



**Kiarago v Mathews t/a Matbronze Wildlife Art (Cause E206 of 2023)  
[2024] KEELRC 1786 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1786 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E206 OF 2023**

**JK GAKERI, J**

**JULY 10, 2024**

**BETWEEN**

**FRIDAH MUKWAMUGU KIARAGO ..... CLAIMANT**

**AND**

**DENIS MATHEWS T/A MATBRONZE WILDLIFE ART ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced the instant suit by a Statement of Claim filed on 15<sup>th</sup> March, 2023 alleging constructive dismissal by the Respondent.
2. It is the Claimant's case that she was employed by the Respondent on 1<sup>st</sup> September, 2012 until 15<sup>th</sup> December, 2022 at a consolidated salary of Kshs.109,565/= comprising basic salary, Kshs.16,435/= as house allowance and a commuter allowance of Kshs.2,000/= per month and served diligently.
3. The Claimant alleges that on 3<sup>rd</sup> November, 2022, she received a notice to show cause on allegations of misconduct and was directed her to proceed on suspension effective 4<sup>th</sup> November, 2022 to 17<sup>th</sup> November, 2022 and a response was required by 18<sup>th</sup> November, 2022 which the Claimant did vide letter dated 10<sup>th</sup> November, 2022 denying any wrong doing.
4. That on 18<sup>th</sup> November, 2022, the Claimant was issued with another suspension letter and was to await the Respondent's return by the Guard house.
5. The Claimant alleges that the Respondent came back with three unknown persons who claimed to be plain clothes policemen who attempted to arrest her in full view of the Respondent's employees, customers and clients and the individuals retreated owing to embarrassment and uniformed police from the Hardy Police Station were called, arrived and arrested the Claimant on the basis that a criminal complaint had been made by the Respondent and recorded a statement at the Station and was released on cash bail of Kshs.120,000/= but after investigation, no charges were preferred.



6. It is the Claimant's case that the Respondent subjected her to a sham disciplinary process on 28<sup>th</sup> November, 2022, was instructed to report to the workplace on 29<sup>th</sup> November, 2022 with all company property in her custody but was unwell and the Respondent was notified but withheld her salary for November 2022 insisting that it had to be collected in person as opposed to a bank transfer and collection by a 3<sup>rd</sup> Party was declined.
7. The Claimant avers that in the circumstances, she resigned on 5<sup>th</sup> December, 2022 and the same was accepted vide letter dated 13<sup>th</sup> December, 2022.
8. The Claimant alleges that she was humiliated and embarrassed.
9. The Claimant prays for;
  - i. 12 months' salary compensation Kshs.1,536,000/=.
  - ii. One month's salary in lieu of notice Kshs.128,000/=.
  - iii. General damages for violation of constitutional rights.
  - iv. Punitive and aggravated damages for humiliation and embarrassing treatment.
  - v. Any other relief the court may deem fit in the circumstances.
  - vi. Costs of the suit.
  - vii. Interest on (i) and (ii) above at court rates.
  - viii. Such orders and directions as the court may deem fit to meet the ends of justice.

### **Respondent's case**

10. In its response and counter-claim, the Respondent avers that the Claimant was its employee from 1<sup>st</sup> September, 2012 as a Front Office Administrator and her salary had risen from Kshs.22,300/= to 128,000/= per month and her duties included coordination, transportation and delivery of the Respondent's bronze products to international clients and in particular the United States of America.
11. The Respondent avers that on request by a customer, the Claimant would request delivery quotations, arrange for the handover of the product to the shipping company, verify that it had been shipped and confirm receipt by the customer before initiating payment to the shipping company.
12. It is the Respondent's case that sometime in July 2022, the Respondent discovered that about 12 artifacts were delayed in shipment and delivery to customers and some were missing which occasioned complaints by customers.
13. That investigations revealed that the Claimant and the Shipping company had a close working relationship and the company often shipped the products in small quantities or piece-meal and inflated shipping costs for personal gain.
14. That the Respondent's request for an explanation on the delay in shipment was ignored and the Respondent prepared an inventory of delayed and missing artifacts.
15. That four of the missing artifacts were not recorded and replacements had to be made for customers.
16. That as a consequence, a notice to show cause was issued and the Claimant suspended.
17. That the matter was reported at the Karen Police Station and recorded under OB. 25/18/11/2022.



18. That on 18<sup>th</sup> November, 2022, the Claimant was invited for a hearing slated for 28<sup>th</sup> November, 2022.
19. That attempts to arrest the Claimant by officers from the Karen Police Station failed as the Claimant caused a commotion but was subsequently arrested and the police acted on their own accord.
20. The Respondent avers that the Claimant was afforded an opportunity to be heard, attended alone and was notified of the outcome but declined to collect the letter and tendered her resignation on 5<sup>th</sup> December, 2022 and was paid her salary for November and December 2022.
21. It is the Respondent's case that the Claimant was negligent in performing her duties and losses ensued as missing products had to be prepared and shipped a second time and was thus claiming artifacts sent to Nelson Bowers, William Stewart, James Gomez and Bert Offerson, valued at Kshs.3,888,202.81 with interest at commercial rates.

### **Claimant's evidence**

22. On cross-examination, the Claimant testified that it was her duty to contract the shipping company and source for quotations and follow-up on delivery status and update clients, confirm arrival and initiate payment for shipping at the end of the month and the shipping invoice was only payable if the shipping documents were attached and presented to RWI for payment.
23. The witness acknowledged that there were delayed deliveries and notified the Respondent and she received complaints from clients whose products had not been delivered and shared it via email.
24. The witness admitted that she deleted quotations she did not need but did not delete a complaint from a client.
25. The Claimant admitted having attended a hearing on 28<sup>th</sup> November, 2022 before the resignation and issues of delay and complaints by clients were discussed.
26. That she was informed of her right to be accompanied by a colleague but attended alone.
27. That the Respondent had hired a private investigator and he contacted her on WhatsApp but she refused to assist or answer questions although he told her that he had been hired by the Respondent.
28. The witness admitted that she was arrested by the police and taken to the Karen Police Station for questioning and released on cash bail and the Respondent had no role at the police station.
29. The Claimant testified that although she was arrested at the Respondent's premises, the Respondent did not prevent the police from roughing her.
30. That the policemen who came earlier had no uniform but those who came later were in uniform and at the time the Claimant was on suspension.
31. The Claimant admitted that although she was to report back on 29<sup>th</sup> November, 2022, she did not as she was unwell and availed a sick-off note dated 7<sup>th</sup> December, 2022 and an appointment card which had no signature or any writing.
32. The witness admitted that she was not at work from 28<sup>th</sup> November, 2022 to 5<sup>th</sup> May, 2022 and resigned vide email as she feared being arrested.
33. The Claimant admitted that 4 items were lost but she presented invoices for the items and the Respondent asked for supporting documents. The witness denied having misinformed the Respondent.



34. It was the Claimant's testimony that she outlined the reasons for resignation in the email.
35. That she was frustrated and the disciplinary process had ended and was paid upto December 31<sup>st</sup> 2022 as well as for untaken leave days.
36. On re-examination, the Claimant testified that shipping involved teamwork of carpenters and the Respondent who was aware of incoming and outgoing emails and she deleted emails she did not need.
37. That the shipper notified the Respondent of the delay and all and sundry were aware.
38. That the investigator was not introduced to her and was thus a stranger.
39. The Claimant admitted that she is the one who labelled the items and the shipper collected them for shipping and all had been cleared by the Kenya Revenue Authority.
40. That the Respondent took her through emotional distress by calling the police who arrested her.

### **Respondent's evidence**

41. Mr. Denis Mathews confirmed that the Respondent was his business.
42. It was his evidence that the Claimant was responsible for transportation and delivery of items to clients through shipping agents whom she engaged singly and dealt with the shipper and clients to ascertain delivery of items and all emails came to her though copied to other persons and her email was enquiries@matbronze.com and no other person had access to it.
43. According to the witness, the Claimant inflated costs which were determined by the shipper and was claiming reimbursement from the Claimant but not claiming shipping costs from the shipper.
44. The witness admitted that typically all goods were insured but in this case they were not yet the invoice dated 20<sup>th</sup> July, 2022 included insurance charges and the proper party to follow in such a case was the shipper.
45. That although he commissioned investigations, she did not share the report with the Claimant before the hearing.
46. That he did not file a police report on the loss at the Jomo Kenyatta International Airport (JKIA) Police.
47. RWI testified that when he reported the matter to the police at Karen, the police informed him they wanted to speak to the Claimant and came in his car as the Claimant waited at the guard house as instructed by the Respondent, having been invited for a meeting.
48. On re-examination, RWI testified that he was unaware of the missing items.
49. That it was the Claimant's duty to source for quotations from shippers, organize shipping and forward the waybill to the client and shipping costs were only payable after delivery and it was the Claimant's duty to confirm the same before the cheque was signed.
50. That shipping costs were increased by the Claimant and was only addressed during the hearing.
51. That the investigator had liberty to find out where the lost pieces were.
52. That the Claimant refused to sign the minutes of the disciplinary hearing and resigned before the process was concluded and did not collect the letter.



### **Claimant's submissions**

53. On constructive dismissal, reliance was made on the sentiments of the court in Nickson Musonye V Minolta Ltd (2023) eKLR and Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga (2015) eKLR to urge that the Claimant's arrest on fabricated allegations created intolerable circumstances leading to the Claimant's resignation.
54. That the Claimant was neither charged nor convicted having been arrested at her place of work and was thus entitled to consider herself as discharged.
55. Counsel urges that the Respondent's conduct amounted to a repudiatory breach of the contract.
56. On termination, counsel cited the provisions of Section 45 and 41 as well as the sentiments of the court in Anthony Yamo Ihito V Basco Products (Kenya) Ltd (2022) eKLR to urge that the termination of the Claimant's employment was unfair substantively and procedurally.
57. As regards humiliation and embarrassment treatment, counsel submitted that the arrest of the Claimant by three male police officers was humiliating and intimidating to the Claimant.
58. That the relationship between the Claimant and the Respondent was acrimonious and the Claimant was unable to return to work in an atmosphere of hostility, embarrassment and humiliation.
59. On the reliefs sought, counsel urged that the Claimant was entitled to all the reliefs prayed for and cited the decision in Benjamin Langwen V National Environment Management Authority (2016) eKLR to urge the court to award 12 months compensation and costs.
60. On the counter-claim, counsel urges that the Respondent had not adduced cogent and relevant evidence and it ought to be dismissed.

### **Respondent's submissions**

61. As regards constructive dismissal, counsel cited the provisions of Section 47(5) of the [Employment Act, 2007](#) to urge that the Claimant resigned from employment and cited the principles outlined by the Court of Appeal in Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (Supra) to submit that the Claimant's arrest was by the police who were not under the control of the Respondent and who released her on cash bail and cited the sentiments of the court in Douglas Odhiambo Apel & another V Telkom Kenya Ltd & 2 others (2006) eKLR on the role of the police and the prosecutor.
62. Counsel submitted that the Claimant was entitled to report what he believed was a criminal act and it was for the police to investigate and take such other steps as were necessary.
63. That resigning due to fear of arrest lacked merit and the report to the police did not amount to a fundamental term of the contract of employment and the Claimant consented to the disciplinary process even after the arrest on 18<sup>th</sup> November, 2022 and she declined to collect the decision of the disciplinary panel citing indisposition yet her intention was to evade the disciplinary proceedings and the requirements of constructive dismissal had not been proved as the resignation was voluntary.
64. On entitlement to the reliefs sought, counsel urges that since the Claimant had not established the elements of constructive dismissal, she was not entitled to compensation and the claim for general and aggravated damages had neither legal nor factual foundation.
65. As regards the counter-claim, counsel urges that the claim comprised special damages and the figures had supportive evidence as held in Roy Hauliers Ltd V Njora (2023) KEELRC 2H2 (KLR) on the requirement to plead and prove special damages, to urge that loss of the artifacts was traceable to the



Claimant's negligence as the items were lost during transit and the Respondent had to remake the four items.

66. Counsel urges the court to allow the counter-claim and dismiss the Claimant's case with costs.

### **Analysis and determination**

67. It is common ground that the Claimant was an employee of the Respondent effective 1<sup>st</sup> September, 2012 to 5<sup>th</sup> September, 2022 by which time her gross salary had risen to Kshs.128,000/= per month.
68. It is equally not in contest that the Claimant was incharge of labelling items, sourcing for quotations from shipping agents, shipping of the items and delivery to the clients, after which she would ensure that Mr. Denis Mathews paid the shipping agent.
69. Similarly, it was her duty to send the Airway Bill to the client.
70. It is equally not in dispute that the Claimant served the Respondent diligently until sometime in the second half of 2022 when issues of delayed shipments and lost items cropped up and all parties appear to have been aware of the challenges.
71. It is common ground that the Respondent engaged an investigator to unearth the loss but the Claimant refused to co-operate with him notwithstanding the fact that she was aware that he was the investigator and had contacted her on WhatsApp. She refused to answer questions or meet the investigator.
72. It is evident that the Respondent issued the Claimant with a notice to show cause on 4<sup>th</sup> November 2022, dated 3<sup>rd</sup> November, 2022 and the Claimant refused to acknowledge receipt but responded referring to the allegations against her as witch-hunt.
73. It is also not in dispute that the Respondent suspended the Claimant from 4<sup>th</sup> November, 2022 to 17<sup>th</sup> November, 2022 and was scheduled to report to the line manager on 18<sup>th</sup> November, 2022 for further directions. The Claimant refused to sign the letter.
74. Also not in contest is the fact that the Claimant's suspension was extended from 18<sup>th</sup> November, 2022 to 28<sup>th</sup> November, 2022, the day the disciplinary hearing was scheduled to take place and the Claimant was informed of her right to avail evidence in support of her case and to be accompanied by a witness and hearing took place and the Claimant attended and resigned by letter dated 1<sup>st</sup> December, 2022 sent on 5<sup>th</sup> December, 2022.
75. Strangely, the Claimant was supposed to report to the office on 1<sup>st</sup> December, 2022, but did not feigning indisposition. Documents on record show that the Claimant visited a clinic on 7<sup>th</sup> December, 2022 and sick-off extended to 8<sup>th</sup> and 9<sup>th</sup> December, 2022.
76. Although the Claimant's claim lacks specificity as to the basis of the action, in paragraph 43.1, the Claimant prays for 12 months compensation for unlawful termination by way of constructive dismissal.
77. The body of the claim make no reference to the particulars of constructive dismissal. However, in his witness statement, the Claimant states that she resigned on account of frustration by the Respondent.
78. The issue for determination are;
- i. Whether the Claimant was constructively dismissed.
  - ii. Whether the Claimant is entitled to the reliefs sought.



79. Concerning the 1<sup>st</sup> issue, counsels for the parties have adopted contrasting position. While the Claimant’s counsel urges that Claimant was constructively dismissed on account that the arbitrary arrest because she declined to sign the suspension letter and the fabricated allegations created intolerable circumstances which culminated in the Claimant’s resignation, counsel for the Respondent submits that the Claimant had not discharged the burden of proof in that;
- i. The Claimant was arrested on 18<sup>th</sup> November, 2022 but resigned later.
  - ii. The Claimant had not shown that the police acted while under the control of the Respondent.
  - iii. The police acted in accordance with the law that governs them as evidenced by the cash bail receipt on record.
  - iv. Finally, the Claimant has not alleged that her arrest was unlawful and the allegation that the Claimant resigned for fear of another arrest was unmerited.
80. The concept of constructive dismissal was exquisitely captured by the sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp (1978) Q.B 761* as follows;
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.
81. Closer home, the concept of constructive dismissal was domesticated and applied by the Court of Appeal in *Coca Cola East and Central Africa V Maria Kagai Ligaga (Supra)* cited by both parties as follows;
- “What is key element and 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 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 *Penderson V Camden London Borough Council (1981) ICR 674*). The criterion for evaluating the employer’s conduct is objective; the employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory . . .



The employee must leave because of the breach but the breach need not be the sole cause as long as it is the effective cause. (See *Walker V Josiah Wedgwood & Sons Ltd (1978) IRLR*). 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 . . .”

82. The Court of Appeal proceeded to articulate the principles relevant in determining constructive dismissal including what the fundamental or essential terms of the contract of employment are, whether a repudiatory breach of a fundamental term(s) has taken place, conduct of the employer must be fundamental or significant breach going to the root of the contract of employment, objectivity in evaluating the employer’s conduct, causal link between the employer’s conduct and the reason for the separation with or without notice, employee must prove repudiatory breach or constructive dismissal and finally, the employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach.
83. The jurisprudence on constructive dismissal is consistent that the employee leaves because the employer has created working conditions that leave the employee with no choice but to resign.
84. Significantly, the employer’s conduct must constitute a repudiatory breach of the contract of employment.
85. The employee must evidentiary demonstrate that the employer committed a fundamental breach of contract of employment.
86. In the instant case, it is common ground that the Respondent issued the Claimant with a notice to show cause and notice of suspension on 4<sup>th</sup> November, 2022 at 9.59 pm and the Claimant declined to acknowledge receipt of either letter.
87. Needless to emphasize, the notice to show cause sought specific information on specific quotations on shipment, client’s complaints on late deliveries of goods to at least six (6) clients. Presentation of bill to RWI for payment (Ace Cargeo) without disclosing the failed deliveries, Waybill number to three (3) clients addressed to one Joseph Mogaka in Minnesota and a Waybill to one Al Lyons which showed that his bronze had been delivered to the Hub in Nairobi in lieu of his address in the USA.
88. As adverted to elsewhere in this judgment, the Claimant responded vide letter dated 11<sup>th</sup> November, 2022 addressed to RWI, the supervisor.
89. The Claimant inter alia admitted that she had not made RWI aware of the estimated shipping quotes and the actual amount charged as she thought Anna or Diana or both had done it.
90. Similarly, the Claimant admitted that she had not informed RWI about the delayed deliveries as Anna and Diana received the complaints too and perhaps ought to have done it and was also in the dark on what Aviacare Shipping had done with the shipments which would appear to suggest that she had not enquired about the deliveries or followed up, yet it was her duty.
91. From the evidence on record, it is clear that there were delayed deliveries and clients complained about it which would appear to confirm the finding of the investigator that the shipping was done in piece meal and only one Susan and the Claimant were aware of this fact.
92. Similarly, during the hearing on 28<sup>th</sup> November, 2022, the Claimant admitted having deleted old quotations. She explained that quotation of Kshs.112,000/= by Susan changed to Kshs.142,000/=, having been initially Kshs.92,911/= on account of insurance but had no explanation which had not been included.



93. The Claimant could not explain why Aviacare Express Cargo did not deliver several consignments.
94. The Claimant equally admitted that she did not inform RWI of the delayed shipments, something she ought to have done and the complaints did not portray the business in good light.
95. The Claimant's response to the notice to show cause and at the hearing leave no doubt that the Claimant played a central role at the Respondent's workplace and in particular ensuring and confirming deliveries and payments for shipping of goods.
96. On cross-examination, the Claimant admitted that she was in charge of shipping, quotations, delivery, update to clients, confirm arrival and payments which is an admission that she was the proper person to respond to the matters raised by the notice to show cause which touched on her docket; quotations, delayed deliveries, non-deliveries, complaints by clients and payment of shipping charges.
97. The foregoing leaves no doubt that there were unexplained and unresolved issues domiciled in the Claimant's docket for which she was required to provide answers or responses.
98. In the court's view, although the Claimant dismissed the allegations set out in the notice to show cause as a "witch hunt", her written response and at the hearing reveals that some of the issues remained outstanding and she had no answers.
99. As the employer, the Respondent had the right to demand an explanation from the Claimant on matters concerning her docket as there had been delayed deliveries, non-existent deliveries and complaints had been lodged against the Respondent.
100. Contrary to the Claimant counsel's submission that the allegations against the Claimant were fabricated, in the court's view and based on the documentary evidence on record, they were not fabricated. The allegations related to real clients, failed and delayed deliveries and payments, all of which the Claimant acknowledged.
101. Relatedly, the Claimant admitted on cross-examination that she was aware that the Respondent had hired a private investigator to investigate the allegations but she refused to assist him even after the investigator informed her that he had been hired by the Respondent. This was a clear demonstration that the Respondent took the allegations very seriously and was desirous of unearthing the true state of affairs.
102. Flowing from the foregoing, the court is not persuaded that the allegations made against the Claimant were a concoction of the Respondent's imagination or hogwash.
103. Concerning the arrest of the Claimant, it is common ground that the Claimant was scheduled to report on 18<sup>th</sup> November, 2022 and did so. Although it is unclear as to whether any meeting took place, it is clear that the Claimant declined to acknowledge receipt of the letter extending the suspension, and was instructed to wait at the guard house until RWI returned.
104. Evidence reveals that RWI drove to the Karen Police Station and filed a complaint recorded as OB No. 25/18/11/2022 and the police indicated their desire to talk to the Claimant and as they had no transport, RWI drove them to the Respondent's compound where the officers who were unarmed attempted to arrest the Claimant but she screamed to attract attention and the officers backdown and she was subsequently picked up by uniformed police and taken to the Karen Police Station and released on police cash bail of Kshs.120,000/=.
105. The Claimant accuses the Respondent for having not stopped the police from roughing her up.



106. It is trite that the National Police Service is a disciplined service which operates under elaborate command structures from the Inspector General of Police to the Officer Commanding Station (OCS) and is regulated by law.
107. It requires no emphasis that the National Police Service does not take instructions or directions from civilians.
108. The Claimant tendered no evidence to prove that the police manhandled or assaulted her on that day or avail corroborative evidence on what transpired on that day.
109. Evidence from one of the police officer, fellow employee, client or customer who the Claimant alleges were present would have demonstrated the factual circumstances.
110. The Claimant's testimony on the occurrence appear over-dramatized to create the impression that it was planned and executed in accordance with the directions of the Respondent.
111. The court is in agreement with the Respondent's counsel's submission that RWI lodged a complaint at the Karen Police Station and transported three police officers to the Respondent's compound only. The officers were not under his control as their conduct is governed by relevant laws including the Criminal Procedure Code and the [National Police Service Act](#) among others.
112. The Claimant alleges that the arrest humiliated and embarrassed her before the Respondent's clients, employees, customers and patrons of an eatery.
113. The alleged particulars of humiliation and embarrassment catalogued under paragraph 39 of the Statement of Claim include fabricated allegations and lack of proof, sharing personal details with a stranger, contact by the investigator, mental anguish, victimization, sham, disciplinary process, termination and denial of the right to be heard among others.
114. Intriguingly, none of the particulars in the claim make reference to the arrest or how it took place.
115. Strangely, the Claimant tendered no evidence of any of the persons allegedly present on that day including colleagues whom she knew by name.
116. In her written statement, the Claimant testified that she was rescued by unknown men and took refuge in the washrooms and when uniformed police came, she was arrested and taken to the police station. In court, the Claimant testified that she was rescued by the uniformed police officers and made no reference to having sought refuge in the washroom.
117. From the evidence on record, it is the finding of the court that the Claimant has not placed before the court sufficient material to establish the alleged humiliation or embarrassing treatment by the Respondent.
118. The Claimant alleges that she was constructively dismissed by the Respondent on account of fabricated allegations, arrest and sham disciplinary process.
119. Significantly, the alleged fabricated allegations were made vide the notice to show cause dated 3<sup>rd</sup> November, 2022 and the Claimant responded and reported to the work place on 18<sup>th</sup> November, 2022 when the suspension was extended and the arrest took place.
120. The letter of extension of suspension invited the Claimant for a hearing on 29<sup>th</sup> November, 2022 and she attended and participated in the hearing but declined to sign the minutes.
121. The Claimant failed to honour the request to report at the workplace on 29<sup>th</sup> November, 2024 feigning sickness and later payment of salary.



122. Documents on record reveal that the Claimant was evidently not indisposed on 29<sup>th</sup> or 30<sup>th</sup> November, 2022 as she consulted a local clinic on 7<sup>th</sup> December, 2022 and accorded sick off for 2 days (8<sup>th</sup> and 9<sup>th</sup> December, 2022) but had already resigned vide email dated 5<sup>th</sup> December, 2022.
123. Assuming that Claimant resigned at the behest of the fabricated allegations and the arrest by the police, it is unclear why the Claimant agreed to subject herself to the disciplinary process, which she characterised as a sham. Was this not acquiescence with the Respondent's conduct or waiver of right to raise the issues thereafter and was thus estopped from relying on the same allegations?
124. Equally, it is unclear why the Claimant waited for over one (1) month after the alleged fabricated allegations were made?
125. But more fundamentally, how did the allegations of arrest and sham disciplinary process amount to a repudiatory breach of the contract of employment.
126. Clearly, the Respondent was concerned about the non-deliveries, late deliveries and complaints by its clients and the Claimant played a key role in these transactions and was the proper employee to provide an explanation.
127. Equally, after the investigation, the Respondent was persuaded that the Claimant may have been involved in fraud. The Respondent had a reasonable basis for the suspicion as the Claimant's response to the notice to show cause lacked the specificity of the items queried by the notice to show cause. This appears to explain the report to the police on 18<sup>th</sup> November, 2022.
128. As demonstrated above, one of the essential elements of constructive dismissal is that the employee must prove the fundamental breach of the contract of employment or the constructive dismissal.
129. The provisions of Sections 107, 108 and 109 of the *Evidence Act* are clear on who bears the burden of proof as who alleges must prove. (See *Mbuthia Macharia V Annah Mutua & another* (2017) eKLR, *Netah Njoki Kamau & another V Eliud Mburu Mwaniki* (2021) eKLR, *Mary Wambui Kaboguo V Kenya Bus Services Ltd* (1997) eKLR, *Miller V Minister of Pension* (1947) ALL ER 373 and *Charterhouse Bank Ltd under Statutory Management V Frank N. Kamau* (2016) eKLR).
130. From the evidence on record, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that the Respondent committed a fundamental breach of the contract of employment between the parties or that the Claimant was constructively dismissed.
131. The Respondent's case that the Claimant resigned to evade the outcome of the disciplinary process would appear plausible as she had gone through the entire process without any complaint on how it was conducted.

Whether the Claimant is entitled to the reliefs sought.

#### **i. 12 months compensation**

132. Having found that the Claimant has failed to prove that she was constructively dismissed by the Respondent or unfairly terminated from employment, the prayer for compensation lacks merit and it is disallowed.

#### **ii. One month's salary in lieu of notice**

133. Having found that the alleged constructive dismissal was not demonstrated, the prayer is declined.



### **iii. General damages for violation of constitutional and human right**

134. The Claimant adduced no evidence to prove that any of her constitutional and human rights were violated.
135. Neither the written statement dated 14<sup>th</sup> March, 2023 nor the oral testimony adduced in court reveals the provisions of *the Constitution* of Kenya, 2010 allegedly violated by the Respondent and how they were violated.
136. The prayer lacks supportive evidence and is declined.

### **iv. Punitive and aggravated damages for humiliation and embarrassment**

137. Having found that the Claimant failed to prove the alleged humiliation and/or embarrassment, the prayer for damages is unsustainable.
138. More significantly, the Claimant adduced no evidence of entitlement to punitive or aggravated damages in the context of the rule in *Rookes V Barnard & others (1964) AC 1129* applied by the Court of Appeal in *Obonyo V Municipal Council of Kisumu (1971) EA 91* where the court identified the circumstances in which a court may award punitive damages as follows;

It will be convenient to begin summarizing very briefly the effect of *Rookes V Barnard*. In the first place, it was held that exemplary damages for tort may only be awarded in two classes of cases (a part from any case where it is authorised by statute), there are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government (emphasis in original) and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff. . .”

139. As held by the Court of Appeal in *Godfrey Julius Ndumba Mbogori & another V Nairobi City County (2018) eKLR*, exemplary or punitive damages differ from ordinary damages as their object is to punish and deter.
140. They are not consolatory as held in *Grinyamwaya V Nairobi City Commission (1985) eKLR* and the Claimant or Plaintiff must prove that the Respondent's conduct deserves punishment.
141. The Claimant tendered no evidence of oppression, arbitrariness on the part of the Respondent or conduct deserving of punishment  
The prayer is declined.
142. Flowing from the foregoing, it is evident that the Claimant's case against the Respondent is for dismissal and it is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF JULY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

DR. JACOB GAKERI

JUDGE

