



**Heaves International Ltd v Nyamai (Appeal E151 of 2023)
[2025] KEELRC 2564 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2564 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E151 OF 2023
JW KELI, J
SEPTEMBER 18, 2025**

BETWEEN

HEAVES INTERNATIONAL LTD APPELLANT

AND

RUTH VAATI NYAMAI RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. C.M. Njagi (PM) delivered on 1st August, 2023 in MCELRC E1987/2021)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. C.M. Njagi (PM) delivered on 1st August, 2023 in MCELRC E1987/2021 between the parties filed a memorandum of appeal dated the 17th of August 2023 seeking the following orders: -
 - a. The appeal be allowed with costs.
 - b. The entire Judgment and Decree of the Honourable Ms. C.M. Njagi (PM) delivered on 1st August, 2023 be set aside and the court do make such orders as it may deem appropriate.
 - c. The costs of this appeal be awarded to the Appellant.

Grounds of the Appeal

2. That the Honourable Trial Magistrate erred in law and in fact by finding that the Claimant had failed to introduce even a single new customer and that the Respondent's customers she was claiming were pre-existing and thus she was not entitled to any commission on sales her claim had failed substantially and there was no basis to award her damages.



3. That the Honourable Trial Magistrate erred in law and in fact by failing to find that the Claimant had willingly and freely resigned by authoring a resignation letter/email wherein she had not raised any issue of delayed payment.
4. That the Honourable Trial Magistrate erred in law and in fact by failing to find that the Claimant had admitted that her job performance was bad and she had failed to make sales and thus had no basis to overlook her poor job performance and failure to make sales which impacted on the financial well-being of the Respondent leading to inability to pay salaries due to lack of business and no revenue from sales.
5. That the Honourable Trial Magistrate erred in law and in fact by failing to find that the Claimant had admitted that during the coronavirus lockdown she had been at home with full pay for several months and upon resumption she could not claim leave and salaries on time whilst aware that she had been earning whilst at home.
6. That the Honourable Trial Magistrate erred in law and in fact by failing to apply the correct formula for award of damages for termination of employment as the Claimant had not been in employment for more than 3 years and she had willingly resigned.
7. That the Honourable Trial Magistrate erred in law and in fact by failing to find that there was absolutely no aggravating or extraneous factor to warrant the award of 12 months damages as the Claimant had not denied that she had not gone to collect the salary arrears nor had she alleged that she ever went to collect the salary arrears upon her resignation.
8. That the Honourable Trial Magistrate erred in law and in fact in failing to find that the Claimant had not succeeded to establish any wrongdoing on the part of the Respondent.
9. That the Honourable Trial Magistrate erred in law and in fact in failing to find that the Claimant had not pleaded constructive dismissal and her claim as pleaded was only for salary arrears, leave, commission and the framing by the court and determination of the court of constructive dismissal was not supported by the filed pleadings.
10. That the Honourable Trial Magistrate erred in law and in fact by failing to analyze and/or consider the evidence, testimony and submissions by the Respondent.
11. That the Honourable Trial Magistrate erred in law and in fact by failing to uphold and apply the binding authorities supplied by the Respondent and/or distinguish them.

Background to the Appeal

12. The Respondent filed claim against the Appellant vide a memorandum of claim dated the 19th of November 2021 seeking the following orders:-
 - a. A declaration that the Respondent breached the principles of natural justice in the process of constructively dismissing the Claimant from her employment.
 - b. Payment being remedy for wrongful dismissal and unfair termination as follows:
 - i. April, May and June salary Kshs. 45,000.00
 - ii. Unpaid commissions (2019&2020) less deductions paid by the Respondent in June Kshs. 9,066.71
 - iii. One (1) year leave earned but not taken Kshs. 12,115.38



- iv. Severance pay Kshs. 7,500.00
 - v. Service Gratuity Kshs. 93,600.00
 - Total Kshs.253,682.09
 - c. Exemplary damages.
 - d. Damages for Constitutional violations.
 - e. Interest on (a) to (d) above at court rates from the date of determination until payment in full.
 - f. Certificate of Service.
 - g. Costs of the suit.
 - h. Any other relief this Honourable Court may deem fit to grant in the circumstances.
(pages 4-8 of Appellant’s ROA dated 27th May 2025).
13. The Respondent filed her witness statement, list and bundle of documents together with the bundle of documents attached, all dated 19th November 2021 (see pages 9-26 of ROA).
 14. The claim was opposed by the Appellant who entered appearance and filed a response to claim dated 6th September 2022 (pages 27-31 of ROA). They also filed a bundle of documents of even date; and witness statement of Michael Njenga, also dated 6th September 2022 (pages 34-57 of ROA).
 14. The Respondent’s case was heard on the 31st of January 2023 where the claimant testified in the case, relied on her witness statement as her evidence in chief, produced the documents attached to her list of documents, and was cross-examined by counsel for the Appellant Mr. Odawa (pages 74B-76B of ROA)
 15. The Appellant’s case was heard on 27th April 2023 with the respondent/appellant calling one (1) witness, Michael Njenga, to testify on his behalf. He relied on his filed witness statement, and produced the appellant’s documents. He was cross-examined by counsel for the claimant/respondent, Ms. Karoki (pages 77- 78B of ROA).
 16. The parties took directions on filing of written submissions after the hearing. The parties complied.
 17. The Trial Magistrate Court delivered its judgment on the 2nd of August, 2023, partly allowing the claimant/respondent’s claim to the tune of Kshs. 225,000/- comprised of 12 months’ salary as compensation for unfair termination, and salaries for April, May and June 2021 (judgment at pages 81-83 of Appellant’s ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties filed.
19. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of



fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

20. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 *De Lestang V.P (As He Then Was) Observed At Page 94*:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Issues for determination

21. Both parties submitted generally on the grounds of appeal in their respective submissions dated the 27th of May 2025, and the 22nd of July 2025.
22. The court discerned from the grounds of appeal that the issues placed before the court for determination on appeal were-
- a. Whether the trial court erred in fact and law by finding that the resignation by the respondent amounted to constructive dismissal
 - b. Whether the trial court erred in the relief awarded.

Whether the trial court erred in fact and law by finding that the resignation amounted to constructive dismissal

Appellant’s submissions

23. The appellant submitted that the entire appeal rests, and will sway on this courts interpretation and fresh analyzing of the resignation letters dated 7th June 2021 which was typed by the Respondent and are found at pages 53 and 53 of the Record of Appeal terminating the employment contract which is found at the record of appeal page 40 to 45 which clearly spell out that the Respondent joined the Appellant company on 1st October 2019. The resignation letter dated 7th June 2021 stated that ...I would like to notify you of my resignation as sales representative effective on 30th June 2021 (which is less than 30 days notice period set out in clause 7 of the employment contract at page 41 of the Record of Appeal. The company official upon receipt of the letter set out that the Respondent had failed to be sincere on her reasons for resignation. Nowhere in the letter had the Respondent alleged that she was being frustrated or her salary was being delayed. The learned magistrate erred in law and fact by failing to find that the Claimant had willingly and freely resigned by authoring resignation letter/email wherein she had not raised any issue of delayed payment.

Respondent’s submissions

24. Conversely, the respondent submitted that the trial court was justified in arriving at the finding that the Respondent’s resignation amounted to constructive dismissal. That constructive dismissal occurs when an employee resigns from employment because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since such resignation was not truly voluntary in nature, it is in effect a termination. That had the Appellant continued to honour the terms of the contract of employment with the Respondent, there is a high possibility



that the Respondent would still be in its employ. However, the repudiatory breach of fundamental terms in the contract of employment led to their unceremonious separation through constructive dismissal. The *Employment Act*, 2007, which is the primary legislation governing labour relationships in Kenya, doesn't make explicit reference to the term constructive dismissal. However, Section 45 thereof provides that an employee may terminate their employment where the employer has breached a fundamental term of the employment contract. Therein lies the substratum of constructive dismissal. Further, the jurisprudence from the High Court and Court of Appeal establishes beyond peradventure that the principle of constructive dismissal has since formed part of our law of employment. The Court of Appeal case of *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR at paragraph 30 of its judgment, outlined the principles relevant in determining constructive dismissal as follows:

- a. What are the fundamental or essential terms of the contract through the conduct of the employer"
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer.
- c. The conduct of the employer must be a fundamental breach or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced, or conducted himself to be estopped from asserting the repudiatory breach; the employee must, within a reasonable time, terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

That by virtue of the foregoing, the Appellant's termination of employment was wrong, unfair and unlawful.

Decision

25. The claim before the trial court was that for failure to pay salary for 3 months, the claimant could not continue working and opted to resign and seek another job. The claimant had a claim for constructive dismissal. The respondent submitted that from the wording of the resignation letter, no issue of outstanding salary payment was raised (resignation letter on page 52 of ROA). During cross-examination, the Respondent/claimant told the court she had salary arrears of 3 months as at resignation, but admitted Kshs. 10,000 was paid to her landlord in June 2021. (page 76 of ROA). During re-examination the appellant's witnesses Michel Njenga stated the claimant was owed Kshs. 30,000 as salary. The doctrine of constructive dismissal is founded on common law. It is not provided for under the *Employment Act*. The court on perusal of the judgment of the trial court found that the trial court relied on relevant definition and case law as follows;- 'The Black's Law Dictionary (9th Edition) defines constructive dismissal as-"A termination of employment brought about by the



employer making the employee's working conditions so intolerable that the employee feels compelled to leave."

26. This concept of constructive dismissal was discussed in the case of Coca Cola East Africa & Central Africa v Maria Kagai Ligaga [2015] eKLR wherein the Court of Appeal found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad that the employee regards himself as having been unfairly dismissed. The Court proceeded to outline and summarize the following legal principles relevant in determining constructive dismissal:-

"The legal principles relevant to determining constructive dismissal include the following:

- a) What are the fundamental or essential terms of the contract of employment?
- b) Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
- c) The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d) An objective test is to be applied in evaluating the employer's conduct.
- e) There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h) The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i) Facts giving rise to repudiatory breach or constructive dismissal are varied."

27. The trial court held –

In looking at the circumstances I note that by the Respondent then failing to pay the Claimant was in breach of the contract of employment thus leading to the constructive dismissal of the Claimant which is then considered unlawful termination under the law. This bearing in mind the letter of 2nd of November, 2020. The Claimant and the Respondent continued to be in an employer employee relationship and thus the contract was still valid between the parties. The Respondent has reiterated severally the Claimant's salary was not based on her commissions and so at the bare minimal the between the parties necessitating that the Claimant thus resigned. Therefore, the Claimant was Respondent should have paid the Claimant's salary. Failure to do so led to breach of contract unfairly and unlawfully terminated." Having re-evaluated the evidence before the trial court, I find no basis to fault the trial court. Payment of salary is at the core of the employment contract, and non-payment of salary when it is due, in this case, end of the month, amounts to repudiation



of the contract. The appellant's witness admitted to non-payment of salary. The court finds no basis to fault the decision of the trial court applying the legal principles outlined on constructive dismissal in *Coca Cola East Africa & Central Africa v Maria Kagai Ligaga* [2015] eKLR (cited above and relied on by the trial court).

Whether the trial court erred in the relief awarded.

28. The trial court entered judgment that the claimant was unfairly dismissed from employment constructively and awarded compensation equivalent of 12 months salary plus salary arrears for 3 months amounting to Kshs. 45000.
29. The appellant submitted that the Learned Trial Magistrate erred in law and fact by failing to apply the correct formula for award of damages for termination of employment as the Claimant had not been in employment for more than 3 years and she had willingly resigned. The employment contract is clear that the Respondent started work with effect from 1st October 2019. She resigned effective on 30th June 2021 vide letter dated 7th June 2021. Those dates have not been controverted by any other documents or evidence. The part for being home due to COVID-19 is found at page 75 B of the record of appeal where the Respondent testified that she was at home allegedly for 2 months during covid from last week of march 2020 until June 2020 which is not 2 months but 4 months if accurately counted during which time she was paid full salary despite not making any sales so she cannot claim leave days as she was employed in 2019 October and by March 2020 less than 5 months into her employment she was at home for 4 months due to covid and by 7th June 2021 she issued less than 30 days notice to resign which is exactly 1 year 8 months after she started work and she had taken 3 months off work due to covid so technically she was in Respondents employment for a period of 1 year 3 months during which time she did not introduce even a single new client and she had a lot of complaints about her poor work performance and she subsequently voluntarily resigned upon her failure to fulfil her terms of employment which made the Appellant have difficulties paying her as sales work was based on commission pay for sales delivered from new customers The learned magistrate erred in law and fact by failing to find that there was absolutely no aggravating or extraneous factor to warrant the award of 12 months damages as the Claimant had not denied that she had not gone to collect the salary arrears nor had she alleged that she ever went to collect the salary arrears upon her resignation. This point is clear at page 78 of the record of appeal where the Appellants witness testified that they did not sack the Respondent but gave her time for reflection and she had made commitment to rectify and would accept a dismissal if she did not amend. She was given a second chance but she opted to resign to avoid her inevitable dismissal and thereafter presented the case for constructive dismissal whilst she had acknowledged that she was not able to bring any new customers or make any sales which was in breach of her employment contract.
30. Conversely, the respondent submitted that the learned magistrate was within the confines of Section 49(1)(c) of the *Employment Act* when she awarded the Respondent 12 months compensation for wrongful and unfair termination of her employment. The Respondent invited the court to consider and analyse the provisions of Section 45 of the *Employment Act*, 2007 through the lenses of principles of constructive dismissal set out hereinabove.

Decision

31. When the court finds that there has been unfair termination, it is obliged under section 50 of the *Employment Act* to consider remedies available under section 49 of the Act, which include compensation capped at a maximum of the equivalent of 12 months' gross salary (section 49(1)(c)), as held by the Supreme Court in *Kenfreight (EA) Limited v Nguti* (Petition 37 of 2018) [2019] KESC



79 (KLR) (23 July 2019) (Judgment). The relevant factors to consider are set out under section 49(4) of the *Employment Act*.

- (a) the wishes of the employee;
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- (c) the practicability of recommending reinstatement or re-engagement;
- (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- (e) the employee's length of service with the employer;
- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonable incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

32. The trial court correctly held the period of employment was as per the contract of employment and not as alleged at the hearing by the claimant. The contract produced by both parties at trial stated the employment was effective 1st October 2019 (page 14 of ROA). The respondent resigned as at 30th June 2021. The trial court stated that she had worked for almost 2 years hence within the law to ask for maximum compensation. The court finds that this was a casual way of assessment of the compensation as the trial court did not apply its mind on other factors under section 49(4) of the *Employment Act*. The period of service was less than 2 years. The respondent had a record of complaints against her performance and had since secured another job, mitigating her losses from the unjustified termination. There was no evidence of social security in terms of pension or gratuity paid to her by the employer. Taking into account the forgoing the maximum award was excessive in the circumstances and is set aside and substituted with compensation equivalent of 6 months salary .

33. On the unpaid salary, the appellant drew attention to the court that the claimed salary differed from the figures by the respondent in an email to the appellant dated 10th August 2021. In the email the respondent demanded unpaid outstanding salary of Kshs. 30000. That is what also the appellant's witness told the court was due. The evidence before the trial court was thus to the effect that the



outstanding salary was 30000 and not 45000 as awarded and the decision of the trial court is faulted to that effect. The award for unpaid salary of Kshs. 45000 is set aside and substituted with award of Kshs. 30000.

In conclusion

34. The appeal is allowed with respect to the reliefs only. The Judgment and Decree of the Hon. C.M. Njagi (PM) delivered on 1st August, 2023 in MCELRC E1987/2021 is set aside and substituted as follows-

Judgment is entered for the claimant against the respondent as follows:-

The claimant is held to have been unfairly dismissed from employment.

Compensation for unfair termination equivalent of 6 months gross salary Kshs. 90,000

Unpaid salary Kshs. 30,000

Total sum of Kshs. 120000 plus costs of the suit is awarded with interest at court rates from date of judgment.

35. The appeal was partially successful. The court orders each party to bear own costs in the appeal.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant – absent

Respondent: Ms. Karoki

