



**Kenya Petroleum Oil Workers Union v Owi (Appeal E069 of 2025)
[2025] KEELRC 2563 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2563 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E069 OF 2025
JW KELI, J
SEPTEMBER 26, 2025

BETWEEN
KENYA PETROLEUM OIL WORKERS UNION APPELLANT
AND
JUDITH OWI RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. A.N. Ogonda
(PM) delivered on 12th February, 2025 in MCELRC E1961/2021)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. A.N. Ogonda (PM) delivered on 12th February, 2025 in MCELRC E1961/2021 between the parties filed a memorandum of appeal dated the 10th of March 2025 seeking the following orders:-
 - a. The Appeal be allowed.
 - b. The judgment and all consequential orders in favour of the Respondent be set aside.
 - c. The appellant be awarded the costs of this appeal and in the Magistrate Court.

Grounds Of The Appeal

2. That the Honourable Trial Magistrate misdirected herself on the evidence and the relevant law on the matter before her and consequently arrived at a wrong decision by entering judgment in favour of the Respondent against the Appellant.
3. That the Honourable Trial Magistrate erred in law and fact, and misdirected herself when she found that the Respondent was constructively terminated and not voluntarily resigned as supported by evidence from the Appellant.



4. That the Honourable Trial Magistrate erred in law and in fact when she failed to consider evidence of the Claimant absconding her duties from the 3rd of August 2021 to the 31st of August 2021.
5. That the Honourable Trial Magistrate found that there was no evidence of the Respondent's assertions that her desk was ransacked and documents were taken from her, but still went to declare that the Respondent had been constructively dismissed.
6. That even though the Honourable Trial Magistrate found that the letter written by the Claimant dated 2nd August 2021 was strongly worded, she failed to find that the Respondent had contributed significantly to the breakdown of the employment relationship.
7. That the Honourable Trial Magistrate failed to appreciate past conduct of the Respondent, notably the fact that she had without notice transferred herself from Mombasa and the Appellant was forced to accept the transfer.
8. That the Honourable Trial Magistrate failed to appreciate the fact that from past conduct, particularly her past transfer, the Respondent had demonstrated that she was capable of changing stations on short notice.
9. That the Honourable Trial Magistrate failed to appreciate the fact that, based on past practices between the Appellant and the Respondent, transfer allowance was assessed and paid after the reporting date.
10. That the Honourable Trial Magistrate misapprehended the law and facts placed before her and failed to take into account the Appellants submissions in opposition of the Respondent's claims, thereby holding that the Respondent was entitled to Kshs. 562,872 as compensation for unfair termination.
11. That the Honourable Trial Magistrate erred in law and in fact by holding that the Respondent was entitled to Kshs. 93,812 being salary for the months of August and September 2021 despite the fact she had not shown up to work in those months.
12. That the Honourable Trial Magistrate erred in law and in fact by holding that the Respondent was entitled to Kshs. 52,906 as leave and travelling allowance despite the fact that the same was not proven.
13. That the judgment that the Honourable court dated 12th February 2025 and delivered on the same day was erroneous in law and fact and a gross miscarriage of justice and judicial precedents particularly, finding that the Respondent was entitled to a net sum of Kshs. 757,862/-payable by the Appellant.

Background To The Appeal

14. The Respondent filed claim against the Appellant vide a statement of claim dated the 17th of November 2021 seeking the following orders:-
 - a. A declaration that the Claimant's resignation was involuntary and amounted to wrongful/unfair termination of employment.
 - b. An order compelling the Respondent Union to pay the Claimant's unpaid salaries for August and September 2021 amounting to Kshs. 93,812/= (Ninety-three thousand eight hundred and twelve only).
 - c. Salary disparity for April 2021 amounting to Kshs 1,366/= (One thousand three hundred and sixty-six only).
 - d. One month leave allowance and traveling allowance amounting to Kshs 52,906/= (Fifty-two thousand nine hundred and six only).



- e. One (1) month salary in lieu of notice amounting to Kshs 46,906/= (Forty-six thousand nine hundred and six only).
 - f. Two (2) day per diem for attending a staff's family burial at Bungoma Kh.8,000/= (Eight thousand only).
 - g. Twelve (12) months compensation for unfair and illegal termination (46,906×12=Kshs.562,872/= (Five Hundred and Sixty-two thousand eight hundred and seventy-two only).
 - h. Certificate of Service; and the Claimant's items/books arbitrary taken by the National General Secretary.
 - i. Cost of the suit (clear copy on pages 7- of Appellant's ROA dated 25th April 2025).
15. The Respondent filed her verifying affidavit, list of witnesses, witness statement, and list of documents together with the bundle of documents attached (see pages 14-58 of ROA).
 16. The claim was opposed by the Appellant who entered appearance and filed a memorandum of response dated 9th December 2021 (pages 119-128 of ROA). They also filed a list of witnesses; witness statements of George Okoth Omollo, Mary Kasyoka, and Francis Omollo; and a list of documents with the bundle of documents attached, all dated 9th December 2021 (pages 129-171 of ROA). Pursuant to leave of the court granted on , the Appellant filed an amended statement of response dated 24th January 2022 and substituted witness statements of even date (pages 173-189 of ROA).
 17. The Respondent's case was heard on the 23rd of January 2024 where the claimant/respondent testified in the case, relied on her witness statement as her evidence in chief, produced her documents, and was cross-examined by counsel for the Appellant Mr. Ochieng' (pages 251-255 of ROA).
 18. The Appellant's case was heard on May 7, 2024, where the respondent/appellant called three witnesses to testify on their behalf. They all relied on their filed witness statements, and RW1 produced the appellant's documents. They were cross-examined by counsel for the claimant/respondent, Mr. Oyugi (pages 256 ROA).
 19. The parties took directions on filing of written submissions after the hearing. The parties complied.
 20. The Trial Magistrate Court delivered judgment on the 12th of February 2025, partly allowing the claimant/respondent's claim to the tune of Kshs. 757,862/- comprised of compensation for unfair termination equivalent to 12 months' salary, notice pay, salaries for August and September 2021, salary disparity for the month of April 2021, and one month leave and travelling allowance (judgment at pages 257 to 265 of ROA).

Determination

21. The appeal was canvassed by way of written submissions. Both parties filed.
22. 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.”

23. 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

24. In their submissions dated the 14th of July 2025, the Appellant identified the following issues for determination:
- a. Whether the Respondent was constructively dismissed.
 - b. Whether the Respondent is entitled to the claims awarded.
 - c. Who should bear the costs.
25. On her part, the Respondent identified the following issues for determination in her submissions dated the 21st of July 2025:
- i. Whether the trial court erred in fact and in law in finding that the Respondent’s resignation was involuntary and amounted to constructive dismissal.
 - ii. Whether the trial court erred in fact and law in its decision on relief.
26. The court finds that the parties were in agreement on the issues in the appeal to be –
- a. Whether the trial court erred in fact and law in finding the resignation amounted to constructive dismissal .
 - b. Whether the trial court erred in reliefs awarded.

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

The appellant’s submissions

27. It is the Appellant’s submission that it did not constructively dismiss the Respondent. The principles governing constructive dismissal were laid down in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR) whereby the Honourable Court stated that; 30. 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.”
28. The Respondent herein was transferred to Mombasa through a letter dated 30th July 2021 and was required to report there on the 4th August 2021. It should be noted that past conduct of the Respondent demonstrated her ability to move between towns easily. Significantly, we refer to her letter dated 21st February 2020 on page 55 of the Record of Appeal where the Respondent requested for a transfer from Mombasa to Nairobi. Before the same was approved, and without regard to the Appellant, she went ahead and reported to the Nairobi office. Essentially, she transferred herself to the Nairobi office. The Appellant, as a sign of good will, ratified the action and allowed her to stay in Nairobi office but sternly warned her against such actions in future pursuant to the letter dated 2nd March 2020 as on page 53 of the Record of Appeal. The Respondent admitted that the previous transfers had been at her behest in cross-examination as evidenced on page 253 of the Record of Appeal. This raises the question of whether an employer should be required to accept an employee transferring herself, but the employer cannot transfer them as was rightly asked in the cross-examination.
29. The appellant submitted that the Respondent’s transfer was not arbitrary or illegal, bearing in mind her past conduct. An employer is free to allocate or organise work as it deems prudent to achieve optimum results. A transfer of an employee from one station to the other should thus be seen from this perspective as the employer is at liberty to organise its business as was held in the case of *Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO)* [2017] KEELRC 470 (KLR). The Respondent was transferred and failed to report to her new station. The Appellant further maintains that the Respondent did not show up at the Appellant’s offices as she alleged for the months of August and September. She was issued with a Show Cause letter dated 26th August 2021 which she refused to acknowledge. There is no way the Respondent would have allocated her work in Nairobi yet she had been directed to report to Mombasa. The Trial Court, in its judgment on page 260 of the Record of Appeal notes that the Transfer would negatively impact the Respondent. As already submitted before, this was not the first time the Respondent was being transferred. The Respondent was well aware that she would be compensated for the move upon her accepting and moving to Mombasa as she had been directed as had been the practice before. Further, when the Respondent transferred herself from Mombasa to Nairobi, she did not require any payment of compensation upfront. She is thus estopped from alleging that the same was illegal or unfair. The Respondent did not work for the months of August and September and as such there was no withholding of salaries. To this end, the appellant submitted that there was no constructive dismissal from the service of the Appellant. The Respondent resigned on her own accord after failing to report to duty.

Respondent’s submissions

30. Whether the trial court erred in fact and law in finding that the Respondent was constructively dismissed. – Grounds 1,2,3,4,5,6,7,8 9. The Respondent submits that the trial court did not err in law and fact by finding that her resignation was not voluntary and amounted to constructive dismissal by the Respondent. The trial court rightfully determined that the Respondent was constructively dismissed since her resignation was as a result of the Appellant making her working conditions intolerable that she was compelled to resign. In the case of *Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited* [2014] eKLR the Honourable court rightfully observed that: “Constructive dismissal is not defined in our *Employment Act* 2007. The concept was the subject of this Court’s Award in Cause Number 611 [N] of 2009 between *Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited* [unreported]. The Court 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 basic ingredients in constructive dismissal are:-a. The employer must be in breach of the contract of employment; b. The breach must be fundamental as to be considered a repudiatory breach; c. The employee must resign in response to that breach; and d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.” As per the Respondent’s resignation letter dated 1 st October 2021 (page 52 of the record), she resigned on account of the Appellant’s conducts, which conducts were tantamount to repudiation of contract. The Appellant withheld her salary for two months, transferred her from Nairobi to Mombasa within a short notice of two working days, refused to facilitate her transfer despite the short notice and refused to bring forward her leave days to enable her relocate to Mombasa as per the transfer. Withholding of Salary. During the hearing, the Appellant’s General Secretary (RW 1) admitted to withholding the Respondent’s salary on grounds that she had deserted work however he failed to produce any evidence and/or substantiate the allegations during cross-examination. (para. 7 of the judgement at page 263 of the record) On the other hand, the Respondent submitted that she was present at work for the two months leading to her resignation and at no point did she abscond duty. On diverse dates, the Respondent wrote various letters to the Appellant’s General Secretary seeking clarification why her salary was withheld however they were ignored. Through letters dated 31st August 2021 and 6th September 2021, the Respondent wrote to the Appellant requesting for payment of her salary. (Page 47 & 49 of the record). Further, via a letter dated 14th September 2021, the Respondent’s Advocate wrote to the Appellant requesting for an explanation why her salary had been withheld. (Page 50 of the record). The Appellant acknowledged receiving these letters but did not respond to them - a clear indication that it had withheld the Respondent’s salary without any reasonable justification.

31. The Respondent submitted that the trial court rightfully relied on the case of Edgar Kiplangat Mutai versus James Kipkech Toroitich Kisa & Another [2022] KEELRC where it was held that: “Withholding of an employee’s salary without any excuse is a fundamental breach of integral part of employment contract therefore on that ground alone the Claimant was justified to resign and sue. An employee, in such circumstances is entitled to deem that the employer has chosen to repudiate the contract.....” Further, in case the Respondent had indeed absconded work, the Appellant was reasonably expected to respond to the letters aforementioned and specifically state the reasons for withholding the salaries. During cross-examination of the Appellant’s 2nd and 3rd witnesses, they categorically confirmed to the court that the Respondent was always present at work until her untimely resignation as stated in their witness statements. (Page 184 and 186 of the record) . In the case of Felistas Acheha Ikatwa v Charles Peter Otieno (2018) e KLR the court stated that; “The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”
- 3.2 That in case the Respondent had absconded duty as alleged by the Appellant, it ought to have demonstrated efforts made to ensure the Respondent reports to work at the trial court. As such, the Appellant did not meet the required standard to prove desertion which it sought to rely on at the trial court. The Respondent maintains that she was not issued with any Notice to Show Cause and the copy which was produced by the Appellant before the trial court was an afterthought and an attempt to misdirect the trial court which was in vain. If in any case the Respondent declined to receive the Notice to Show Cause as submitted by the Appellant, they would have sent it to the Respondent through her official email and/or postal address which is in their custody as an employer. Further, the same would have been communicated to her Advocate upon sending the demand for payment of her salary. As per paragraph 27 of the Appellant’s submissions, it is evident that they have acknowledged the Respondent



was present at the head office but they declined to allocate her any work since they expected her to be present at Mombasa branch. As such, the trial court rightfully held that the Respondent did not desert work and continued to present herself to the work place and to make demands for payment of her salary until her resignation. Unreasonable Transfer (Short notice & refusal for facilitation). The trial court did not err in fact and in law when it held that the Appellant transferred the claimant on very short notice, refused to facilitate the transfer and also refused to bring forward her leave. The Appellant's General Secretary, on his own admission, during cross-examination confirmed that he had transferred the Respondent to Mombasa on a short notice. To justify the same, under paragraph 19 of his witness statement, he stated: "I am aware that the Claimant had been brought up and lived in Mombasa, and that is the reason why the Respondent was of the opinion that the claimant should not have any problem adjusting." (Page 187 of the record). From the aforementioned statement, it can be reasonably deduced that the transfer was unreasonable and meant to frustrate the Respondent so as to resign. As per the transfer letter dated 30th July 2021, (page 32 of the record), the Respondent was expected to report to the Appellant's coast branch on or before 4th August 2021. The letter was served upon the Respondent at 14:30 hrs. The court should take judicial notice that 30th July 2021 was on a Friday and the Respondent was required to report Coast within 2 working days and the national opening of schools after corona pandemic had just commenced on 26th July 2021. On 2nd August 2021, the Respondent wrote a letter to the Appellant informing it of her predicaments and her inability to move to Mombasa within the short notice and further requested for facilitation if the Appellant insisted on her moving to Mombasa within the short notice. (Page 33-35 of the record). In response to the letter, the Appellant, through a letter dated 2nd August 2021, informed the Respondent that her letter dated 2nd August 2021 bordered insubordination. (Page 36 of the record). From the tone of the two letters and as rightfully observed by the trial court, the Respondent had been subjected to frustrations at the work place and the Appellant had been hell-bent at ensuring she resigned from work. However, since the Respondent was determined to keep her job, she applied for her leave days to be brought forward to enable her prepare her family and move to Mombasa as per her letter dated 3rd August 2021. (page 45 of the record)

33. The respondent submitted that to frustrate her further, the Appellant ignored her plea for the leave to be brought forward did not respond to the request. As properly observed by the trial court and contrary to the Appellant's evidence on record, the alleged leave that was approved by the Appellant was the one to commence in September 2021 and not 4th August 2021 as requested by the Respondent. (refer to page 147 of the record) That the Appellant's attempts to hoodwink the trial court that it had approved the Respondent's request to bring forward her leave days were laid bare when they were unable to explain why it purported to have issued the Respondent with a Notice to Show Cause for desertion of work yet she ought to have been on leave as alleged.]In *Patrick Kiogora Moses v Mobicom (K) Limited [2015] eKLR*, the court emphasized that failure to accord an employee adequate transfer notice and facilitation to move contravenes article 41 of *the constitution* hence unfair labour practice. The same was reiterated in the case of *Patrick Kiogora Moses v Mobicom (K) Limited (supra)* where it was held that the employee had been constructively dismissed for failure to be issued with adequate transfer notice and facilitation to move. It expressly held that: "The court finds that the circumstances were such that the claimant had a valid grievance and it was necessary that the respondent accords the claimant a chance to ventilate that grievance- that the notice was short and he needed facilitation to move. Under section 46 (h) of the *Employment Act*, 2007, such valid complaint would not constitute a valid reason for the termination. The court further holds that the failure to accord the claimant a genuine grievance management procedure amounted to an unfair labour practice that contravened Article 41 of *the Constitution*. Thus, the court returns that the constructive termination was unfair." (emphasis ours). That the Respondent's resignation was involuntary and the court did not err in finding that the same amounted to constructive dismissal which was unfair and unlawful.



Decision

34. The claimant vide letter dated 1st October 2021 wrote a letter the national general secretary of the appellant notifying of resignation which she stated was as a result of frustration by the general secretary and stated the reasons for the resignation to be as follows:- “Deliberate failure to pay my salary for the months of August and September 2021 without any explanation despite several demands for payment of the same, yet all other staff members have been paid their salaries.

Refusal by the Union to allocate me duties since July 2021.

Arbitrary transfer to Mombasa within a short notice of 2 working days without any financial support during this challenging Covid 19 period

Refusal to respond/ approve my leave application request to enable me to plan on moving to Mombasa upon declining to issue me with financial facilitation for relocation to Mombasa within 2 days.

Constant harassment by the General Secretary by ransacking my office drawers and taking away my personal books; my office chair and other personal documents in an attempt to bully and intimidate me out of employment.

6. Reluctant attitude by the top National Union Officials who have been notified of my quandary but have decided to remain unresponsive towards the same.

The above-mentioned reasons have therefore made the working condition intolerable that I am compelled to terminate my services (resign).

Therefore, urge your office to pay me my terminal dues and give me back my personal books and documents.”(page 52 of the ROA).

35. The court upheld the decisions cited by both parties on constructive dismissal. The Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR) was upheld in the case of *Kenneth Kimani Mburu & Another v Kibe Muiqai Holdings Limited* [2014] eKLR where the Honourable court 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 noted that the genesis of the resignation was a transfer letter dated 30th July 2021 from Nairobi to the Coast Branch office of the appellant effective 1st August 2021 with the respondent being required to report on duty on 4th August 2021. The transfer reason was organizational needs. (page 32 of ROA). The respondent in response vide letter of 2nd August 2021 challenged the transfer alleging she had been transferred now and then and asked if she was the only employee in the petroleum fraternity. She stated the transfer was out of malice, union politics and made to frustrate her entire dependants. She stated that it was one year since she had been transferred to Nairobi from Mombasa, that the transfer was causing damage to her family and marriage, the notice was not enough and was impractical for her to move to Mombasa County from Nairobi, she complained of changing schools for the children, she was a tenant and had to give 3 months' notice or forfeit her deposit, her househelp was 1 month in place and could not be trusted with her children in her absence, that she required facilitation of transport of her household and fare to Mombasa because it was not her request for transfer, and that she needed to be compensated for disturbance and frustration the office was causing her in the transfer. (pages 34-35 of ROA).



36. The appellant respondent stated that she was unable to reconcile the content of her letter, which bordered on insubordination, and added that the respondent hands over and wishes her well in her new station. (page 36 of ROA). The respondent also stated on the same date that she was unable to report to the new station with such short notice and without financial facilitation to enable her organize her family (page 44 of ROA). The respondent further, on August 3, 2021, wrote to the appellant and asked for her leave, which she had applied for the previous day, to be brought forward to begin on August 4, 2021, for 26 days to enable her organize her family considering the transfer. She further requested that her salary and leave allowance be paid at the start of her leave to facilitate her logistics to Mombasa County, now that the employer declined to give her adequate notice and to pay transfer allowance (page 45 of ROA). On page 46 of ROA, there is a leave application dated August 2, 2021, requesting 26 days leave effective September 1, 2021.
37. The court noted that on the 26th August 2021 a notice to show cause was issued to the respondent. (page 148 of ROA). The court noted no specific reply to the show cause but there were subsequent letter for delayed salary by the respondent to the appellant and no response by the appellant.
38. During the hearing before the trial court, the Respondent stated she resigned due to non-payment of salary in August and September and because of an arbitrary transfer with only 2 days' notice. She mentioned she was frustrated by the general secretary. During cross-examination, the respondent reiterated the basis of her claim of constructive dismissal, citing the lack of salary payment in August and September and an arbitrary transfer with short notice. She stated that the last transfer was malicious, citing the short notice and failure to facilitate the move. She told the court she couldn't move to Mombasa without facilitation. She denied knowing that her leave was approved on August 4th, 2021, and claimed she was in the office the entire time.
39. The respondent denied receiving the show cause letter. She claimed that the leave application attached to the respondent's documents was a forgery. The claimant admitted that she was still in Nairobi when she wrote the resignation letter. Upon re-examination, the claimant stated she asked for facilitation, and the employer did not indicate when it would pay. (proceedings at page 250-256). The appellant did not produce the defense hearing proceedings. The court noted from the judgment that the appellant called witnesses in support of its case.
40. The decision of the trial court was to effect that the resignation was involuntary and there was a case of constructive dismissal on grounds of short transfer notice, failure to facilitate the transfer, refusal to bring forward the claimant's leave as requested considering the short notice and withholding of salary. (page 263 of ROA).
41. The court is guided by the decision in Mbogo V Shah [1968] EA Page 93 where 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." In the instant case, this was a case of transfer. It is settled principle that transfer is a prerogative of the employer on basis of reorganistaion to meet the needs of the organisation. The only reason the court may interfere is on the basis of lack of sufficient notice as held in Henry Ochido v NGO Co-ordination Board [2015] KEELRC 150 (KLR)- ' 40. I therefore find the Respondent failed to issue a reasonable notice of transfer to the petitioner, there were no prior consultations and the changes made to his terms and conditions of employment with the relocation



of work station was arbitrary and contrary to section 10 of the *Employment Act*.” This is argument affirmed by the Court in *Githunguri versus Republic* [1986] eKLR in the finding that;

... That official undertakings given officially must be honoured and members of the society are entitled to an orderly and tranquil life and not be subjected to vicissitudes of law especially when there have been no subsequent fresh events to justify it.”

42. The Appellant issued a transfer letter dated July 30, 2021, with the transfer effective on August 1, 2021, and the respondent was expected to report to duty on August 4, 2021. This was clearly very short notice. The court found that the respondent raised genuine concerns in a letter dated August 3, 2021, and even requested to bring forward their leave, but there was no response from the appellant. The letter dated August 3, 2021, was before the reporting date of August 4, 2021. The court agreed with the trial court’s finding that the show cause notice dated August 26, 2021, was not received by the claimant. The court also found that the claimant admitted she never reported to work in Mombasa after the transfer. The failure to report was based on the short notice and the lack of facilitation for the employee to move. The court notes that constructive dismissal is not provided under the *Employment Act* but is a common law legal principle recognized by the court, as upheld in *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) E.K.L.R. In this decision, the court upheld several English decisions, including: ‘28. In this appeal, we have considered the local and persuasive foreign authorities cited by counsel. The authoritative meaning of constructive dismissal was clarified by Lord Denning MR in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761, as follows:”If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also *Nottingham County Council -v- Meikle* (2005) ICR 1).”29. What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstressing the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See *Pedersen -v- Camden London Borough Council* [1981] ICR 674). The criterion for evaluating the employers conduct is objective; the employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory (See *Office -v- Roberts* (1980) IRLR 347). The employee must be able to show that he left in response to the employer’s conduct (i.e. causal link must be shown, i.e. the test is causation). In the case of *Jones -v- F. Sirl & son (Furnishers) Ltd.* [1997] IRLR 493, it was held that there can still be constructive dismissal if the employee waits to leave until



he has found another job to go to. The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause. (See *Walker -v- Josiah Wedgwood & Sons. Ltd.* [1978] IRLR 105). The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations. (See *Wooder -v- Wimpey* [1980] 1 WLR 277; see also *Malik and Mahmud -v- Bank of Credit and Commerce International* [1998] AC 20). If the employee makes it clear that he or she is working under protest, he/she is not to be taken to have waived the right to terminate the contract under constructive dismissal. We adopt the dicta in the above cited persuasive judicial decisions as establishing relevant principles in constructive dismissal." In the instant case the cause of the grievance leading to resignation was a transfer which was tainted by a very short notice and the refusal by the appellant to mitigate the short notice as offered by the respondent vide bringing forward her leave and payment of salary and leave allowance in advance. (page 146 of ROA). The respondent was then left to work under protest. The court found the assertion by the respondent that she continued to report to office at Nairobi was not controverted by records of employer as held by the trial court. In her letters it was clear the Respondent was protesting the conduct of the employer of short notice, failure to accommodate her request for facilitation and failure to pay her salary. The court noted that all correspondence by the respondent from 3rd August 2021 to resignation date did not elicit response by the appellant. The court finds no basis to fault the finding of the trial court that the appellant did not produce its transfer policy to support its claim that facilitation was done upon reporting.

43. The appellant, on the alleged absconding of work by the respondent, ought to have proceeded with disciplinary action under section 41 of the *Employment Act* to bring employment to an end on the basis of absconding by the claimant, having clearly failed to report to the new station of work. For lack of sufficient notice to effect transfer and failure to facilitate the employee to move or even pay salary in advance as requested by the respondent the court found no procedural fairness in the transfer process as held in *Henry Ochido v NGO Co-ordination Board* [2015] KEELRC 150 (KLR). The appellant has not persuaded me that the trial court misapprehended or misapplied the legal principles of constructive dismissal. The finding of constructive dismissal is upheld.

Whether the trial court erred in reliefs awarded.

The appellant's submissions

44. On Maximum Compensation the respondent submitted that the Trial Court awarded the Respondent maximum compensation in the sum of Kshs. 562, 872/=. That Trial Court erred by failing to consider the applicable principles in awarding maximum compensation as stated in *Oi Pejeta Ranching Limited v David Wanjau Muhoro* [2017] KECA 329 (KLR) whereby the Court of Appeal held; In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee. In its reasoning, the Trial Court only considered the duration of time that the Respondent had worked for the Appellant. The Trial Court was cognizant of the fact that the Respondent had contributed to the breakdown of the Relationship between the two parties. In particular, at page 260 of the Record of Appeal, the Trial Court stated, "I have noted the tone of the



Claimant's letter, although raising valid concerns, it was strongly worded," The Trial Court then went ahead to justify the behaviour of the Respondent by citing frustration. Further, the Respondent was required to report to the Mombasa office, which she did not. This act amounts to insubordination. This was not the first time that the Respondent was exhibiting such behaviour as evidenced by the Appellant's letter dated 2 nd March 2020 as on page 53 of the Record of Appeal. It is clear that the Respondent's behaviour significantly contributed to the decline of the relationship between the parties and as such she did not merit an award of maximum compensation. The appellant urged that the award of the sum of Kshs. 562,872/= be set aside by this Honourable Court.

45. On Notice Pay – The appellant submitted that Trial Court awarded the sum of Kshs. 46,906 as Notice pay. The Appellant submitted that the Respondent is not entitled to payment in lieu of notice, having voluntarily resigned from her employment without providing the contractually or statutorily required notice. No prior notice was given to the Respondent, and no mutual agreement was reached to waive the notice requirement. The Trial Court therefore erred in fact and in law in awarding the Respondent Notice Pay and urged it be set aside.
46. On Unpaid dues for August and September 2021. The Trial Court awarded the sum of Kshs. 93,812 as unpaid dues for August and September. The Appellant maintains that the Respondent did not work for the months of August and September. She had been transferred to Mombasa. The Transfer was not rescinded and as such, it defies logic that she would continue to work at the Nairobi office yet there was no work for her there. That the Trial Court erred as a matter of fact and law in awarding sums under this head bearing in mind that the Respondent did not work for these months. The appellant urged that the award of the sum of Kshs. 93,812 be set aside by the Honourable Court.
 - a. On One month leave and travelling allowance. The Trial Court awarded the sum of Kshs. 52,906 as one month leave and travelling allowance. The appellant submitted that there was no legal basis to award the same. Nothing in the pleadings or documents filed justifies the claim. When the Respondent was cross-examined on the same, she also failed to establish the basis for the claim as evidenced on page 254 of the Record of Appeal. 58. That the Trial Court erred in awarding the sums under this head where the same was not justified and pray that the same be set aside.

Respondent's submissions

47. Whether the trial court erred in fact and law in its decision on relief. – Grounds 9,10,11 & 12. i. Compensation for unfair termination. The respondent submitted that the Honourable trial court properly exercised her discretion in awarding the Respondent 12 months salary as compensation for unfair and unlawful termination of employment.⁴³ As per paragraph 8 of the judgment (page 264 of the record), the trial court was guided by the consideration under section 49(4) of the Employment Act, 2007 which included the circumstances under which the termination took place, and the length of service. Having served the Appellant for 10 years and not contributing to her termination, we submit that the Respondent was entitled to the maximum compensation of 12 months' salary as rightfully held by the trial court. 45. We humbly rely on the case of Kenya Union of Sugarcane Plantation and Allied Workers v Othira [2024] KEELRC 843 (KLR) where the Honourable court, on appeal, held that: "The Trial Court awarded the Respondent 6 months' salary for the unfair termination. Considering that the Respondent put in 10 long years of service with the Appellant and the manner in which his termination was executed, I hold that he has made a case for maximum compensation. In Alfred Muthomi & 2 Others v National Bank of Kenya Limited [2018] eKLR the Court held that in granting 12 months of salary compensation for unfair termination, it considered the Claimant's long service."



48. Notice Pay. The Respondent's resignation was as a result of the Appellant creating hostile work environment by withholding her salary and unreasonably transferring her. As such, she was entitled to one month pay in lieu of the termination notice under sections 35(1)(c) and 36 of the *employment act* since the termination of her employment was unfair and illegal. The trial court did not err in awarding the Notice Pay as prayed by the Respondent in her claim.
49. Unpaid dues for August and September 2021. The Respondent was entitled to full salary for the months of August and September 2021 amounting to Kshs. 93,812.00 which were unlawfully withheld by the Appellant having been present at work for the two (2) months as held by the court. Further, the Appellant has upload withholding the salary alleging that the Respondent had abscond work. As determined by the trial court, the Respondent presented herself at the work place until her untimely resignation. The same was confirmed by the Appellant's 2nd and 3rd witness during cross-examination. The trial court did not err in awarding the unpaid dues to the Respondent.
50. One month leave allowance -As per the Appellant's letter dated 18th December 2020 (page 27 of the record), the Respondent was entitled to a leave allowance of Kshs. 6,000.00 effective 2021. . Further, since the Respondent was entitled to leave at the time her contract was terminated, we submit that she is entitled to one month leave salary hence the total award of Kshs. 52,906.00 as compensation for leave period. As such, the trial court did not err in awarded the same as pleaded by the Respondent.

Decision on reliefs

- 51 The Trial Magistrate Court delivered its judgment on February 12, 2025, partly granting the claimant/ respondent's claim of Kshs. 757,862/-, which includes compensation for unfair termination equal to 12 months' salary, notice pay, salaries for August and September 2021, salary disparity for April 2021, and one month's leave and travel allowance (judgment at pages 257 to 265 of ROA).
52. On the maximum compensation awarded; In *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] KECA 329 (KLR) whereby the Court of Appeal held; "In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee." The appellant rightly stated that the Trial Court only considered the duration of time that the Respondent had worked for the Appellant. The court agreed that the Trial Court was cognizant of the fact that the Respondent had contributed to the breakdown of the Relationship between the two parties. In particular, at page 260 of the Record of Appeal, the Trial Court stated, "I have noted the tone of the Claimant's letter, although raising valid concerns, it was strongly worded," The court noted that the Respondent contested transfer before as evidenced by the Appellant's letter dated nd March 2020 as on page 53 of the Record of Appeal. The court noted that the claimant took the position that the transfer was malicious. Thus her issue with the transfer was beyond the notice. It is settled law that the quantum of damages as compensation is at the discretion of the trial court. In *Edward Sargent -v- Chhotabhai Jhaverbhat Patel* [1949] 16 EACA 63, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also *Spry VP in Haman Singh & Others -v- Mistri* [1971] EA 122, 125). The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of *Mbogo & Another-v-Shah* [1968] EA 93, where it was



held at page 96 that: "An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion...." The criteria in section 49(4) of the *Employment Act* as summarised in *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] KECA 329 (KLR, is broad. In the instant case the trial court only considered the length of period of service of 12 years of the Respondent. The court finds basis is established for the court to interfere with the quantum. The root cause of the resignation was the transfer which the respondent stated was malicious. The transfer is a prerogative of the employer and was only tainted by the procedural unfairness of short notice and lack of facilitation as held above. The employer failed to mitigate the unfair process leading to the resignation. Taking the foregoing into account the court finds that the 12 months maximum compensation was too high. The court finds that compensation equivalent of 3 months salary was adequate compensation in the circumstances.

53. The court having upheld the constructive dismissal, which is equal to unfair termination, the notice pay is upheld under sections 35 and 36 of the *Employment Act*.
54. The claimant applied for leave and the same was not approved. The trial court found the approval of 4th August 2021 was not true and the position is upheld.
55. The salary for august and September is upheld for reasons given above the court having upheld the finding of the trial court that the claimant continued to work in the station protesting the transfer.

Conclusion

56. In the upshot the appeal is allowed with respect to the compensation which is reduced from the maximum compensation to 3 months' salary . The Judgment and Decree of the Hon. A.N. Ogonda (PM) delivered on 12th February, 2025 in MCELRC E1961/2021 is set aside and substituted as follows:-

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

- a. A declaration that the Claimant's resignation was involuntary and amounted to constructive dismissal. It was unfair termination.
- b. An order is issued compelling the Respondent Union to pay the Claimant-
 - A. Unpaid salaries for August and September 2021 amounting to Kshs. 93,812/= (Ninety-three thousand eight hundred and twelve only).
 - B. Salary disparity for April 2021 amounting to Kshs 1,366/= (One thousand three hundred and sixty-six only).
 - C. One month leave allowance and traveling allowance amounting to Kshs 52,906/= (Fifty-two thousand nine hundred and six only).
 - D. One (1) month salary in lieu of notice amounting to Kshs 46,906/= (Forty-six thousand nine hundred and six only).
 - E. Three (3) months compensation for unfair and illegal termination (46,906×3) =140,718
 - F. The Total sum of Kshs. 335708 (above) is payable with Interest at court rates from the date of judgment until payment in full. The respondent shall pay the claimant the costs of the suit.



- c. Certificate of Service to be issued under section 51 of the *Employment Act*.
57. The appeal succeeded on issue of the compensation quantum. I order each party to bear own costs in the appeal.
58. It is so Ordered.

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

