II of PSC Disciplinary Procedure Manual;-

“Where an officer is absent from duty without leave, reasonable or lawful cause, the following steps will apply:-

Establish the exact period with dates the officer has been absent from duty. If not traced within a period of ten (10) days from the commencement of such absence, stop salary with effect from the date of absence.

Address a show cause letter to the officer through his or her last known address by registered mail giving a reasonable period within which to respond but not less than ten (10) days stating clearly the nature of the offence and the contemplated action.”

48. There is no evidence that after the respondent established that the claimant was absent from duty for over 24 hours, they sent him a show cause letter to explain her whereabouts.
49. Given the scenario that plays between the claimant and the respondent, it is apparent that the claimant was absent from duty for a considerable time which she admitted when she was in the USA on treatment.
50. That notwithstanding, the claimant had a duty to inform her employer of her absence due to illness. This was never done. In any case, the respondent also had mandate to initiate disciplinary process against her for absenteeism which was never done.
51. Given the position, I would order this case be resolved by declaring the date when the claimant's salary was stopped to be her effective day of early retirement on account of illness and direct that the respondents process her retirement benefits based on that period.
52. There will be no order of costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Odhiambo holding brief for Nyagaka for the Claimant - present



Kinuthia for the Respondent – present

Court Assistant - Fred

