



**Ananda v Teachers Service Commission (Employment and Labour Relations  
Petition E004 of 2023) [2024] KEELRC 1996 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1996 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2023**

**JW KELI, J**

**JULY 25, 2024**

**IN THE MATTER OF ARTICLES 2(6), 19, 20, 22, 23,24,  
162(2)(A) AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES  
27,35 AND 41 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**PAMELA AMBIYO ANANDA ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner alleges that she was constructively dismissed from employment and her rights to access to information, fair labour practices and social security violated by the Respondent.
2. Vide Petition dated 7<sup>th</sup> August 2023 which was accompanied by the affidavit in support of the petition of an even date the Petitioner sought: -
  - a. A declaration do and is hereby made that the rights of the Petitioner Pamela Ambiyio Ananda, to access information, fair labour practices and social security under international law, *the Constitution* and provisions of the *Pensions Act* have been violated.
  - b. An order be and is hereby made and directed to the Respondent to forthwith delete from its database and subsequently release the Petitioner’s IPPD payroll details to the Petitioner(spent)
  - c. An order be and is hereby made and directed to the Respondent to supply the Petitioner with information on the calculation of her terminal benefits(spent)



- d. A declaration do and is hereby made that the Petitioner Pamela Ambiyu Ananda was constructively dismissed from employment.
  - e. The Respondent do and is hereby directed to compensate the Petitioner for violation of her rights.
  - f. The Respondent do and is hereby directed to compensate the Petitioner for constructive dismissal.
  - g. The Respondent be compelled to pay the Petitioner's unpaid salary for January until when they release to the Petitioner her IPPD payroll details.(spent)
  - h. Any other relief the Honourable Court may deem fit to grant.
  - i. The costs of this Petition be borne by the Respondent.
3. The Petitioner additionally on 14<sup>th</sup> February 2023 filed the list of witnesses dated 9<sup>th</sup> February 2024, witness statement of George Isanda dated 9<sup>th</sup> February 2024, and the further list of documents dated 19<sup>th</sup> April 2024.
4. The Petitioner had also filed the Notice of motion application dated 7<sup>th</sup> August 2023 brought under the provisions of Order 51 rule 1 and 3 of the Civil Procedure Rules,2010 and Section 3 and 3A of the Civil Procedure Act seeking orders that: -
- SUBPARA a.
- Spent
- SUBPARA b.
- That pending the hearing and determination of the application and suit herein, the Respondent be compelled to release to the Petitioner/applicant her IPPD payroll details.
- SUBPARA c.
- The Costs of this application.
5. The Notice of Motion was supported by the grounds on its face and the supporting affidavit sworn by the Petitioner/Applicant on 7<sup>th</sup> August 2023 that: -
- i. The Petitioner is a former employee of the Respondent employed as a teacher, with her last post at Ezra Gumbe Primary School, until she was forced by the Respondent to opt for Voluntary early retirement.
  - ii. She secured employment with the County Government of Kakamega and was seconded by the Respondent with effect from 6<sup>th</sup> August 2015 to 31<sup>st</sup> December 2017 as per the Release letter of 6<sup>th</sup> August 2015(PAA-1). Her secondment was conditional that she would report 30 days after her contract being terminated by the County, to the Respondent, for her to be redeployed to an institution.
  - iii. She signed a contract of two years and a half with the County Government of Kakamega effective from 6<sup>th</sup> August 2015 to 28<sup>th</sup> February 2018, during which period she was not on a payroll but was paid salary on vouchers (PAA-2).



- iv. Before the expiry of her contract with the county, she on January 2018 reported to the Respondent that her contract would lapse on 28<sup>th</sup> February 2018 and sought to be redeployed as a teacher to an institution, as per the conditions in her release letter.
- v. She states that the Respondent informed her that through a memo sent to all seconded teachers, the said teachers had been recalled and since the Petitioner had not come back, she was informed by a Mr. Mochache, the head of the Human Resource Unit she could either sue or opt to retire early.
- vi. That upon counseling and considering that her contract with the county was coming to an end, she opted to retire early as she needed her retirement benefits and she opted to tender her early retirement letter at the age of 52 years effective 1<sup>st</sup> March 2018(PAA-3), which retirement request was accepted on 6<sup>th</sup> June 2018 (PAA-4).
- vii. That on her retirement, she assumed her personal details would be deleted from the Respondent's payroll /systems which was not done.
- viii. That owing to her predicament, she went to the county and pleaded for a job as a personal assistant, a position that was available after new CECs had been appointed, and her contract was renewed from 1<sup>st</sup> May 2018 (PAA-5) and whose salary was being paid through vouchers until November 2018 when she was issued a PF number.
- ix. That the Respondent on 4<sup>th</sup> November 2019 informed the Petitioner that they had forwarded her pension claim to the Director of Pensions for settlement (PAA-6); only on 15<sup>th</sup> November 2019, the Director of Pensions, to state that they could not process the pension payment as the Respondent had not forwarded some details (PAA-7).
- x. That the Petitioner followed up with the Respondent who gave a brief history that led to the petitioner's retirement (PAA-8) to the Director of pensions.
- xi. The Petitioner made further follow-ups and was informed that she could not be paid her pension as her personal and employment records were yet to be deleted from the respondent's system. She wrote to the Respondent on 17<sup>th</sup> December 2019 seeking that her details be deleted from their database to facilitate her pension payment(PAA-9)and in the Letter of 30<sup>th</sup> December 2019, the Respondent stated that her name had been deleted from their payroll from 1<sup>st</sup> August 2015 upon her secondment, but her name could not be changed from secondment to early retirement as the Petitioner was still in public service and on IPPD payroll and further threatened to cancel her retirement until she exited public service(PAA-10).
- xii. That she was advised by someone at the respondent's office to have her IPPD details from the county transferred to the Respondent to aid in deleting of her name from the Respondent's payroll.
- xiii. That the Respondent through a letter of 31<sup>st</sup> October 2020(PAA-11) asked the county of Kakamega to forward the petitioner's IPPD Payroll details for the purpose of deleting the petitioner's details from TSC's payroll and that they would thereafter return them to the county.
- xiv. The said IPPD details were sent in 2020 and the Respondent failed or neglected to return the said details as confirmed by the county in its letter of 12<sup>th</sup> June 2023(PAA-12), which has occasioned untold pain to the Petitioner since she cannot be paid her salary without her IPPD details.



- xv. That despite several follow-ups with the Respondent, it has failed to return the petitioner's IPPD details even after a demand letter was sent. That the Petitioner received a new contract on 30<sup>th</sup> January 2023 and she was unable to receive her salary since her IPPD details were still retained by the Respondent. That the county cannot generate a new IPPD. That since her salary is not processed by the county, her NHIF and NSSF are not paid and she has been forced to pay for her NHIF for medical admission (PAA-13).
  - xvi. That she cannot apply for loans from Sacco or banks as she cannot get a pay slip.
  - xvii. The Respondent's continued infringement of the Petitioner's right is causing her untold anguish as she works for the county of Kakamega without pay, harm which cannot be compensated by way of damages.
6. The Respondent on 30<sup>th</sup> October 2023 filed a replying affidavit sworn by Mollet Sango on 27<sup>th</sup> October 2023 in response to the application and Petition. The Respondent later filed the Supplementary list of documents dated 22<sup>nd</sup> March 2024 and the bundle of documents therein.

### **Directions**

7. The Court on 20<sup>th</sup> September 2023 directed that the application and petition be canvassed simultaneously through Written submissions.
8. Parties requested to attempt an out-of-court settlement on 5<sup>th</sup> October 2023, which did not materialize. The parties being keen to settle amicably, the Court referred the matter to Court Annexed Mediation on 16<sup>th</sup> November 2023.
9. On 10<sup>th</sup> January 2024, Parties filed a Partial Settlement Agreement which was adopted by the Court on 5<sup>th</sup> February 2024 to the effect that; prayers (a), (d), (e), (f), (h), and (i) of the Petition would proceed to viva voce hearing. The application was thus compromised in the mediation settlement.

### **Hearing**

10. The Petitioner's case was heard on 19<sup>th</sup> March 2024 when she gave sworn evidence and was cross-examined by the Respondent's counsel, Ngere. On 23<sup>rd</sup> April 2024, George Isanda testified as CW2 on oath. He was cross-examined by the respondent's counsel Ngere.
11. The Respondent's case was heard on the same day, 23<sup>rd</sup> April 2024, when Mollet Sango testified on oath as DW and was cross-examined by the Petitioner's counsel, Ambala.

### **The Petitioner's case**

12. During cross-examination, the Petitioner testified that she was paid by the county her salary for January 2023 to December 2023.
13. The Petitioner confirmed having written a letter to the Respondent asking for voluntary retirement on the 1<sup>st</sup> of March 2018, after which she was appointed by the county on 1<sup>st</sup> of May 2018(C-Exh-2 page 30). She confirmed that she did not write a letter to the Respondent asking to be reposted upon the expiry of her contract.
14. The Petitioner testified that she did not have a copy in Court showing her 1<sup>st</sup> March 2018 appointment although she had it. She confirmed that the Respondent released her IPPD details to the County and that the Petitioner was receiving her pension from Treasury. She confirmed to having no claim for pension from the Respondent.



15. The Petitioner testified that her IPPD details were sent to the Respondent by the county in November 2020 and in November 2023, the Respondent sent the details back to the County.
16. The Petitioner testified that her details were only sent after her demand letter dated 3<sup>rd</sup> May 2023 which was received by the Respondent on 6<sup>th</sup> May 2023(C-Exh-15).
17. The Petitioner testified that at the time she tendered her early retirement letter, she did not have an offer for appointment from the county.
18. The Petitioner testified that all other communications with the Respondent were in writing and her request for deployment was done physically, as she could not write a letter as she was devastated. She testified at the hearing to be 58 years old and working at the County Government of Kakamega.
19. CW2 was George Isanda, the payroll master of the County Government of Kakamega. He testified that the Petitioner was on secondment to the County on 1<sup>st</sup> August 2015 and her data was transferred to the county on 1<sup>st</sup> December 2023(pg.5).
20. CW2 testified that the petitioner's data had been sent to the Respondent on the 16<sup>th</sup> September 2020 and additionally re-transferred back on 30<sup>th</sup> November 2023 upon the petitioner's request, which was sent through email but there was no acknowledgement by the Respondent. He confirmed that the Petitioners' arrears were paid.
21. CW2 confirmed that the Petitioner received a certificate of last pay upon her details having been deleted from the respondent's systems.
22. CW2 testified that the Petitioner was released to the County Government of Kakamega. but the transfer of IPPD details could not be done immediately. He confirmed that the Petitioner was first paid through the payroll in November 2018.
23. CW2 testified that as of November 2019 when the Petitioner was paid via voucher, the Respondent had already released the Petitioner's details.
24. CW2 testified that the date of 31<sup>st</sup> November 2019 does not exist but it was an error and the secondment detail on the same document could not be changed(pg.56).

### **Respondent's case**

25. DW testified that she was a personnel officer attached at the pension claims section of the Respondent. She testified that communication between the Respondent and the other entities was written, but between the Respondent and staff, it was possible oral communication was there.
26. DW testified that the Memo to seconded staff was sent in December 2017, recalling them and the same was sent through the TSC County Director's office. DW testified that she could not tell whether the Petitioner received the Memo. She testified that there was no letter asking the Petitioner to return to work, only the release letter existed. She testified that the Petitioner reported after 2 months of the expiry of her contract with the county.
27. DW confirmed that the letter of 2<sup>nd</sup> January 2020 was received and its contents noted, and no action could be taken since the Respondent was not the action person. She testified that in 2015, IPPD details were forwarded via flash disk as there was no digital data, which was introduced later (TRA).
28. DW stated that in November 2023, they transferred the data from the County a second time after receipt of the demand letter. She testified that they received communication from the Director of Pensions vide a payment voucher on the Petitioner's pension having been paid.



29. DW testified the deletion of details of the Petitioner was done in November 2023, and stated that the County Government of Kakamega ought to have prompted the Respondent to delete the details.
30. DW testified that the Petitioner received a certificate of last pay upon her details having been deleted from the Respondent's system and stated that after the release of a Claim to the National Treasury for pension, a teacher's details are archived.
31. DW stated that as of 2<sup>nd</sup> January 2020, the Petitioner was a retired teacher and the Pension Voucher was signed on January 2020. She testified that the Petitioner ought to have reported on February 2018 from the secondment, but only reported on 1<sup>st</sup> March 2018 delivering the letter for voluntary retirement. DW testified that the Petitioner's letter of appointment indicated how she was to communicate with the Respondent upon the end of her secondment but she did not do so.
32. DW testified that the issue of deletion of IPPD Data was brought to their attention by the Director of Pensions in 2020 and that there is no outstanding issue with the Petitioner.

### **Written Submissions**

33. The Court after the close of the defence case, directed parties to file their submissions. The parties complied. The Petitioner's written submissions drawn by Odindo & Ambala Advocates were dated 30<sup>th</sup> May 2024 and filed on an even date. The Respondent's submissions drawn by Sylvia Ngere, Advocate were dated 3<sup>rd</sup> July 2024 and filed on an even date.

### **Determination**

#### **Issues for determination**

34. The Petitioner in her submissions identified the following issues for determination in the petition: -
  - a. Whether the Petitioner was constructively dismissed from employment.
  - b. Whether the Petitioner's constitutional rights were infringed by the Respondent.
  - c. If the answer to(a) and (b) above is in the affirmative, what are the appropriate reliefs.
  - d. Costs.
35. The Respondent in its submissions identified the following issues for determination in the petition: -
  - a. Whether the Petitioner was constructively dismissed from employment;
  - b. Whether the Petitioner is entitled to the prayers sought.
36. The Court having perused pleadings by the parties and their submissions was of the considered opinion that the issues placed before the Court by the parties for determination were as follows: -
  - i. Whether the Petitioner was constructively dismissed from employment.
  - ii. Whether the Petitioner's constitutional rights were infringed by the Respondent.
  - iii. If the answer to(a) and (b) above is in the affirmative, what are the appropriate reliefs under prayers a,d,e,f, h and i of the Petition .

SUBDIVISION - Whether the Petitioner was constructively dismissed from employment.



## The Petitioner's Case

37. The Petitioner was a former employee of the Respondent as a teacher, with her last post at Ezra Gumbe Primary School, until she alleged to have been forced by the Respondent to opt for Voluntary early retirement. She secured employment with the County Government of Kakamega and was seconded by the Respondent with effect from 6<sup>th</sup> August 2015 to 31<sup>st</sup> December 2017 as per the Release letter of 6<sup>th</sup> August 2015(PAA-1). Her secondment was conditional that she would report 30 days after her contract being terminated by the County Government of Kakamega to the Respondent for her to be redeployed to a public institution.
38. The Petitioner was authorized for secondment and signed a contract of two years and a half with the County Government of Kakamega effective from 6<sup>th</sup> August 2015 to 28<sup>th</sup> February 2018, during which period it was said she was not placed on a payroll but was paid salary on vouchers (PAA-2).
39. Before the expiry of her contract with the county, the Petitioner alleged on January 2018 to have reported to the Respondent that her contract would lapse on 28<sup>th</sup> February 2018 and sought to be redeployed as a teacher to an institution, as per the conditions in her release letter. She told the Court that the Respondent informed her that through a memo sent to all seconded teachers, the said teachers had been recalled and since the Petitioner had not come back, she was informed by a Mr. Mochache, the head of the Human Resource Unit she could either sue or opt to retire early.
40. The Petitioner told the Court that she was devastated and upon counseling; and considering that her contract with the county was coming to an end, she opted to retire early as she needed her retirement benefits. That she opted to tender her early retirement letter at the age of 52 years effective 1<sup>st</sup> March 2018(PAA-3), which retirement request was accepted on 6<sup>th</sup> June 2018 (PAA-4).
41. The Petitioner asserts for the foregoing she was forced to take early retirement which she contends was constructive dismissal.
42. The Petitioner in written submissions relied on the definition of the term constructive dismissal in the Black's Law Dictionary. The Court picked the latest edition the 10<sup>th</sup> edition where constructive dismissal is defined as: "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 determinate to an employee, leaves the employee almost no option but to quit."
43. The Petitioner further relied on the landmark authority on constructive dismissal by Court of Appeal in Coca Cola East and Central Africa Limited v Maria Kagai Ligaga(2015)e KLR. The Petitioner also relied on the decision in Premier Construction Limited v Josephat Bwire Lukale & 5 others to emphasise on the principles for constructive dismissal.

## Defence case

44. The facts on the employment of the Petitioner were not in dispute and the defence relied on the same documents. The Respondent contended that as per its uncontested release letter of the Petitioner to the County Government of Kakamega of 6<sup>th</sup> August 2015 ( MS1) and also produced by the Petitioner as PAA-1, the Petitioner was required to report back to the Respondent for posting upon the lapse and / or termination of her contract. The Petitioner admitted her contract with the County Government of Kakamega lapsed on the 28<sup>th</sup> February 2018 due to effluxion of time. That immediately after the lapse of her contract vide letter dated 1<sup>st</sup> March 2018 she sought for voluntary early retirement from teaching service (MS3 was the letter dated 1<sup>st</sup> March 2018 also produced by the Petitioner as PAA-3)



45. The facts in dispute were the allegation by the Petitioner of having visited the Respondent sometimes in January 2018 for posting to a public institution in line with the release letter but was informed she was late in reporting as there was a memo sent out in December 2017 recalling all seconded teachers (the disputed facts being under paragraphs 7 to 13 of the Petitioner's affidavit dated 7<sup>th</sup> August 2023 in support of the petition) .
46. On aforesaid disputed facts, the Respondent through the affidavit of Mollet Sango in paragraph 9 asserted that the allegations of the Petitioner of having approached the Respondent sometimes in January 2018 were false and a misrepresentation to the Court as the employment record of the Petitioner does not reflect that. That in any case she had not tendered before Court evidence to prove her request for posting due to the looming lapse of her contract with the County Government of Kakamega after all she knew communication with the Respondent ought to be in writing. That the Respondent accepted her request for voluntary early retirement and embarked to process her pension (paragraph 13-15 of the affidavit by Sango ). The Petitioner did not reply to this affidavit.

### Decision

47. It was not in dispute that the terms of secondment of the Petitioner were as per the release letter to the County Government of Kakamega by the Respondent dated 6<sup>th</sup> August 2015(PAA-1). Paragraph 4 of the letter stated the terms for return of the Petitioner for posting as follows:- "Should your contract be terminated or not renewed you are advised to report to Teachers Service Commission within thirty (30) days for immediate posting to a public institution. If you fail to report for posting or join other institutions without the Teachers Service Commission approval you will forfeit all pension benefits accrued..."
48. It is the foregoing clause on return under which the Petitioner alleged to have visited the Respondent's office on an undisclosed date in January 2018 and spoke to a Mochache of HR department who was alleged to have informed her all teachers in secondment were recalled in 2017 hence she had missed her opportunity for posting. This was denied by the Respondent for lack of proof.
49. It is trite that he who alleges proves consistent with section 107 of the *Evidence Act* to wit:- "107. Burden of proof. (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person." Further Section 108 of the Act states:- "108. Incidence of burden. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." The Court returns that the burden of proof of constructive dismissal lay with the Petitioner.
50. The Petitioner relied on the letter by Lawrence Omuhaka , Chief Officer Public Service and Administration (PAA2). At paragraph 4 of the letter, the said Lawrence stated:- "After elections the CECM she was serving didn't secure a chance in the current government and this led to her end of contract. Before leaving office she was given permission to get to TSC and prepare for her return. When she came back to the office she reported that, she had been informed teachers on release had been recalled back to TSC. She reported to the then Human Resources Manager in the county that she never received any communication from TSC on the same and there was no memo in her file. Therefore she was advised by the TSC Human Resources Management to opt for voluntary retirement."
51. The Court finds the said allegations of reporting to employer sometimes in January 2018 were not consistent with the release letter by the Respondent which required the Petitioner to return within 30 days of termination of contract with the county which date of termination of contract as per the letter



of release and evidence before the Court was 28<sup>th</sup> February 2018. The Petitioner stated that she was traumatized by an alleged exchange with a Mochache then went back and after counselling resigned.

52. The evidence before the Court was that the Petitioner worked up to end of her contract on 28<sup>th</sup> February 2018 (MS10a) letter by County Government of Kakamega to the Respondent confirming the contract ended on the 28<sup>th</sup> February 2018). There was no evidence before the Court that the Petitioner wrote to the employer to complain or follow up on the alleged exchange with the said Mochache. The Court noted the Petitioner's request for release dated 3<sup>rd</sup> August 2015 was in writing through the TSC County Director Kisumu (MS1). The Petitioner never produced similar follow-up letter to the employer to back her claims on posting. The question in the mind of the Court was how Lawrence knew that the Petitioner's file had no such a memo? Did the Petitioner request the Respondent's county office for the Memo? The Petitioner never led any evidence on this allegation. The Court finds the allegations by Lawrence in paragraph 4 of his letter (supra) to be hearsay and inadmissible as evidence for lack of corroboration. The said County Human resource manager could have been called as a witness to corroborate the allegation but even his or her name was not disclosed.

53. On 1<sup>st</sup> March 2018, the Petitioner wrote a very brief and precise letter to the employer, the Respondent, titled voluntary retirement (PAA3). It stated: "Re- voluntary retirement

The above subject matter refers.

I wish to apply for voluntary retirement from the commission with effect from 1<sup>st</sup> March 2018, after being released to the County Government of Kakamega in 2015.

I am now 52 years old as per my official date of birth 28<sup>th</sup> August 1965. Attached find notice of end of contract from the county government of Kakamega and my gratuity statement. Kindly give my request an urgent positive consideration. Thank you." (PAA-3)

54. The Petitioner alleged she was forced to retire early following the alleged exchange with one Mochache and visit to the County office of the Respondent. The Court scrutinised voluntary retirement letter (PAA-3 above) with laser-sharp lenses on the word, language, and tone. The Court finds that the only reason in the letter given for the request for early retirement was "after being released to the County Government of Kakamega in 2015." The allegation that she was advised to retire early as per Lawrence's letter was not disclosed in the letter. The Court finds that even the tone of the letter did not disclose any hint of a devastated employee.

55. Both parties relied on the authority on constructive dismissal in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) e KLR. The said authority set out principles of constructive dismissal as follows:-

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 overstretching 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.”

56. The Court of Appeal in the above authority, Coca Cola East & Central Africa Limited v Maria Kagai Lugaga (2015)e KLR delineated the legal principles relevant to determine constructive dismissal to 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.

SUBPARA f.

An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.

- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.;”(paragraph 30)



57. Applying the above principles set out in the authority in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015)e KLR which was relied on by both parties, the Court holds that clause 4 of the release letter((PAA-1) was a term of contract between the parties. The clause read in part:- “Should your contract be terminated or not renewed you are advised to report to Teachers Service Commission within thirty (30) days for immediate posting to a public institution.” The Court returns that the Petitioner was free to return for posting in the event of termination of contract or non-renewal with the County Government of Kakamega within 30 days for immediate posting.
58. It was an undisputed fact the Petitioner’s contract ended on 28<sup>th</sup> February 2018 hence not terminated earlier. Under clause 4 of the release letter, the Petitioner ought to have reported to the Respondent within 30 days after 28<sup>th</sup> February 2018 for posting. The Petitioner alleged to have visited the Respondent for posting sometimes in January 2018 yet her contract was still running and that was not a requirement of the employer.
59. On the next legal principle for determination of constructive dismissal under the authority being, “is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? 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. An objective test is to be applied in evaluating the employer’s conduct. 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.” The Court returns that the Respondent had no opportunity to comply with clause 4 of the release letter as the Petitioner did not comply by reporting for posting within 30 days after expiry of contract date of 28<sup>th</sup> February 2018. On the alleged time of reporting in January 2018, the Court returns that the Petitioner was not free for posting. Applying an objective test on conduct of the employer, the Court holds the claims before the expiry of the Petitioner’s contract with the County Government of Kakamega were not founded on the contract terms of release but on speculations and conjectures.
60. The Court further holds that the letter dated 1<sup>st</sup> March 2018 by Petitioner was precise to the reasons for the early retirement (PAA3). It stated: ‘ Re- voluntary retirement  
The above subject matter refers.  
I wish to apply for voluntary retirement from the commission with effect from 1<sup>st</sup> March 2018, after being released to the County Government of Kakamega in 2015.  
I am now 52 years old as per my official date of birth 28<sup>th</sup> August 1965. Attached find notice of end of the contract from the county government of Kakamega and my gratuity statement.” The Petitioner gave reason for the voluntary retirement as having been released to the county government. Her contract ended 28<sup>th</sup> February 2018((MS-10a). On the face of the letter written on last day of the contract with the County, there was nothing to suggest any breach of contract by the Respondent. The time for posting after the County contract had not started running. The claim of breach was premature. The Court under the authority cited is to apply an objective test which means on the reliance of evidence placed before it. Applying the objective test the Court returns that this was a voluntary retirement by the petitioner. The Court holds that the Petitioner failed to discharge the burden of proof of the alleged constructive dismissal on a balance of probabilities.

**Whether the Petitioner’s constitutional rights were infringed by the Respondent.**

61. The grounds for the petition were stated in paragraphs 48 to 51 of the Petition as follows:-



- a. The Respondent's decision to send a memo to other teachers who were seconded to other government institutions requiring them to return to the employ to the Respondent for redeployment while failing to accord the Petitioner the same treatment was unfair, discriminatory and in complete contravention of Article 27 of *the Constitution*.
  - b. The Respondent's action of constructively dismissing the Claimant's employ was contrary to Article 41 of *the Constitution* of Kenya.
  - c. The Respondent's failure to give the Petitioner any information on the calculation of her terminal benefits is in complete contravention of the Petitioner's rights under Article 35 of *the Constitution*.
  - d. The Respondent's failure to delete the Petitioner's IPPD payroll details from the Respondent's database and subsequently sending the same to the County Government of Kakamega to enable processing and payment of her salary yet the Petitioner is no longer in the employ of the Respondent is an affront to her rights to fair labour practices and social security in complete contravention of Article 35 and 41 of *the Constitution*.
  - e. The actions of the Respondent of failing to delete and subsequent release of the Petitioner's IPPD payroll details has effectively condemned the Petitioner to a life of servitude since she is working for the County Government of Kakamega but cannot be paid since her salary cannot be processed without her IPPD payroll details which the Respondent is illegally, unlawfully, and unjustifiably withholding.
62. The Petitioner submits that her petition was in compliance with the authority in *Anarita Karimi Njeru v Republic (1979) KLR 154*. In the case it was stated:-
- “We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”
63. The Petitioner alleged that her fundamental rights under Articles 27, 28, 35, 41 and 43 of *the Constitution* were infringed by the Respondent hence the petition. The petitioner's case in summary in support of the petition was that the Respondent as her former employer withheld her employment / IPPD payroll information which she requested several times to enable her current employer onboard her on the payroll database, since she was removed from the manual payroll after it was abolished as of December 2022.
  64. During cross-examination, the Petitioner confirmed having been paid pension under the Respondent's service post the voluntary retirement and subsequent contract gratuity from the county. That she was earning pension from treasury. The Petitioner confirmed that it took the effort of the Respondent and the County Government of Kakamega where she was working to have the IPPD details released.
  65. The Petitioner in re-examination stated that her IPPD details were sent to the Respondent in November 2020. They were sent again in November 2023 after a demand letter by her advocates following which the respondent released her details to the county. The petitioner informed the Court that she was informed of the Respondent 's procedures with Teachers being in writing. On why she never wrote to the Respondent, she stated that she was devastated. In the examination in chief, the Petitioner told the Court she was seeking compensation for missing her salary from January 2023 to



- November 2023 as the Respondent failed to submit her IPPD details and she could not get medical cover and further it caused her to be listed by CRB and was unable to pay loans.
66. The Petitioner called CW2, George Isanda, who stated that they transferred data to the Respondent on 16<sup>th</sup> September 2020. That they re-transferred it again on 30<sup>th</sup> November 2023 on request by the petitioner and her lawyer. CW2 told Court as per their record, the Petitioner was seconded to the county in 2015 and her IPPD details released in November 2018. The witness had no information as to when they received the petitioner's IPPD details. CW2 confirmed that the petitioner was their employee in October 2020 and was paid manually. CW2 told the Court that they had been paying the Petitioner manually upto end 2022 when it was stopped completely.
  67. DW told the Court on secondment of the Petitioner her IPPD details were given vide flash disk to the county. They sent the data a second time in 2023 on receipt of request by the county. That on receipt of payment voucher by Treasury with respect to the Petitioner's pension they knew her case was closed. The deletion of the petitioner's details from the Respondent was done on the filing of the Petition and receipt of the Petitioner's IPPD data from the county. DW told the Court that the county ought to have prompted it earlier. In 2020 the Petitioner having exited service her records were archived.
  68. The Court having analyzed the facts as above finds it was apparent that the petition was ignited by the closure of the County manual payroll in 2022 hence the Petitioner could not get her salary from January 2023 as she was not on payroll. She exited the Respondent's service in March 2018 following her voluntary retirement. The Petitioner vide letter dated 17<sup>th</sup> December 2019 wrote to the Respondent's Human Resources pension department. In the letter, the petitioner contended that after voluntary retirement she expected her name to be deleted from the system to set in motion pension payment as was the practice but this had not been done. In response to the said letter, the Respondent's HR department responded vide letter dated 30<sup>th</sup> December 2019 stating that her name had been deleted from its payroll effective 1<sup>st</sup> August 2015 on release to county. The letter explained the Respondent was unable to change the reason for deletion from secondment (release) to voluntary retirement because it was apparent she had been and was still in public service and on IPPD payroll. CW2 told the Court that they got the petitioner's IPPD details in November 2018.
  69. The Court finds that the Respondent was no longer the Petitioner's employer after 1<sup>st</sup> March 2018. There was no evidence of immediate communication of the employment for the petitioner with the County after 1<sup>st</sup> March 2018 which was still using the same system to process her wages affecting her pension payment. This was a case of the Petitioner not being transparent with the Respondent in her affairs of employment with the County Government of Kakamega. The Court returns that the county ought to have moved as early as April 2018 when they issued the Petitioner with employment letter to have the Respondent change her records to reflect her new status. The Court was at pains to understand why the Petitioner was paid manually by a public entity for years while her details were in the IPPD system. The Court finds that it was the County Government of Kakamega who had the responsibility to pay wages to the Petitioner effective 1<sup>st</sup> March 2018 when she terminated her services with the Respondent. It was thus their responsibility to pursue the IPPD details which the Court did not find credible effort by the County to do so.
  70. The Respondent vide letter of 21<sup>st</sup> August 2020 wrote a letter to the County requesting for the Petitioner's IPPD details after the County explained she had since secured employed post the retirement with them (letter dated 2<sup>nd</sup> January 2020). In letter dated 31<sup>st</sup> August 2020, the Respondent was to process the petitioner's pension and sent back the TRN file to county for continuity of payments. Vide letter dated 12<sup>th</sup> June 2023 the County informed the Petitioner that they forwarded



details since November 2019 for change of terms from secondment to transfer and the Respondent had not reverted back.

71. The Court finds that the County was the new employer and ought to have made effort to pursue the change of IPPD details but because it was operating a manual salary payment all was well including for the petitioner who most likely benefited from the manual system until the relevant authorities banned the practice. That explains why the County never bothered to follow up on the IPPD details of the Petitioner with the Respondent who the Court believed had archived her details following the voluntary retirement.
72. The Court did not find any constitutional dimension from the facts before it. It was simply a case of a non-transparent employee to the employer(TSC) wanting to have her cake and eat it. She was thoroughly aided by the County government officials as seen from the letter by Lawrence Omuhaka which the Court found was speculative and based on conjecture. The county paid her wages for years manually until the practice was banned. It was only after the Petitioner could no longer get paid manually that she brought the Petition. The court returns that this petition was an afterthought on finding she could no longer earn her salary . From 2020 when she got her pension she was silent till year 2023. The Court holds that the Respondent no longer had employer-employee relationship after pension payment. Any inconveniences the Petitioner suffered can only be blamed on herself and the new employer for indolence in pursuit of the IPPD details.

### **Question Of Constitutional Avoidance**

73. The question then in the mind of the Court was whether even if the Respondent may have failed to act timely in change of the IPPD details of the Petitioner whether that constituted a constitutional breach. The Court returns that those are complaints that could have been addressed under a normal claim according to the provisions of section 86 of the *Employment Act* (2024) to wit:- ‘Complaint and jurisdiction in cases of dispute between employers and employees (1) Subject to the provisions of this Act whenever— (a) an employer or employee neglects or refuses to fulfill a contract of service; or (b) any question, difference or dispute arises as to the rights or liabilities of either party; or (c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment and Labour Relations Court.’
74. The Court holds that the instant petition did not meet the threshold of a constitutional petition as the issues raised concerned administrative duties of change of details in the IPPD system on change of employer. I found no constitutional dimension in the matter. Communication Commission of Kenya & Others v Royal Media Services & 5 Others [2014] eKLR the Supreme Court held it was a case of constitutional avoidance to invoke *the Constitution* and for the Court determine a constitutional issue, when a matter may properly be decided on another basis.

If the answer to(a) and (b) above is in the affirmative, what are the appropriate reliefs under prayers a,d,e,f, h and i of the Petition .

75. The Court returned issue (a) and (b) above as negative. Consequently, the Petitioner is not entitled to reliefs sought in (a), (d), (e), (f), (h), and (i) of the Petition.

### **Conclusion And Disposition**

76. In the upshot, for the above reasons, the Court holds that the Petitioner was not constructively dismissed by the Respondent and that the grounds of the Petition lacked constitutional dimension or merit against the Respondent.



77. On costs of the petition, the parties settled some of the issues out-of Court in good faith. Consequently, the Court dismisses the petition and the application thereunder with no order as to costs.

78. It is so Ordered.

**DATED, DELIVERED, AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**J.W. KELI,**

**JUDGE.**

IN THE PRESENCE OF

Court Assistant: - Macheso

For Petitioner: - Ambala

For Respondent: - Mulako h/b Ngere

