



Kangethe v Monarch Insurance Company Limited (Cause E959 of 2021) [2024] KEELRC 990 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 990 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E959 OF 2021**

SC RUTTO, J

MAY 3, 2024

BETWEEN

GABRIEL GITAU KANGETHE CLAIMANT

AND

THE MONARCH INSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent as a Marketing Manager-General Insurance Business (GIB) with effect from 11th July 2019. According to the Claimant, there was marked business growth during his tenure of service. He avers that business grew by 4% in 2019 and 14% in 2020. The Claimant attributes the business growth to marketing activities whose cash outlay was approved by the General Manager-GIB and CEO. He was tasked with accounting for the cash and he duly presented receipts to the finance department in the years 2019 and 2020.
2. The Claimant further contends that previously, the Marketing Manager was not required by policy to have a personal budget for efficiency and administrative reasons but the Respondent's CEO, on 11th March 2021, with no precedent or policy backing or agreement, unilaterally crafted and compelled him to own a personal budget without consultation. That there was no addendum to his contract to revise the terms thereof. It is the Claimant's view that this was the first salvo towards creating a hostile environment that would eventually lead to him resigning.
3. From the record, the Claimant tendered his resignation from the Respondent's employment on 9th September 2021. It is his contention that he was always ready and willing to work for the Respondent. However, due to the Respondent's unilateral actions including unilateral alteration of his contractual terms, unilateral imposition of a budget, knee-jerk transfers to punish him, inflation of his new station's budget as well as continued blame for cash which he had accounted for 3 years earlier, communicated to him that he was no longer needed and that the Respondent had breached material trust based on the contractual agreement in place.



4. It is against this background that the Claimant prays for the following orders:
 - a. A finding and declaration that the Claimant's resignation amounts to constructive dismissal and thus unlawful and unfair termination;
 - b. A finding that the Claimant was discriminated against by the Respondent;
 - c. A finding that the Claimant was not paid house allowance and his effective monthly salary ought to have been Kshs 340,500.00;
 - d. An award of Kshs 15,179,500.00 made up as follows;
 - i. House allowance arrears for 27 months Kshs 1,093,500.00
 - ii. 12 months compensation Kshs 4,086,000.00
 - iii. Damages for discrimination Kshs 10,000,000.00
 - e. Costs of the suit;
 - f. Any other relief that the Court may deem fit and just to grant.
5. The Respondent countered the Claim through its Response dated 29th July 2022, in which it avers that its Staff Policy Handbook was incorporated as part of the Claimant's terms of employment pursuant to clause 11 of the contract. That the requirement to account for allowances provided by the Respondent to the Claimant was a matter of policy and prudent financial practice and cannot be said to be hostile to employees.
6. That on diverse dates, the Respondent provided a total of Kshs 597,000/= to the Claimant as entertainment allowances. He was required to account for the expenditure of these allowances but failed to do so hence the issue was raised by the Respondent's auditors.
7. The Respondent further avers that the Claimant voluntarily gave notice of his resignation on 9th September 2021. According to the Respondent, the Claimant was not constructively dismissed. It is the Respondent's view that the Claimant is not entitled to any of the prayers sought in the Memorandum of Claim and as such, prays that the Claim be dismissed with costs.
8. The matter proceeded for hearing on 9th October 2023 and 23rd November 2023, with both parties calling oral evidence.

Claimant's Case

9. The Claimant testified in support of his case and called Mr. Augustine Onyango as his second witness. The Claimant who testified as CW1 started by adopting his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before Court.
10. The Claimant stated that his remuneration was itemized as a gross salary of Kshs. 300,000.00 made up of; Basic salary - Kshs. 270,000.00; Car allowance- Kshs. 2 0,000.00 and Airtime- Kshs.10,000.00. There is nowhere in his contract where the statutory 15% house allowance is indicated.
11. He further stated that on 17th March 2021, he was accused of not accounting for the marketing activities float to the tune of Kshs. 372,000.00, notwithstanding that audit for 2019 and 2020 financial years had already been completed and this alleged loss had, curiously, not been flagged. He is aware



- that he had presented all receipts related to the events to the Finance Department for processing and clearing in 2019 and 2020.
12. That at that time, the COO, by the name Mr. George Nyambuti, prevailed upon him to take ownership of the alleged unaccounted funds so as to pave way for the clearance of the outgoing GM-GIB, Mr. Augustine Onyango. He was reassured by the COO that the steps were requested purely for the purpose of clearing the GM-GIB and that there was no intention of revisiting the recovery of the said monies from him. He did this in good faith not realizing that that was another step towards setting him up for resignation due to frustration.
 13. The Claimant averred that around 5th to 12th March 2021, he was placed under immense pressure from the CEO, COO and the Human Resources (HR) to appraise and confirm the Westlands Branch Manager, Mrs. Eunice Ngano, yet she had not met the agreed targets. He acted in good faith and in the best interest of the business by appraising and recommending that the said Branch Manager had not met the targets and advised the HR to consider finding another candidate for the position.
 14. Immediately after he forwarded the appraisal recommendations, the alleged unaccounted-for cash miraculously rose from Kshs. 327,000.00 to Kshs. 597,000.00. On the same day, he was issued with a transfer letter to Thika Branch and given a single day to clear and hand over.
 15. It was the Claimant's evidence that he developed COVID-19-like symptoms on 8th March 2021 and proceeded for testing on 9th March 2021 at Meridian Medical Center- Upperhill. He tested positive for the virus and immediately notified the HR and shared a copy of the test results and sick-sheet for 15 days to allow him take his medication and recover.
 16. He was surprised to receive an email from the HR on 10th March 2021 demanding that he takes another COVID-19 test specifically from Nairobi Hospital, Mater Hospital or Aga Khan Hospital. He was given 2 days to test and share the results before close of business on 12th March 2021. The email further stated that the test results from Meridian Medical Center were not recognized by the Respondent. The Claimant contended that at no point had the HR shared a list of approved medical facilities where he should take the COVID-19 tests.
 17. The Claimant further stated that he made an appeal to the CEO indicating that he has a child with special needs who requires therapy thrice a week and that he was afraid he would not access such facilities in Thika. Further, he explained that since he has a titanium fixed plate in one of his limbs, the transit from Nairobi to Thika (so as to keep his family in Nairobi for the sake of his child accessing necessary facilities) would not be an easy task for him.
 18. On 12th March 2021, while he was recovering from the COVID-19 virus, his deputy, was instructed by the COO to conduct a second appraisal for the Branch Manager of Westlands and to confirm her. That his Deputy was instructed to reduce her budget to ensure that her appraisal was successful. She was eventually confirmed as a Branch Manager and at the same time, promoted to the Marketing Manager-GIB, the position which he occupied.
 19. It was the Claimant's further evidence that his mother unfortunately passed away on 22nd March 2021 due to COVID-19 complications. The HR office sent a notification email of the Claimant's mother's demise on 22nd March 2021 but the Life Department later declined to honour the claim on account of an allegation that her name was not on the proposal form.
 20. Earlier on 9th June 2020, the HR office communicated the establishment of a Last Expense Benefit for which all employees were eligible. He took up the cover and had an amount of Kshs. 800.00 deducted monthly from his salary as premiums for that cover. The beneficiaries in that cover included up to 10



family members. That the initial email from HR and the attached proposal form did not categorically state that he must indicate the name of the parents.

21. On 24th March 2021, in an effort to save his job and source of livelihood while being under a great deal of emotional anguish trying to come to terms with the loss of his mother, he appealed to the HR Board Committee against the transfer to Thika Branch indicating the unusual circumstances surrounding the transfer.
22. He was contacted by a member of the life team on 27th March 2021 informing him that the last expense claim would not be paid. He averred that the call was traumatizing, inconsiderate and the worst time since he was from burying his late mother not less than thirty minutes before getting the call.
23. On 5th April 2021, the first transfer was rescinded by the Board HR Committee and he was advised through an email from the HR to return to the station as the Marketing Manager.
24. Further, he humbly requested the Acting CEO and HR to consider honouring his late mother's last expense claim payment to the full limit. He eventually received an undocumented token "ex gratia" payment of Kshs. 100,000.00 towards the last expense claim. He was not issued with a policy document for the last expense cover and neither was the ex-gratia payment documented in the form of an offer/discharge voucher.
25. That on 19th April 2021, exactly two weeks after resuming work at his usual station, he was issued with a second transfer letter to Thika Branch and was required to report from 1st May 2021.
26. The Claimant averred that having noticed the sudden turn of events, for the sake of his mental health and being keen to salvage his job, he decided not to fight the transfer and requested the HR through an email on 20th April 2021 to work from home the remaining two weeks of April 2021. He therefore reported to the Thika Branch on 1st May 2021.
27. It was the Claimant's further evidence that the 2021 budget for Thika Branch was unilaterally altered and inflated to unrealistic figures of Kshs. 86.8M against an initial budget of Kshs. 37.4M which represented a 156% increment to be achieved in less than five months. He contended that this increment was not based on any formula.
28. That the aforementioned un-realistic budget targeted a growth of 383% for the branch in comparison to the Kshs.18M achieved between July 2020 to December 2020. According to the Claimant, the Thika Branch average monthly revenue was between Kshs. 3M to Kshs. 4M, while the new unrealistic targets were set at Kshs. 15M per month. He averred that this represented an increase of 400%. It was the Claimant's contention that the budget for all other branches was reduced.
29. The Claimant stated that he informed the management through an email on 3rd August 2021 that the budget was unachievable, after an analysis of the past three years annual production of the branch, introduction of the budget past mid-year and tough economic times as a result of COVID-19 in the country.
30. In response, the management insisted he takes up the arbitrary budget and confirmed there had been a noticeable growth of the branch production in the months of May 2021 and June 2021.
31. On 22nd August 2021, he proposed to the management a realistic budget for Thika Branch which was based on key business areas and a formula having used his knowledge and experience.
32. That between 3rd August 2021 and 8th September 2021, he was continuously put under immense pressure to sign the new KPI's based on the new unrealistic budget. He contended that the budget



- was never discussed with him. This contravened the 2020 Staff Policy Handbook which requires and makes mandatory a consultative process between the staff member, management and relevant teams.
33. That on 9th September 2021, he resigned. He had been put on the spot by the GM-GIB to sign the KPI based on the arbitrary targets before close of business on the same day without the option of discussing the figures and targets as well as the period which had been backdated.
 34. The Claimant averred that he gave the requisite 30 days' notice. Without prior communication, he was unceremoniously kicked out of the regular Monday zoom business development meeting on 13th September 2021 at around 8.30 am without ascribing any legitimate reasons related to his conduct or ability.
 35. That on 15th September 2021 around 3.30 pm, 7 days into his notice of resignation, his office e-mail was disabled. He was thereafter informed by the HR office that his last working day had been reviewed to the very same day and that he was to clear immediately.
 36. On 16th September 2021, he shared his clearance form with the HR for signing by the relevant departments and was informed by the HR through an email on 30th September 2021 that he could not be cleared since he had an unaccounted-for cash amounting to Kshs. 597,000.00.
 37. The Claimant averred that the Respondent machinated a well-calculated series of events aimed at forcing him to resign.
 38. He now wants the Respondent to pay his terminal dues together with the underpayment of house allowance unconditionally.
 39. It was his further evidence that he did not have any disciplinary and or performance complaints raised against him during his employment. That he was at all times in compliance with the policies and regulations of the Respondent.
 40. That were it not for the Respondent's arbitrarily punitive, malicious and unilateral decisions regarding his service and career as well as discrimination, he would not have resigned. That he was pushed to the wall in what he sincerely believes was an open attempt at forcing him to leave employment hence he was unlawfully and unfairly terminated through constructive dismissal.
 41. Mr. Augustine Onyango who testified as CW2, identified himself as a former employee of the Respondent having joined on 7th January 2019 as General Manager- General Business. Similarly, he adopted his witness statement to constitute his evidence in chief.
 42. It was CW2's testimony that he knows the Claimant and was directly involved in his recruitment as the Head of Marketing in 2019. That during the Claimant's tenure, they always travelled together across the branches in the country and he confirms that all receipts for expenditure were always handed back immediately after they came back. For these particular ones, they were handed over to the accounting officer, by the name Mr. Emmanuel Musyimi.
 43. He remembers calling Mr. Musyimi to the office in December 2020 and the Claimant handing over the receipts for the last marketing trip that they went for between August 2020 and September 2020.
 44. As the General Manager, no marketing activities would take place without his approval. That it was the company policy that no funding of any new marketing activities would be done without accounting for the previous expenditure.
 45. That all the payments were always approved by the company's Chief Executive Officer and directly processed by the Finance Manager/ COO.



46. It was his view that to purport that the money he spent with the Claimant was not approved and accounted for, is pure mischief by the Respondent's officers to serve their own selfish interests.
47. That the same issue was raised by the CEO & COO when he (CW2) was exiting. The same claim was withdrawn and his dues were fully paid after proving that the same was fully accounted for.
48. That for the Respondent to demand half of that money from the Claimant after his exit is total malice and double standards. According to him, this confirms the Respondent's intended frustrations against the Claimant because he was a close working associate.
49. CW2 further averred that if it is true that the Claimant never accounted for his expenses, then the company would not have continued to fund their consecutive trips from 2019 to 2021.
50. He is aware that the Respondent prepares audited accounts every accounting period. It baffles him that for those years, audited accounts were prepared and none of the unaccounted-for funds were found to be missing in the audit. He is also perplexed as to why the Respondent would wait for so long to claim such monies if at all the Claimant failed to account for the expenses.

Respondent's Case

51. The Respondent called oral evidence through Ms. Angela Mjomba who testified as RW1. She identified herself as an employee of the Respondent serving in the capacity of Human Resources Administrator. Equally, she adopted her witness statement to constitute her evidence in chief. She proceeded to produce the initial bundle and supplementary bundle of documents filed on behalf of the Respondent as exhibits before court.
52. RW2 stated that Clause 6 (a) of the Claimant's Contract expressly provided that his consolidated salary was inclusive of 15% house allowance. She termed the Claimant's prayer for housing allowance misconstrued and inapplicable in view of the provisions of Section 31 (2) (a) of the *Employment Act*.
53. She further stated that Clause 1.11.4 of the Handbook expressly provided that the Respondent may deduct from the Claimant's salary any unaccounted imprest and /or petty cash.
54. That it is the Respondent's policy to provide a per diem of Kshs.10,000/= per day as accommodation allowance to management-level employees for work related travel out of their respective stations. The Claimant qualified for a per diem at the rate of Kshs.10,000/= per day as he was at management level.
55. As per diems are issued as a matter of policy, the Respondent did not require management level employees to account for this. However, the Respondent requires all employees including those at management level to account for entertainment allowances for entertainment expenses incurred.
56. That on various dates in 2020, the Respondent provided to the Claimant a total of Ksh.905,000/= as per diems and entertainment allowances for trips taken in the course of his employment. Of this amount, Kshs.835,000/= was provided to the Claimant through direct bank transfers to his bank account and Kshs.70,000/= was provided to him in cash on 28th November 2019.
57. Out of the overall amount provided by the Respondent to the Claimant, Kshs.308,000/= was in respect of per diems and the balance of Kshs. 597,000/- was for entertainment allowances and for which he was required to account. The Claimant failed to provide receipts for the expenditure in respect of the entertainment allowances totaling Kshs.597,000/=.
58. RW1 further stated that the issue of the unaccounted-for expenditure arose during the process of auditing the Respondent's books of account when its auditors noted that there were no receipts



- accounting for the expenditure of a total of Kshs.597,000/= being the entertainment allowances provided to the Claimant.
59. By an email dated 3rd September 2020, she requested CW2 and the Claimant to account for the entertainment allowances. CW2 was included in the email as it had been indicated that although the monies were disbursed to the Claimant, he had utilized the expense together with him.
 60. Sometime in early 2021, CW2 left the employment of the Respondent and in his employment clearance form, indicated that the Claimant was the one to account for the entertainment allowances as these were disbursed directly to him. This was communicated to the Claimant by an email dated 17th February 2021. The Claimant acknowledged receipt of this information by email sent on the same date.
 61. By an email dated 17th February 2021, it was clarified to the Claimant that it was necessary for him to take responsibility for the amounts disbursed to him as entertainment allowances. By an email sent on the same date, the Claimant wrote “I confirm” and alleged that receipts were accounted for.
 62. By a further email dated 17th February 2021, the Claimant indicated that “I confirm the entertainment amount was paid to me and am responsible for accounting for it”.
 63. That by an email dated 17th February 2021 she requested the Claimant to liaise with the Respondent's Accounts Department to ensure that the entertainment allowance is accounted for. There was no response from the Claimant.
 64. By an email dated 3rd March 2021, she sent the Claimant a reminder to complete the accounting process. It was further indicated to the Claimant that if he failed to account for the entertainment allowance provided to him, the amount would be recovered from his salary.
 65. By an email dated 3rd March 2021, the Claimant indicated that he had provided the receipts to the Respondent's Accounts Department but had not been reconciled.
 66. There was a further exchange of emails between the Claimant, the Respondent's Accounts Department, and herself on the issue of the unaccounted-for amount and the Accounts Department provided to the Claimant a breakdown of the amount by email dated 8th March 2021.
 67. By an email dated 11th March 2021, the Claimant alleged that he only took responsibility to pave way for CW2's clearance based on his suggestion. The HR Manager contacted CW2 and, by an email dated 15th March 2021 in which the Claimant was copied, CW2 maintained that the monies were disbursed to the Claimant and therefore he is responsible for accounting for it.
 68. By an email dated 15th March 2021 to the HR Manager the Claimant wrote inter alia, “I would like to confirm the marketing expense was paid to me”.
 69. That in light of the foregoing, the claims by the Claimant are misconstrued as he admitted in writing to directly receiving the monies for entertainment allowance from the Respondent. That the Claimant is estopped from alleging that he did not receive the said monies.
 70. RW2 further averred that the Respondent could transfer the Claimant to any other office depending on the exigencies of work. That by a letter dated 8th March 2021, the Respondent transferred the Claimant to its Thika Branch pursuant to the terms of Clause 4 of the Contract.
 71. By a letter dated 9th March 2021, the Claimant appealed against the decision to transfer him to the Respondent's Thika Branch.



72. His appeal was considered by the Respondent's Human Resource Board Committee which decided to uphold the decision to transfer him to Thika Branch. This decision was communicated to the Claimant by a letter dated 19th April 2021.
73. RW2 averred that the Claimant's transfer did not adversely affect his remuneration.
74. That as the transfer to the Thika Branch was implemented at a time when the Respondent had implemented a work-from-home schedule, the Claimant only physically reported to the Thika Branch office on very few occasions. Therefore, the transfer was not prejudicial to the Claimant as alleged or at all.
75. RW2 stated in further evidence that due to the effects of the COVID-19 pandemic on the economy, the Respondent's financial performance during the first half of 2021 was very low. The Respondent's Board therefore resolved to set very high financial targets for the second half of 2021 across the board in order to drive performance. This decision and its rationale were communicated to all staff including all managers during the weekly consultative meetings with the Respondent's General Manager. The newly set financial targets were also communicated to all staff and all managers.
76. That there were email exchanges between the Claimant and his Line Manager on the newly set financial targets for all of the Respondent's staff and managers. In these emails, it was clarified to the Claimant that the Respondent was aware that the newly set financial targets were very ambitious but that this was done in order to try to bridge the gap in performance experienced in the first half of 2021.
77. It was RW2's contention that the Claimant did not receive any negative appraisal based on these newly set financial targets.
78. That the new targets that were comparably higher than previous targets were set for all of the Respondent's staff and managers. That the Respondent did not discriminate against the Claimant as alleged or at all.
79. RW2 further stated that by an internal memorandum from the Respondent's Human Resource Manager to all staff, the Respondent indicated that it would offer the Funeral Insurance Plan to its staff at a discounted premium. The internal memorandum specifically stated that the proposal form would be circulated to all staff to fill in the details of their dependants.
80. That by a proposal form dated and signed by the Claimant on 12th June 2020, he applied for the Funeral Insurance Plan with a monthly premium of Kshs.800/=.
81. That in Section 2 of the proposal form, the Claimant only declared 4 dependants being his wife, his son and 2 brothers. The Claimant did not declare any of his parents in the proposal form. That consequently, the Funeral Insurance Plan taken out by the Claimant did not cover his parents and could not be extended to the unfortunate demise of his mother.
82. It was her testimony that the Respondent has a policy to provide ex-gratia financial assistance to bereaved members of its staff and upon the unfortunate demise of the Claimant's mother, the Respondent provided him with Kshs.100,000/= as ex-gratia financial assistance. This payment was made independently as a part of the Respondent's policy independent of the Funeral Insurance Plan taken out by the Claimant.
83. RW2 further stated that on 10th March 2020, the Claimant submitted a sick-off sheet provided by Meridian Medical Centre following a COVID-19 positive diagnosis. The Respondent informed its medical insurance service provider as required and was instructed to request the Claimant to have a



- conclusive PCR COVID-19 test carried out at one of the hospitals covered by its insurers in order to confirm the diagnosis and facilitate contact tracing at the Respondent's offices.
84. By an email dated 12th March 2021, the Respondent's HR Manager relayed this request to the Claimant who indicated that he would get the test as recommended once his health improved.
 85. That due to the nature of the COVID-19 virus and the threat that exposure presented to the Respondent's staff, it was urgent that it conducts a contact tracing exercise and isolate any staff that may have been exposed to the Claimant and possibly infected. As a result, the Respondent's HR Manager sent a reminder to the Claimant 6 days later to request for an update on the situation.
 86. RW2 further stated that as a member of the Respondent's managerial team, the Claimant was requested to assist in the appraisal of an applicant for a managerial position at its Westlands Branch.
 87. That the Claimant gave a negative appraisal of the applicant without following any of the Respondent's appraisal guidelines or noting down any feedback.
 88. That as the Claimant had mishandled this process, the Respondent was forced to carry out a fresh appraisal using a panel which gave a very positive appraisal contrary to what was provided by the Claimant. This led to the hiring of the then Westlands Branch Manager whose performance was beyond the Respondent's expectations leading to her subsequent promotion. RW2 maintained that the Respondent has sole discretion in hiring its employees.
 89. RW2 further averred that by a letter dated 9th September 2021, the Claimant voluntarily gave notice of his resignation from the Respondent. That by a letter dated 14th September 2021, the Respondent accepted the Claimant's resignation and indicated that his terminal dues would be paid upon him completing the Respondent's clearance process in accordance with its Policy.
 90. The Claimant submitted his clearance form to various departments within the Respondent and was cleared by all the departments save for the Finance Department which made the remarks that he had not accounted for Kshs.597,000/= entertainment allowances.
 91. She further averred that the Claimant's last working day was 15th September 2021. Up to and including his last day at the Respondent, the Claimant failed to produce any receipts accounting for the entertainment allowances totaling Kshs.597,000/= provided to him by the Respondent.
 92. That as the Claimant had failed to account for entertainment allowances totaling Ksh.597,000/=, the Respondent withheld his terminal dues of Ksh.202,769.54 to offset the unaccounted amount.

Submissions

93. Upon close of the hearing, both parties filed written submissions which I have considered. On his part, the Claimant submitted that the conduct and/or behavior of the Respondent pushed him to resign. It was the Claimant's position that the Respondent made his work environment difficult, hostile, and filled with a lot of frustrations which left him no other choice but to resign.
94. According to the Claimant, the Respondent's conduct amounted to breach of fundamental terms in the contract and in the Staff Policy Handbook, which pushed him to resign. He further submitted that the continuous frustrations and ill-treatment by the Respondent all concentrated in one continuous period of time caused him to render his resignation. In support of this position, the Claimant placed reliance on the case of Coca Cola East & Central Africa Limited v Maria Kagai Lugaga (2015) eKLR.
95. In further submission, the Claimant stated that the Respondent was impatient and could not wait till his last day of work as stipulated by law and in the terms of the employment. Instead, the Respondent



- decided to take matters into its own hands and forced him to exit. In the Claimant's view, this shows how much the Respondent wanted to have him out of their offices and was actually in a hurry to make it happen.
96. The Claimant maintained that his resignation was not voluntary but influenced by the hostility of the working environment and as such, his resignation should therefore be blamed on the Respondent's conduct and actions towards him in the 3 months before he resigned.
 97. It was the Claimant's further position that he has clearly demonstrated that he was discriminated against by the Respondent on account of his disability, his mental status, and that of his child.
 98. The Claimant further submitted that he had adduced evidence showing the absurd increase of his budget by 156% requiring a growth of 383% from the previous performance when he reported to the new station. He termed the said budget unreasonable and unrealistically way too impossible to achieve. He posited that interestingly, the budgets for other branches were significantly reduced. In the Claimant's view, this is further proof of discrimination against him. It was his submission that there is no explanation given by the Respondent or its witness as to why he was hit with such a disproportionate parameter of determining the branch budget while the rest of his peers were handled with velvet gloves with soft landings.
 99. The Claimant further submitted that from the foregoing, it is quite evident that he was not accorded the same treatment as the other employees in the other branches. He contended that the sole intention of this was established to have been to frustrate him and push him to resign. It was his view that the Respondent's actions amounted to discrimination.
 100. It was the Claimant's further submission that he never received the statutory element of his pay known as "house allowance" and thus he merits the relief in terms of accrued arrears thereof.
 101. The Respondent on the other hand submitted that housing allowance is expressly provided for under Section 31(1) of the *Employment Act* which requires employers to provide housing for employees. Referencing the case of *Kenya Union of Sugar Plantation & Allied Workers v Butali Sugar Mills Limited* (2021) eKLR, the Respondent posited that this is subject to the proviso in Section 31 (2) (a) of the *Employment Act*.
 102. Still on the same issue, the Respondent submitted that a plain reading of Clause 6(a) of the Claimant's employment contract, expressly provides for consolidation of his gross salary to include housing allowance.
 103. The Respondent further submitted that the Claimant has not by any means or measure met the requirements for constructive dismissal.
 104. It was the Respondent's position that it is irrational and would be antithetical to its business to provide large sums of money to employees (outside of their salaries) for activities relating to travel and marketing without requiring them to account for such funds. That this is further underscored by the fact that the Respondent is a regulated entity subject to certain regulatory financial reporting requirements as set out in Section 23(1), 54, 55 and 56 of the *Insurance Act*.
 105. According to the Respondent, it cannot be said that requiring the Claimant to account for the funds amounted to "frustration". It was the Respondent's position that it did this in compliance with the HR Policy and the *Insurance Act*.
 106. The Respondent stated in further submission that in addition to ordinary business reasons, the decision to transfer the Claimant to its Thika branch was taken due to the difficulties experienced in



getting him to account for funds provided for travel. That there was need to place him in a role that did not require the accounting for travel expenses to prevent the issue from arising any further.

107. The Respondent further posited that the salary, benefits and designation of the Claimant were not affected by the transfer.
108. It was the Respondent's further submission that the Claimant's resignation letter does not set out any alleged frustration. In the same breath, the Respondent submitted that the Claimant has not established any basis for alleged constructive dismissal in view of the tone of his resignation letter. In support of this position, the Respondent placed reliance on the case of Dock Workers Union (K) v Associated Motor Vehicle Assemblers (2022) eKLR and Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR.
109. The Respondent further submitted that the Claimant's allegations of discrimination are unfounded, unsubstantiated, and unsupported by evidence. In support of this argument, the Respondent cited the cases of Boniface Momanyi Nyachae v Kenya Orient Insurance (2018) eKLR and Violet Wanjiru Kanyiri v Kuku Foods Limited (2020) eKLR where it was held that an employee must prove differential treatment between the employee and other employees.

Analysis and Determination

110. In view of the issues raised in the pleadings by both parties, the evidentiary material on record and the rival submissions, I find the issues falling for the Court's determination as being;
 - i. Whether the Claimant was constructively dismissed by the Respondent;
 - ii. Whether there is a case of discrimination;
 - iii. Whether the Claimant has a claim for unpaid house allowance;
 - iv. Is the Claimant entitled to the reliefs sought?

Constructive dismissal?

111. The crux of the Claimant's case is that he was constructively dismissed. According to the Claimant, he was pushed to tender his resignation owing to the Respondent's conduct towards him in the period leading up to his resignation. To this end, the Claimant has cited a number of reasons which he terms as having triggered his resignation from the Respondent's employment. According to the Claimant, these reasons include unilateral alteration of his contractual terms, unilateral imposition of a budget that was not based on policy, knee-jerk transfers to punish him, inflation of his new station's budget while the budgets for all the other branches were reduced and continued blame for cash he had accounted for 3 years earlier.
112. The Respondent has refuted this position and has averred that the Claimant's resignation was voluntary.
113. In light of the rival positions taken by both parties, the key question that begs for an answer is whether the Claimant was constructively dismissed.
114. The Black's Law Dictionary (10th Edition) defines the term constructive dismissal to mean:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working



conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

115. To put it succinctly, constructive dismissal occurs when an employee is left with no choice but to leave his or her job owing to the employer's conduct. Accordingly, in as much as the employee is not in the actual sense dismissed from employment, the working conditions created by the employer are so intolerable or there is a breach of fundamental terms of the employment contract by the employer such that the employee is entitled to regard himself or herself as having been unfairly dismissed.
116. In addressing the question of constructive dismissal, the Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR cited with approval the case of Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, in which Lord Denning MR expressed himself 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).”

117. The learned Judges of Appeal proceeded to formulate the following as the guiding principles in respect of claims of constructive dismissal: -
- 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 repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.



118. Turning to the instant case, the record bears that the Claimant tendered his resignation from the Respondent's employment vide a letter dated 9th September 2021, whose contents I will reproduce hereunder for context purposes: -

“RE: Resignation Letter

Reference (sic) made to the above subject, I hereby issue my resignation with effect from 09/09/2021. This serves as my 30 days' notice as per the contract less the available leave days.

Thank you for the opportunity given to work with the company having served in various roles. The period spent at TMIC has been valuable addition to my career and personal growth, these will be instrumental in future endeavours.

Kind regards

Gabriel G. Kangethe”

119. The Claimant's resignation was accepted by the Respondent's Ag. Chief Executive Officer through a letter dated 14th September 2021. Through the said letter, the Claimant was notified that his last day of service had been reviewed to be 15th September 2021 and that upon satisfactory clearance, he would be entitled to salary up to and including 15th September 2021; leave days earned but not utilized upto 15th September 2021; a certificate of service; retirement benefits as per the RBA Act; and salary equivalent to 15 days in lieu of notice. The Claimant was further advised to hand over any company property or funds that may have been placed under his custody.
120. Revisiting the principles formulated in the case of Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [supra] and bearing in mind the definition of the term constructive dismissal, it is clear that the Claimant was duty bound to demonstrate that there was a fundamental breach of the employment contract in order to sustain a claim for constructive dismissal.
121. Differently expressed, it was incumbent upon the Claimant to prove that the actions of the Respondent resulted in his resignation and that he resigned in response to the breach and did not waive or affirm the breach by the Respondent.
122. Further, it is instructive to note that the Claimant was required to establish a causal link between the Respondent's conduct and the reason for his resignation.
123. In this case, it is notable that the Claimant did not assign any reasons for his resignation. As such, he did not state the reason for his resignation as being anything close to repudiation of a term in his employment contract.
124. Indeed, the issues the Claimant now attributes as being the cause for his resignation did not feature anywhere in his letter of resignation. As such, it is not possible to infer that the real reason for his resignation was the Respondent's conduct and more specifically, the instances he has enumerated in his Claim whereas he did not proffer any reasons at all in his letter of resignation.
125. Therefore, it goes without saying that the Claimant did not prove that there was a causal link between the alleged breaches committed by the Respondent and his resignation. As a matter of fact, he did not draw any nexus between his resignation and the Respondent's conduct.
126. In the circumstances, I cannot help but conclude that the reasons the Claimant is now fronting are afterthoughts.



127. If indeed, the Claimant was pushed to tender his resignation by the very same reasons he now gives, nothing would have been easier than for him to indicate as much in his letter of resignation. Quite the contrary, the Claimant's parting shot was a positive one. He thanked the Respondent for the opportunity to work for the company and termed his period of employment as having been a valuable addition to his career and personal growth which would be instrumental in his future endeavours. What then informed his about turn?
128. All in all, it is this Court's finding that the Claimant has not demonstrated to the requisite standard that his resignation from the Respondent's employment was involuntary and amounted to constructive dismissal.

Discrimination

129. The Claimant has further averred that following his transfer to the Respondent's Thika Branch, the budget was increased by 156% while requiring a growth of 383% from the previous year's performance. According to the Claimant, the budgets for the Respondent's other branches were significantly reduced. It was the Claimant's contention that this was proof of discrimination against him.
130. The Black's Law Dictionary, (10th Edition), defines the term "discrimination" to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
131. Admittedly, by dint of Section 5(7) of the Act, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that Section. Be that as it may, the Claimant was first required to establish a prima facie case for discrimination in order for the burden to shift.
132. In support of his case, the Claimant exhibited targets set for various branches of the Respondent for the period starting July to December 2021. Reviewing the record, it is notable that the targets are split between the Branch Manager and the Deputy Branch Manager whereas the targets for the other branches, like Nyeri, Nakuru, Kisii and Eldoret are in global form and are only assigned to the Branch Managers.
133. It is also notable that in his email dated 4th August 2021 to the Claimant, the Acting Marketing Manager by the name Edwin Esendi informed the Claimant that the branch had the capacity to grow beyond the initial set targets and that it was the only branch with a Branch Manager and a Deputy making it unique in terms of human resource manpower hence the slightly higher increment on targets compared to other branches. The Claimant did not refute this position.
134. As such, I have not discerned the basis for the Claimant's assertion that he was treated in a discriminatory manner despite prevailing similar conditions, when the Respondent reviewed his targets for the Thika Branch and that the said discrimination fell within any of the grounds stipulated under Section 5(3) of the *Employment Act*.
135. In the circumstances, it is my finding that the claim for discrimination has not been substantiated hence it collapses.

House Allowance?

136. The Claimant has further stated that as per his contract of employment, he was not paid house allowance during his employment with the Respondent.



137. A perusal of the Claimant's contract of employment reveals that his salary was consolidated. Section 31(2) of the Act, envisages salary consolidation where then, the employer is not expected to pay a separate amount as house allowance.
138. A reading of clause 6(a) of the Claimant's contract of employment states that his salary was inclusive of 15% house allowance. As such, it is clear that as per the Claimant's contract of employment, the component of house allowance was subsumed in his salary. For this reason, the claim for house allowance is declined.

Reliefs?

139. As the Court has found that the Claimant was not constructively dismissed, the claim with regards compensatory damages collapses.
140. Further, as the Court has found that the Claimant's salary was inclusive of house allowance, the claim for house allowance cannot be sustained.
141. Equally, as there has been no finding of discrimination against the Claimant, the claim for general damages to that effect fails.

Orders

142. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of May 2024.

.....
STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Njiru

For the Respondent Ms. Odiero instructed by Ms. Wataka

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

