



REPUBLIC OF KENYA



**Munyoki v Grainden Millers Ltd (Cause E026 of 2021)  
[2023] KEMC 257 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEMC 257 (KLR)

**REPUBLIC OF KENYA  
IN THE MACHAKOS LAW COURTS  
CAUSE E026 OF 2021  
CN ONDIEKI, PM  
MARCH 23, 2023**

**BETWEEN**

**CHRISTINE BAHATI MUNYOKI ..... CLAIMANT**

**AND**

**GRAINDEN MILLERS LTD ..... RESPONDENT**

**JUDGMENT**

**Part I: Introduction**

1. There are sundry contours of termination of a contract of employment. However, one of the most humiliating of such termination is constructive dismissal. It occurs when the employer ventures into a fundamental breach of the contract of employment (going to the root of the very contract) and which then signifies that the employer no longer intends to be bound by one or more of the central terms of the contract, with the deleterious result of driving the employee to a feeling of frustration and compulsion to leave employment (involuntarily).
2. Every employee has the right to fair labour practices.<sup>1</sup> In complimenting the foregoing, every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair<sup>2</sup> and in the event a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.<sup>3</sup> A contract of employment is terminable but within the four corners of the law.<sup>4</sup> The law thus prohibits

<sup>1</sup> See Article 41(1) of *the Constitution*.

<sup>2</sup> See Article 47(1) of *the Constitution*.

<sup>3</sup> See Article 47(2) of *the Constitution*.

<sup>4</sup> And especially *the Constitution* and the *Employment Act*, 2007.



termination of a contract of employment unfairly<sup>5</sup> and permits an employee whose contract of employment has been terminated unlawfully and/or unfairly to question the termination in a Court of law on grounds that the termination was unfair and therefore unlawful.<sup>6</sup> A termination of employment by an employer is deemed unfair if the employer fails to justify in Court that the reason for the termination is not only valid but also the procedure adopted conforms with the law.<sup>7</sup> The test of fairness is equity and in this construction, that conduct of the employer's which is construed as equitable is deemed fair.<sup>8</sup> The simple reason of matching fairness with equity is based on the understanding that a conduct may be lawful yet unfair. And so, the fairness test is dichotomized into substantive and procedural fairness.<sup>9</sup> While the substantive aspect focuses on whether the reason assigned for termination is valid or not, the procedural aspect looks at the procedure adopted by the employer to effect the termination. Whereas the employee shoulders the burden of proving unfair termination of employment or wrongful dismissal, the employer shoulders the burden of justifying that the grounds of the termination of employment or dismissal were lawful.<sup>10</sup> Constructive dismissal is an unfair labour practice and the burden to prove the ingredients thereof rests on the shoulder of the employee.<sup>11</sup>

## Part II: The Claimant's Case

3. Vide a Memorandum of Claim dated 14<sup>th</sup> June 2021 and filed on 15<sup>th</sup> June 2021, the Claimant brought this action against the Respondent seeking Judgment for: (a) Payment of all salary arrears owed to our client for the month of February Kshs. 80,000 (sic). (b) Payment of one month's Notice in lieu of termination as per his contract of employment Kshs 80,000 (sic); (c) Damages and or compensation sum equivalent of 12 month's salary amounting to Kshs. 960,000 salary for unlawful and malicious termination (sic). (d) Payment for the pending leave days Kshs. 57,807 (sic). (e) and issuance of a certificate of service.
4. The Claimant claims that vide a letter dated 5<sup>th</sup> August 2020, she was employed by the Respondent as a Human Resource Manager effective the same date and put on a monthly salary of Kshs. 80, 000. It is claimed that the Job Description was set out in the said letter. It is averred that the Claimant served the Respondent with dedication and diligence until 1<sup>st</sup> February 2021 when the Claimant tendered her resignation citing the Respondent's persistent frustration and refusal to comply with the lawful procedures in its dealings with the employees. It is further claimed that on 9<sup>th</sup> February 2021, the Claimant was called to the office to pick a letter and upon picking, it turned out to be a termination agreement. It is claimed that no explanation was offered for the said termination and that the Claimant lodged a complaint at the Machakos Sub-County Labour Office but the Respondent did not honour

<sup>5</sup> See section 45(1) of the *Employment Act*, 2007.

<sup>6</sup> See section 35(4) of the *Employment Act*, 2007.

<sup>7</sup> See sections 45(2) read with sections 43(2) and 46 of the *Employment Act*, 2007.

<sup>8</sup> See *Elizabeth Washeke and 62 Others vs. Airtel Networks (K) Ltd & another* [2013] eKLR, per M. Mbaru, J.; and *Amos Kitavi Kivite vs. Kenya Revenue Authority* [2020] eKLR, et alia.

<sup>9</sup> *Amos Kitavi Kivite vs. Kenya Revenue Authority* [2020] eKLR; *Walter Ogal Anoro vs. Teachers Service Commission* (2013) eKLR; *Peter Wangai vs. Egerton University* [2019] eKLR; *Kenya Plantation & Agricultural Workers Union vs. Sotik Tea Kenya Ltd* [2017] eKLR; *Justus Mutahi Ihaji vs. Kenya Airways Limited* [2018] eKLR; and *Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike* [2017] eKLR, et alia.

<sup>10</sup> See section 47(5) of the *Employment Act*, 2007.

<sup>11</sup> See *Max Masoud Roshankar & another vs. Sky Aero Limited* [2015] eKLR, per Mbaru, J.



- the summons. The Claimant thus avers that the termination was actuated by malice and bad faith since at the time of termination, the Claimant was serving her notice in lieu of salary.
5. And so, the Claimant's claim against the Respondent is (a) withheld salary for one month amounting to Kshs. 80,000; (b) salary in lieu of 1 month's notice in the sum of Kshs. 80,000; (c) unpaid leave in the sum of Kshs. 57,807; (d) twelve months' salary compensation for unlawful termination; and (f) a certificate of service.
  6. At the hearing of the Claimant's case, the Claimant was the only witness and she adopted her witness statement dated 14<sup>th</sup> June 2021 and filed together with the Statement of Claim, as her evidence-in-chief. In her said witness statement, the Claimant rehashes the facts in the Memorandum of Claim and I find it unnecessary to reproduce it here. In support of her claim, the Claimant exhibited the following documents: (a) appointment letter dated 5<sup>th</sup> August 2020 as the Claimant's Exhibit 1; (b) employment termination agreement dated 9<sup>th</sup> February 2021 as the Claimant's Exhibit 2; (c) confirmation letter dated 5<sup>th</sup> November 2020 as the Claimant's Exhibit 3; (d) a payslip dated 31<sup>st</sup> December 2020 as the Claimant's Exhibit 4; (e) a letter from the Machakos County Labour Office dated 20<sup>th</sup> May 2021 as the Claimant's Exhibit 5; (f) notice of conciliation meeting dated 23<sup>rd</sup> February 2021 as the Claimant's Exhibit 6; (g) a compliant letter addressed to the labour office dated 16<sup>th</sup> February 2021 as the Claimant's Exhibit 7; (h) a resignation letter dated 1<sup>st</sup> February 2021 as the Claimant's Exhibit 8; and (i) a demand letter dated 24<sup>th</sup> May 2021 as the Claimant's Exhibit 9.
  7. In cross-examination of the Claimant, she stated that she resigned out of frustration. She stated that she did not indicate the frustrations in the resignation letter. She stated that she tendered the notice on 1<sup>st</sup> February 2021. She stated that she was latter called by the General Manager (hereinafter "the GM") and given a termination agreement. She stated that she was reporting to the GM and that had powers to issue the termination agreement. She was referred to paragraph 14 of the Employment Contract for the GM, one Jennifer Kyengo (on representation) and she stated that she cannot confirm that position. She stated that she was serving on notice till end of February 2021. She stated that she did not employ drivers and she did not issue goods without authority.
  8. In her written Submissions dated 28<sup>th</sup> December 2022 and filed on 4<sup>th</sup> January 2023, learned Counsel Mr. Onyango instructed by the Firm of Oscar & Associates Advocates representing the Claimant has proposed three issues for determination as follows: (i) Whether the Claimant was constructively terminated and validity of the Employment termination Agreement; (ii) Whether the Claimant was wrongfully, unfairly and unlawfully terminated from employment; and (iii) Whether the Claimant is entitled to the prayers sought in her Statement of Claim.
  9. On whether the Claimant was constructively terminated and validity of the employment termination agreement, Counsel answers this in the affirmative relying on the definition and ingredients thereof which were enunciated in *Milton M Isanya vs. Aga Khan Hospital Kisumu* [2017] eKLR; and *Kenneth Kimani Mburu & Another vs. Kibe Muigai Holdings Limited*, Nairobi ELRC Cause No. 339 of 2011. In this connection, it is submitted that due to persistent frustration, withholding of February 2021 salary and the Respondent's refusal to comply with lawful procedures in employee relations and being a Human Resource Manager whose work pertains the welfare of employees, the Claimant had no other choice but to tender her resignation. It is submitted that the conduct of the Respondent was fundamental or significant breach going to the root of the contract of employment and clearly demonstrates that the Respondent no longer intended to be bound by the essential terms of the contract. It is further submitted that by frustrating the Claimant, the Respondent had the sole intention of inducing her into resignation and thus amounts to a repudiatory breach on the part of the Respondent, placing reliance in *Coca Cola East and Central Africa Limited vs. Maria Kagai Ligaga*



to buttress the assertion that the employer's conduct was so grave as to lead to the resignation. It is submitted that the Claimant resigned immediately without any delay upon expressing her frustration and displeasure with the manner in which the Respondent was pressing her to handle employee welfare. Further, it is submitted that although the Claimant was frustrated into her resignation, she initially had no intentions of filing the present suit in light of the Respondent's commitment through the Employment Termination Agreement to pay her dues and this in part explains the professional and cordial tone of her resignation letter. It is argued that the frantic effort by the Respondent to get the Claimant to sign the Termination of Employment Agreement and later renegeing on the same further demonstrates that the Respondent appreciated the consequence their conduct and pre-empted the filing the present suit for constructive termination. It is submitted further that the Claimant has demonstrated sufficiently that she resigned solely because of the Respondent's hostile and unfair conduct towards her and that she terminated her employment within the statutory limit of 3 months from the date the cause of action arose. It is submitted that the Claimant has further discharged the onus of proving her case as against the Respondent, particularly the specific terms of both the Employment contract and the Termination of Employment Agreement breached by the Respondent by its conduct and has shown that the repudiatory breach of the Employment Contract was a direct and casual link to her resignation and this Court is urged to so find.

10. On whether the Claimant was wrongfully, unfairly and unlawfully terminated from employment, it is submitted that on 9<sup>th</sup> February 2021, the Claimant was summoned by Respondent's General Manager and handed her an Employment Termination Agreement which provided among other things the manner in which the Claimant's dues were to be paid and urged her to stay away as she was not needed to serve the notice period. It is thus submitted that the allegation that the Claimant absconded work has no basis in law as the employment relationship between the Respondent and the Claimant had ceased to exist upon receipt of the resignation letter, citing *The Black's Law Dictionary* (10th Edition) which defines resignation to mean "The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one's job or organisation, often in the form of a written statement." In this context, it is submitted that by penning down a letter of resignation and handing it over to the Respondent formally, the Claimant announced his intention to leave its employment with immediate effect, placing reliance in *Edwin Beiti Kipchumba vs. National Bank of Kenya Limited* [2018] eKLR, where Rika, J. found that "resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The *Employment Act* does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect." Further, reliance is placed on a South African case of *Lottering vs. Stellenbosch Municipality*, (2010) 31 ILJ 2923 (LC), the Court held as follows: "That the resignation is a final unilateral termination of the employment contract and once the applicant had submitted the first resignation that was the end of the contract. This means that there was no longer a contract of employment once she resigned." In this connection, it is submitted that RW testified that the Claimant colluded with the General Manager of the Respondent to among other accusation hire incompetent relatives and that she also testified that against her instructions as a director, the Claimant issued goods to unauthorized drivers resulting into loses amounting Kshs. 170,000 but RW admitted in cross-examination that although this was a misconduct, they never issued a show cause letter to the Claimant nor invited her to a disciplinary hearing contrary to section 45 of the *Employment Act* 2007. In this regard, it is submitted that although the two versions differ, three things are clear from both versions: (i) that the Respondent wanted the Claimant out of employment but without Justifiable reasons; (ii) that the Claimant was neither issued with show cause letter nor subjected to any disciplinary process with respect to the alleged misconduct; and (iii) the Claimant was not given any notice or paid in lieu before the termination of his employment was effected. It is submitted that the Claimant in her testimony confirmed/maintained



that she was never issued with any show cause letter or subjected to any disciplinary process in light of the allegation. It is thus argued that since the Claimant has demonstrated she was employed on a permanent and pensionable terms, she was entitled to be subjected to the provisions of sections 35, 43 and 45 of the *Employment Act*. It is submitted that sections 43 and 45 of the *Employment Act* stipulate that the duty in showing that termination was fair is on the employer in this case the Respondent, placing reliance in *Walter Ogal Anuro vs. Teachers Service Commission (2013) eKLR*, where the Employment and Labour Relations Court held that “... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.” It is submitted that the termination was procedurally unfair staking reliance in *Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company Ltd [2013] eKLR*, where Radido, J. pronounced himself that “The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

11. On whether the Claimant is entitled to the prayers sought in his Statement of Claim, it is submitted as follows.
12. Pay in lieu of notice: it is submitted that since the Claimant’s employment was unfairly and unlawfully terminated by the Respondent, the Claimant is entitled to 28 days’ notice or pay in lieu of notice under sections 35 (1) (c) and 36 respectively. It is thus submitted that having not been issued with a one month’s notice, the Claimant is entitled to a one month’s salary in lieu of notice in accordance with the dictates of section 36 of the *Employment Act*, in the sum of Kshs. 80,000 and Kshs. 80,000 salary for the month of February as per the Regulation of Wages (General) (Amendment) Order 2013.
13. Regarding damages/compensation for unlawful/unfair termination, it is submitted that having demonstrated that the termination of the Claimant’s employment was wrongful/unlawful and unfair for want of both substantive justification and procedural fairness, the Claimant should be compensated for unlawfully and un-procedurally losing his employment under Section 49 (1) (c) of the *Employment Act* which provides for compensation of up to twelve (12) months’ salary, citing *Peter Kamau Mwaura & another vs. National Bank of Kenya [2020] eKLR*. It is submitted that the Claimant lost her source of livelihood and since then she has not been able secure an alternative employment considering the hard economic circumstance that was occasioned by the aftermaths of the Covid-19 Pandemic and that considering that she had a clean record during the pendency of her employment as Human Resource manager of the Respondent, the maximum compensation equivalent to twelve months’ salary will be just and fair in the circumstance.
14. Concerning payment in lieu of leave days not attended, it is submitted that section 28 of the *Employment Act* provides that an employee is entitled to a not less than twenty-one (21) leave days after every twelve consecutive months of service with his/her employer. It is submitted that the Claimant’s averments and testimony are that she was never allowed to proceed to her annual leave days during her employment period and that she was never paid in lieu of the leave days not utilized and that her averments and testimony are corroborated by the Respondent provided no evidence to the contrary.



It is thus urged that this Court should order the Respondent to pay the Claimant in lieu of all her annual leave days she did not attend Kshs. 57,000.

15. Regarding costs, it is submitted that ordinarily costs follow the event and that the unlawful actions of the Respondents caused the instant industrial dispute and it will then be just and fair that the Claimant is awarded costs in this cause.

### **Part III: The Respondent's Case**

16. In its Memorandum of Response and Counter-Claim dated 9<sup>th</sup> September 2021 and filed on 15<sup>th</sup> September 2021, the Respondent denies all material facts except the fact that the Claimant was its employee effective 5<sup>th</sup> August 2020 and that her monthly salary was Kshs. 80,000. The Respondent further admits that the Claimant tendered her resignation on 1<sup>st</sup> February 2021 and started absconding duty on that pretext. The Respondent avers that the Claimant colluded with the GM of the Respondent and on 9<sup>th</sup> February 2021, without knowledge and authority of the Respondent, the GM and Claimant executed a termination agreement awarding the Claimant one-month salary in lieu of notice and that the said GM had no powers to commit the Respondent financially. The Respondent thus avers that the employment of the Claimant was not terminated as she had already resigned. It is averred further that the Claimant in cahoots with the GM hired incompetent relatives at the expense of meritocracy.
17. In its Counter-Claim, the Respondent rehashes the substance of the Memorandum of Response. In addition, the Respondent claims that the Claimant having had knowledge that certain drivers were about to leave service and contrary to the instructions of the directors to do so, issued them with goods valued at Kshs. 170,000 for supply, leading the Respondent to loss and that to this day, the said amount has not been recovered from the said drivers. The Respondent thus prays for Judgment for: (a) Kshs. 170,000 being the amount of money the Claimant caused the Respondent to suffer loss; (b) Interest on (a) above at Court rates; and (c) Costs of this Counter-Claim.
18. At the hearing of the Respondent's case, Lucy Muthoni Mwangi, a director of the Respondent was the only defence witness and she adopted her witness statement dated 17<sup>th</sup> November 2021 and filed on 18<sup>th</sup> November 2021, as her evidence-in-chief. In her said witness statement, Ms. Lucy has rehashed the substance of the Memorandum of Response and Counter-Claim. She underlines that the Claimant tendered a letter of resignation on 1<sup>st</sup> February 2021 and thereafter absconded duty and that their efforts to get clear from the company were fruitless until they received communication from the labour office. She testified that she had instructed the Claimant to stop assigning work to the drivers. In support thereof, Ms. Lucy exhibited the following: (a) an appointment letter as the Respondent's Exhibit 1; (b) a confirmation of employment as the Respondent's Exhibit 2; (c) an employment contract for Jennifer Kyengo (the said GM) as the Respondent's Exhibit 3; (d) the Claimant's resignation letter as the Respondent's Exhibit 4; and (e) a clearance letter as the Respondent's Exhibit 5.
19. In cross-examination of Ms. Lucy, she stated that the Claimant was an employee of the Respondent. She stated that she was issued with a contract and in that contract, she was supposed to report to a manager. She was referred to the Claimant's exhibit 2, paragraph which states that she was supposed to report to the GM and she stated that in weighty matters, she was not supposed to report to the GM and instead supposed to report directly to the directors. She stated that they did not commence disciplinary action for absconding because she had already resigned and had only 20 days to end of her service. She stated that it is true the termination agreement was signed by the GM who had no authority to do so. She states that the Claimant is aware of the Respondent's policy that the GM cannot sign such an agreement. She stated that the Claimant is not entitled to terminal benefits. She stated that they incurred a loss of Kshs. 170,000 on account of the Claimant's negligence.



20. In his written Submissions dated 25<sup>th</sup> January 2023 and filed on 26<sup>th</sup> January 2023, learned Counsel Mr. Wanjohi instructed by the Firm of Mundui Murai Advocates representing the Respondent proposes four issues for determination as follows: (i) Whether the Claimant was wrongfully terminated; (ii) Whether the Claimant is entitled to the reliefs sought; (iii) Whether the Respondent is entitled to the reliefs sought in its counterclaim; and (iv) Who should pay the costs of this suit?
21. Regarding whether the Claimant was wrongfully terminated by the Respondent, it is not in contention that the Claimant was employed by the Respondent as a Human Resource Manager on the 5<sup>th</sup> August 2021 and that the Claimant was receiving a monthly salary of Kshs.80, 000. Counsel posits that what is in contention in this suit is how the employment of the Claimant with the Respondent came to an end and whether the same was unlawful as alleged by the Claimant. It is submitted in this regard that the Respondent relies on the definition of ‘termination of employment’ as presented in the 2<sup>nd</sup> edition of the Black’s law dictionary which is “the last step of employment where a worker is let go”. In this connection, Counsel for the Respondent submits that the Respondent’s witness (a director in the Respondent’s company) stated in her witness Statement and the evidence tendered in Court that on 1<sup>st</sup> February 2021, the Claimant served the Respondent’s director with a resignation letter, issuing the Respondent a one month’s notice as was expected of her in the employment contract and that the same witness stated in the said witness statement that the Claimant’s employment was never terminated since she voluntarily resigned and further started absconding duty on the pretext that she had already tendered her resignation letter thus not subject to the Rules and Regulations of the Respondent. Counsel then reasons that in this state of affairs, the Respondent did not terminate the Claimant’s employment as the Claimant left employment on their own volition when she tendered in their resignation letter. On whether the Claimant’s service was wrongfully and unlawfully terminated, it is submitted that the Claimant has in her witness statement indicated that she resigned following continuous frustrations by the Respondent in the manner it was treating its employees and it was the Respondent’s evidence that it was the Claimant who started absconding duty on the pretext that she had already tendered their resignation hence relieved from the rules and regulations of the Respondent. It is submitted that the claim of wrongful and unlawful termination was not proved since the Claimant did not state in the said resignation letter of any conduct by the Respondent that pushed her to resign and that the Claimant did not provide any evidence proving the alleged frustrations by the Respondent nor availed any witness to corroborate her testimony. It is submitted that constructive dismissal of employees is recognized in Kenya as forced resignation following an undesirable conduct by the employer that leaves them with no option but to resign, citing the holding in Nathan Ogada Atiagaga vs. David Engineering Limited (2015) eKLR, where it was defined as follows: “Constructive dismissal, occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.” Further reliance is placed in the Court of Appeal decision in Coca Cola East and Central Africa Limited vs. Maria Kagai ligaga [2015] eKLR, where the Court outlined the principles of constructive dismissal. In this connection, the Respondent urges this Court to find that the Claimant has failed to prove the basic ingredients of constructive dismissal, placing reliance in Edwin Beiti Kipchumba vs. National Bank of Kenya Limited [2018] eKLR where it was held that, “the Court must be persuaded that the employee has reason to resign”. It is further submitted that had the clamant been forced to resign, nothing could have been easier than to demonstrate frustration, citing the holding in Jackson Murithi Kiura vs. Family Bank Limited [2022] eKLR.



22. Regarding the termination agreement, it is submitted that it was executed by the GM who had no authority, citing *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR. It is submitted that the termination was by voluntary resignation in search of greener pastures, citing *Kenneth Onialo v Majlis Resort Lamu t/a Majlis Lamu Ltd* [2022] eKLR where the Court in making its decisions stated that the Respondent in that case could not have been said to have terminated the contract of service between the parties if the Claimant voluntarily resigned from duty to seek greener pastures. It is thus urged that the provisions of section 41, 43 and 45 did not apply to it in this instant case as they did initiate the termination of employment of the Claimant.
23. On whether the Claimant is entitled to the reliefs sought in the claim, it is submitted that she is not since she has failed to prove unfair termination and that the termination agreement was executed by an authorized person, citing *Kenya Broadcasting Corporation vs. Geoffrey Wakio* [2019] eKLR, where it was held that “section 49 of the *Employment Act* is not to be applied in a manner that amounts to punishing the employer” since the section applies to instances of unfair termination. Further reliance is placed in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR. In the alternative, it is submitted that the Claimant only worked for the Respondent for a period of 5 months only and that the Claimant was on probation for the first three months and so in essence the Claimant worked for a period of two months only and that this means that the Claimant cannot be entitled to compensation of 12 months’ salary because of the length of her as provided in Section 49(4) (e) of the *Employment Act*. It is further submitted that the Claimant’s relief for payment in lieu of notice should fail for the same reason that the Respondent is not the one that initiated the termination of employment and there was therefore no obligation cast on them to issue a notice to the Claimant. Further, it is submitted that the Claimant having served for only 5 months and she was on probation for the first three months, under section 28 (1) (b) of the *Employment Act*, she can only be justified to get 1.75 leave days for the two months she worked for the employer and that in any event, the Claimant had utilized all her leave days as was evidenced in the extracts on the list of documents relied on by the Respondent and she did not produce any evidence to prove that she never took up her leave days. It is submitted that the claim for compensation for unattended leave days should therefore fail. In this light, it is urged that that the Claimant’s contention that she lost her source of livelihood as she has not secured an alternative employment is not something that is to be faulted on the Respondent as the Respondent never terminated their employment and likewise, the Respondent did not engage in any conduct that would cause the Claimant to resign as she now pleads.
24. On whether the Respondent is entitled to the reliefs sought in its counterclaim, it is submitted that the Respondent’s has made a case for loss of Kshs. 170,000 occasioned by the Claimant and thus entitled to the compensation.
25. On costs, it is submitted that the Respondent is entitled to costs for the counterclaim as costs follow the event.

#### **Part IV: Points for Determination**

26. Commending themselves for determination - gleaning from the Memorandum of Claim; Memorandum of Response and Counter-Claim; and the rival written Submissions - are eight points as follows:
- i. First, determination of the Claimant’s gross monthly pay and whether this Court has jurisdiction to determine this cause.
  - ii. Second, whether this claim is maintainable and/or sustainable.



- iii. Third, whether the Claimant was an employee of the Respondent.
- iv. Fourth, the date the Claimant was employed by the Respondent.
- v. Fifth, whether the Claimant has proved on a preponderance of probabilities that she was constructively dismissed.
- vi. Sixth, whether the Claimant has proved on a preponderance of probabilities that there was an Employment Termination Agreement and whether it stands the legal test of an instrument or document which can legally and properly so bind the Respondent; and whether the Claimant is entitled to the reliefs arising therefrom.
- vii. Seventh, whether the Respondent has on a balance of probabilities made a case for restitution of Kshs. 170,000 by the Claimant.
- viii. Eighth, which party will shoulder the costs of the claim and Counter-claim?

### **Part V: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination**

27. The principal duty of this Court is to examine facts, evaluate evidence, subject the proven facts to the law and render a decision on a balance of probability. See *Lakhamshi vs. Attorney-General* (1971) 1 EA 118, per Spry V-P, Lutta and Mustafa JJA, as they then were) Spry, V-P, (as he then was); *Ferdinand Nd ung'u Waititu vs. Independent Electoral & Boundaries Commission (IEBC) & 8 Others* (2014) eKLR, per Warsame J.A.; and *Abbay Abubakar Haji vs. Marain Agencies Company & Another* (1984) 4 KCA 53.
28. Who shoulders the onus probandi in civil cases generally? In all cases, there is always a legal burden to prove or onus probandi incumbit ei qui dicit, non ei qui negat. This is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In civil cases, the onus probandi is always on the person who brings a claim in a dispute, originally expressed as *semper necessitas probandi incumbit ei qui agit* (the necessity of proof always lies with the person who will fail if no proof is adduced). The legal burden of proof lies in him who will fail if no evidence is adduced to that end. The obligation first starts with the Plaintiff who must discharge the burden of proof placed on her shoulders to the required standard namely preponderance of probability. See sections 107, 108 and 109 of the *Evidence Act*; Halsbury's *Laws of England* 4<sup>th</sup> Edition, at page 662; *Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute* (2016) eKLR, per Nyamweya, J. (as she then was); *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR; *Vincent Okello vs. Attorney General Gulu HCCS No. 4 of 1992* (1995) III KALR 129; *Treadsetters Tyres Ltd vs. John Wekesa Wepukhulu* (2010) eKLR, per Ibrahim, J., (as he then was); *Charlesworth & Percy on Negligence*, 9<sup>th</sup> Edition at page 387; and *Henderson vs. Henry E Jenkins and Sons* (1970) AC 232 at 301.
29. What is the standard of proof for civil cases generally? In civil cases, the general standard of proof is on preponderance of probability. It can vary upwards depending on the gravity of the matter. See *Henry Hidayat Ilanga vs. Manyema Manyoka* (1961) EA 705; and *Miller vs. Minister of Pensions* (1947) 2 ALL ER 372, per Denning J.
30. What then is the meaning of balance of probability and what may be deemed as sufficient enough to reach or meet the standard of proof on a balance of probabilities? The balance of probability standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the



allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. See Lord Nicholls of Birkenhead in *Re H and Others (Minors)* (1996) AC 563, at page 586. Put differently, it means that the case will be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place and in percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. See *William Kabogo Gitau vs. George Thuo & 2 Others* (2010) 1 KLR 526, per Kimaru, J. It can again be said that degree which is not so high as is required in a criminal case so as that a tribunal can say ‘we think it more probable than not’ and the burden is discharged thereby, but, if the probabilities are equal it is not. See *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, where the Court of Appeal adopted the reasoning of Denning, J. in *Miller vs. Minister of Pensions* (1947) 2 All ER 372.

31. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? Since evidence is weighed and not numbered, no particular number or volume of evidence is prescribed. See S.C. Sarkar in *Hints of Modern Advocacy and Cross-examination* (7<sup>th</sup> Edition, 1954, at page 16) and section 143 of the *Evidence Act*. See also *Siraj Din vs. Ali Mohamed Khan* (1957) EA 25.
32. In employment disputes, whereas the employee shoulders the burden of proving unfair termination of employment or wrongful dismissal, the employer shoulders the burden of justifying that the grounds of the termination of employment or dismissal were lawful. See section 47(5) of the *Employment Act*, 2007. Decisional law deems constructive dismissal an unfair labour practice and the burden to prove the ingredients thereof rests on the shoulder of the employee. In *Max Masoud Roshankar & another vs. Sky Aero Limited* [2015] eKLR, Mbaru, J. took enunciated that “57. the Court further held that in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that indeed there were intolerable conditions, frustrations, breaches that trust and confidence supposed to be enjoyed in a conducive workplace environment dissipated and thus repudiation of the contract.”
33. I now embark on analysis, interrogation, assessment and evaluation of each of the eight issues, seriatim.

**(i) First, determination of the Claimant’s gross monthly pay and whether this Court has jurisdiction to determine this cause**

34. For purposes of jurisdiction of this Court, it is prudent at the earliest to settle the Claimant’s gross monthly pay along with the jurisdiction of this Court.
35. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by *the Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of *the Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See the locus classicus on this subject namely the Court of Appeal decision in *Owners of Motor Vessel “Lillian S” vs. Caltex Oil (K) Ltd* [1989] KLR 1, per Nyarangi, JA.
36. Article 2(2) of *the Constitution* provides that no person may claim or exercise State authority except as authorised under this Constitution.



37. Since Jurisdiction is everything, the Court must inquire into its jurisdiction before Judgement is rendered. Without it, a Court has no power to make one more step and should instead down tools in respect of the matter before it, the moment it holds the view that it lacks it. See the said Owners of Motor Vessel “Lillian S” case.
38. Jurisdiction is not a mere procedural technicality. It flows from either *the Constitution* or legislation or both. See the Supreme Court decisions in Samuel Kamau Macharia vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR; and In the Matter of Interim Independent Electoral Commission [2011] eKLR.
39. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.
40. Article 162 of *the Constitution* enshrines the system of Courts in Kenya. Article 162(4) of *the Constitution* provides that subordinate Courts are the Courts established under article 169 of *the Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169.
41. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1)(a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in *the Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates’ Courts, *the Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof.
42. In line with the command of Article 169(2) of *the Constitution*, Parliament repealed the *Magistrates’ Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates’ Courts Act*, 2015. In the said re-enacted Act, the Preamble reads thus “AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of *the Constitution*; to confer jurisdiction, functions and powers on the Magistrates’ Courts; to provide for the procedure of the Magistrates’ Courts, and for connected purposes”. The pre-ambule clearly indicates that the enactment is to actualize among other intentions, the command of *the Constitution* contained in Article 169 (2) of *the Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates’ Courts. Categorically, sections 6, 7, 8, 9 and 10 of the *Magistrates’ Courts Act*, 2015 is dedicated to the jurisdiction of Magistrates. Section 6 provides for the criminal jurisdiction of Magistrates’ Courts; section 7 provides for civil jurisdiction of the said Courts; section 8 provides for claims relating to violation of human rights jurisdiction of the said Courts; section 9 provides jurisdiction on labour, employment, environment and land; and finally, section 10 provides for jurisdiction to punish for contempt of Court. I will focus on section 9(b) of the Act for now. The text of section 9 (b) the Magistrate’s Court Act, which for ease of contextualization, I wish to recapitulate them read as follows: “9. A Magistrate’s Court shall — ... (b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations.”
43. The said section 29 of the Employment and Labour Relations Court provides as follows: “(1) The Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties.



- (2) For purposes of subsection (1), the Chief Justice may designate a Judge in a county as a Judge for the purposes of this Act. (3) The Chief Justice may, by notice in the Gazette, appoint certain Magistrates to preside over cases involving employment and labour relations in respect of any area of the country. (4) Subject to Article 169(2)(a) of *the Constitution*, the Magistrates appointed under subsection (3) shall have jurisdiction and powers to handle— (a) disputes relating to offences defined in any Act of Parliament dealing with employment and labour relations; (b) any other dispute as may be designated in a Gazette notice by the Chief Justice on the advice of the Principal Judge.” {Emphasis supplied}
44. This Court is alive to the fact that the jurisdiction of this Court donated by section 9 (b) of the *Magistrates’ Courts Act*, 2015 and section 29 of the Employment and Labour Relations Court, was successfully challenged in *Malindi Law Society vs. Attorney General & 4 others* [2016] eKLR, per Emukule, Chitembwe & Thande, JJ., this Court is also alive to the fact that on appeal, the decision of the High Court was set aside and the jurisdiction of this Court was affirmed by the Court of Appeal in *Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 others* [2017] eKLR, per Waki, JA (as he then was), Nambuye, Musinga, Gatembu & Murgor, JJA.
45. In Gazette Notice Number 6024 dated 10<sup>th</sup> June 2018, the Chief Justice Emeritus, His Lordship David Kenani Maraga appointed all Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine employment and labour relations cases within their respective areas of jurisdiction as follows: “1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed KSh. 80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016. 2. Matters relating to the following specific areas— (i) offences under the *Work Injury Benefits Act*, 2007 (ii) offences under the *Employment Act*, 2007 (iii) offences under the *Labour Institutions Act*, 2007 (iv) offences under *Occupational Safety and Health Act*, 2007; and (v) offences under the *Labour Relations Act*, 2007.”
46. Again, this Court is alive to the fact this designation through the said gazette notice was unsuccessfully challenged in *Watson Burugu vs. Attorney General & 2 others* [2021] eKLR, per W. Korir.
47. It follows that unlike the Employment and Labour Relations Judge who has general and unlimited jurisdiction in employment and labour relations matters, the jurisdiction of a Magistrate in such matters is limited and affected by three key determinative factors: (i) appointment by the Chief Justice; (ii) the pecuniary limit as set by the Chief Justice from time to time, but now standing at a monthly gross pay not exceeding Kshs. 80,000; and (iii) the limitation of time to bring the claim under section 90 of the *Employment Act*, 2007.

#### **Determination**

48. The Claimant’s evidence is that her gross monthly pay as at 9<sup>th</sup> February 2021 was Kshs. 80,000. This was not denied by the Respondent. It was actually confirmed by the Respondent.
49. I thus conclude that first, this Court being presided by a Principal Magistrate passes the first hurdle of rank, being within the ranks contemplated in Gazette Number 6024 dated 10<sup>th</sup> June 2018. Second, the gross monthly pay (of Kshs. 80,000) falls within the pecuniary limit of this Court as set in the same Gazette Notice. Wherefore I conclude that this Court has jurisdiction to hear and determine this cause.

#### **(ii) Whether this claim is maintainable and/or sustainable**

50. Sustainability of employment disputes is chiefly affected by sections 45(3) and 90 of the *Employment Act*.



51. Section 35 of the *Employment Act*, 2007 provides for termination of a contract of employment. Section 35 (4) of the *Employment Act*, 2007 provides that “Nothing in this section affects the right — (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.” Although the said section 35(4)(a) permits an employee whose contract has been terminated to question the lawfulness and fairness of the termination in Court, sustainability of such a claim is affected by section 45(3) of the same Act which limits the right to question the lawfulness and fairness to only an employee who has served continuously for a period of thirteen months. Section 45(3) aforesaid provides that “(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.” The implication is that employees who have served for a period less than thirteen months cannot challenge the termination however illegal or unfair it may be. However, this legislative stance was found inconsistent with Article 41 of *the Constitution* in by Lenaola, J. in Samuel G. Momanyi vs. Attorney General & another [2012] eKLR, His Lordship rendered himself as follows: “26. I wholly agree and as I have shown above, Section 45(3) is unreasonable and has the opposite of what the object of the *Employment Act* was intended to be. In his Ruling, Rika J. (above) labored to show that the Applicant would otherwise have been heard on his claim against the 2<sup>nd</sup> Respondent but for the barrier created by Section 45(3). The learned judge then severed the Petitioner’s claims and struck out what he thought fell under Section 45 but retained for hearing what fell outside it. Clearly, the Law was oppressive but the judge’s hands were tied. 27. I have said enough to show that *the Constitution* must be upheld and Section 45(3) declared invalid to the extent of its inconsistency.”
52. What is the limitation period? Section 90 of the *Employment Act*, 2007, stipulates that “Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act* (Cap 55), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.” In construing section 90 of the *Employment Act*, 2007 on whether the Court has jurisdiction to extend time in Divecon vs. Samani [1995-1998] 1 EA 48, the Court of Appeal held that “No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no Court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.” The same view has been maintained in inter alia Maria Machochi vs. Total (K) Industrial Cause Number 2 of 2012; Beatrice Kahai Adagala vs. Postal Corporation of Kenya [2015] eKLR; Josephat Ndirangu vs. Henkel Chemicals (EA) Limited [2013] eKLR; Attorney General & Another vs. Andrew Maina Githinji & another [2016] eKLR; Peter Nyamai & 7 others vs. V.M. Clarke Limited, Cause Number 78 of 2012 (ELRC Mombasa); Muiru Mwangi Muita vs. Greenpark Water Services Ltd [2016] eKLR; and Samson Wanyoike Kimani vs. Bliss Flora Limited [2018] eKLR, et alia.
53. Reasons wherefore this Court concludes that notwithstanding the provisions of section 45(3) of the *Employment Act* (which has since not been amended to bring it in conformity with the said holding), any and indeed this Claimant has brought herself within the avail of both sections 35(4)(a) and Article 41 of *the Constitution*. Further, the Claimant having claimed to have been constructively dismissed on 9<sup>th</sup> February 2021 and brought this action on 15<sup>th</sup> June 2021, this Court finds that this claim was filed within time. I thus conclude that this claim is maintainable.



### **(iii) Whether the Claimant was an employee of the Respondent**

54. In this regard, both oral and documentary evidence was led to the effect that the Claimant was an employee of the Respondent between 1<sup>st</sup> August 2020 and 9<sup>th</sup> February 2021. In support of this claim, the Claimant exhibited an appointment letter dated 5<sup>th</sup> August 2020 (the Claimant's Exhibit 1); an Employment Termination Agreement dated 9<sup>th</sup> February 2021 (the Claimant's Exhibit 2); a confirmation letter dated 5<sup>th</sup> November 2020 (the Claimant's Exhibit 3); a payslip dated 31<sup>st</sup> December 2020 (the Claimant's Exhibit 4); and a resignation letter dated 1<sup>st</sup> February 2021 (the Claimant's Exhibit 8).
55. The Respondent did not deny this assertion and actually admitted in cross-examination. Wherefore this Court concludes that the Claimant was an employee of the Respondent.

### **(iv) The date the Claimant was employed by the Respondent**

56. In this regard, both oral and documentary evidence was led to the effect that the Claimant was employed by the Respondent on 5<sup>th</sup> August 2020. In buttressing this, the Claimant exhibited an appointment letter dated 5<sup>th</sup> August 2020 (the Claimant's Exhibit 1); an Employment Termination Agreement dated 9<sup>th</sup> February 2021 (the Claimant's Exhibit 2); and a confirmation letter dated 5<sup>th</sup> November 2020 (the Claimant's Exhibit 3) all of which speak to this date.
57. Again, the Respondent did not deny this assertion and actually admitted in cross-examination. Wherefore this Court concludes that the Claimant was an employee of the Respondent effective 5<sup>th</sup> August 2020.

### **(v) Whether the Claimant has proved on a preponderance of probabilities that she was constructively dismissed**

58. The Claimant contends that she was compelled to resign on 1<sup>st</sup> February 2021 on account of the Respondent's persistent frustration and refusal to comply with the lawful procedures in its dealings with the employees.
59. The Respondent fervently denied this specific allegation.
60. Article 41(1) of *the Constitution* of Kenya provides that: "(1) Every person has the right to fair labour practices." Article 47 (1) & (2) provides that "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."
61. The law takes cognizance that a contract of employment is terminable but the same law commands that the termination be effected within the four corners of *the Constitution* and *Employment Act*, 2007. And so, the law prohibits termination of a contract of employment unfairly (within the meaning of unfair termination assigned by section 45(2) of the *Employment Act*, 2007). See section 45(1) of the *Employment Act*, 2007. An employee whose contract of employment has been terminated therefore reserves a right to question the termination in a Court of law on grounds that either the termination was unlawful or unfair. Section 35 of the *Employment Act*, 2007 provides for termination of a contract of employment. Section 35 (4) of the *Employment Act*, 2007 provides that "Nothing in this section affects the right — (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law."



62. What is deemed unfair termination? The markings of an unfair termination are found in sections 43, 45 and 46 of the *Employment Act*, 2007. A termination of employment by an employer is unfair if the employer fails to prove in Court that the reason for the termination is not only valid but also fair (fair in the sense that it is related to the employee's conduct, capacity or compatibility; based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure); if the reasons assigned is one of the reasons prohibited in section 46 of the *Employment Act*, 2007; if the employer did not act in accordance with justice and equity in terminating the employment of the employee (including the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee; handling of any appeal against the decision; the conduct and capability of the employee up to the date of termination; the extent to which the employer has complied with any statutory requirements connected with the termination including the issuing of a certificate under section 51 and the procedural requirements set out in section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination, and existence of any previous warning letters issued to the employee). The text of section 45(2) of the *Employment Act*, 2007 provides that "(2) A termination of employment by an employer is unfair if the employer fails to prove — (a) that the reason for the termination is valid; (b) that the reason for the termination is a fair reason — (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure. (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. (4) A termination of employment shall be unfair for the purposes of this Part where — (a) the termination is for one of the reasons specified in section 46; or (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee. (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider — (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any previous warning letters issued to the employee."
63. And what are the reasons which the law deems to constitute unfair termination within section 45(4) (a) of the *Employment Act*, 2007? The unfair reasons include pregnancy; taking leave or proposal for leave; membership or proposed membership of a trade union; participation or proposed participation in activities of a trade union outside working hours or with the consent within working hours; seeking of office as or acting or having acted in the capacity of an officer of a trade union or a workers' representative; refusal or proposed refusal to join or withdraw from a trade union; an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability; an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or an employee's participation in a lawful strike. The text of section 46 of the *Employment Act*, 2007 reads: "The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty — (a) a female employee's pregnancy, or any reason connected with her pregnancy; (b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract; (c) an employee's membership or proposed



membership of a trade union; (d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours; (e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative; (f) an employee's refusal or proposed refusal to join or withdraw from a trade union; (g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability; (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or (i) an employee's participation in a lawful strike."

64. And so, termination of a contract of employment without a lawful, fair and justifiable reason is deemed unfair. Section 43 of the *Employment Act*, 2007 places a burden on the shoulders of the employer, if a suit is filed, to prove the lawful and justifiable reason(s) for termination failing which the termination is deemed unfair termination within the meaning assigned under section 45 of the Employment, 2007 (discussed supra). Section 43 aforesaid reads: "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." {Emphasis supplied}}
65. From the Statement of Claim and written Submissions of the Claimant, I gather that the Claimant to be asserting that she was constructively dismissed. What amounts to constructive dismissal?
66. There is no statutory formulation of constructive dismissal and I therefore resort to secondary sources. Henry Campbell Black (in the said Dictionary, Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), at page 530, defines an "constructive discharge" as follows: "... A termination of employment brought about by making the employees working conditions so intolerable that the employee feels compelled to leave... "Most constructive discharges fall into one of two basic fact patterns. First, the employer can cause a constructive discharge by breaching the employee's contract of employment in some manner short of termination. Second, the employer can make working conditions so intolerable that the employee feels compelled to quit."
67. In breathing life to this concept in Kenya in *Kenneth Kimani Mburu & Another vs. Kibe Muigai Holdings Limited* [2014] eKLR, Rika, J. simplified it as follows: "47... constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed."
68. In *Milton M Isanya vs. Aga Khan Hospital Kisumu* [2017] eKLR, M. Onyango, J., construed constructive dismissal in the following words "In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation."
69. In *Nathan Ogada Atiagaga vs. David Engineering Limited* [2015] eKLR, the concept was defined as follows: "Constructive dismissal, occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer



- makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”
70. If, therefore, 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 and if the employee takes this step, he should be deemed to have been constructively dismissed. In this regard, the employee is entitled to leave with or without giving notice. See *Leena Apparels (EPZ) Limited vs. Ngewu Juma Ndokolani* (2018) eKLR; *Pamela Nelima Lutta vs. Mumias Sugar Co. Ltd* (2017) eKLR; and *Western Excavating (ECC) Ltd vs. Sharp* [1978] ICR 222 or 1978 QB 761, which has been adopted locally as reflecting the correct principles of constructive dismissal, in which Lord Denning MR summarized the principal considerations 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.”
  71. It follows that the threshold of constructive dismissal is not reached if the employee left voluntarily and there is no evidence of a hostile and intolerable environment. See *Sophie Muthoni Njagi vs. Rift Valley Railways (Kenya) Limited* [2020] eKLR, per M. Onyango, J.; and *Milton M Isanya vs. Aga Khan Hospital* (2017) eKLR.
  72. How does it happen actually? In *Nathan Ogada Atiagaga vs. David Engineering Limited* [2015] eKLR, Mbaru, J. had this to say about how constructive dismissal happens: “11. Constructive dismissal, occurs when an employee resign because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge...The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.”
  73. And so, the ingredients were delineated in *Maria Kagai Ligaga vs. Coca Cola East and Central Africa Limited Nairobi ELRC Cause Number 9 of 2011 (UR)*, by Rika, J. as follows: “Constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are: a. The employer must be in breach of the contract of employment; b. The breach must be fundamental as to be considered a repudiatory breach; c. The employee must resign in response to that breach; and d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.” See also *Kenneth Kimani Mburu & Another vs. Kibe Muigai Holdings Limited* [2014] eKLR, per Rika, J.; and *Emmanuel Mutisya Solomon vs. Agility Logistics, Cause No.1448 of 2011 (UR)*.
  74. The Maria Kaigai case rose to the Court of Appeal and the broad principles which govern constructive dismissal were enunciated in *Coca Cola East and Central Africa Limited vs. Maria Kagai ligaga* [2015] eKLR, where Court set down the following broad guiding principles: “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."

75. The burden to prove the ingredients of constructive dismissal, rests on the shoulder of the employee. In *Max Masoud Roshankar & another vs. Sky Aero Limited* [2015] eKLR, Mbaru, J. took enunciated that "57. the Court further held that in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that indeed there were intolerable conditions, frustrations, breaches that trust and confidence supposed to be enjoyed in a conducive workplace environment dissipated and thus repudiation of the contract."

### **Determination**

76. Construing from the test and threshold of constructive dismissal discussed supra, both the averment and evidence of constructive dismissal must necessarily be characterized with specificity, exactitude, precision and clarity. In her Statement of Claim and witness statement, the Claimant did not deem it fit to plead and adduce particulars of the alleged persistent frustration and refusal to comply with the lawful procedures in its dealings with the employees. This Court, therefore, finds that both Claimant's averment and evidence in this regard, lacking in specificity. Instead, the averment and evidence in this regard are imprecise, underprovided, insufficient and thus easily contestable. No history of such incessant frustrations - ahead of tendering her resignation on 1<sup>st</sup> February 2021 - was depicted or demonstrated through the Claimant's witness statement. And so, at the close of the Claimant's evidence, it was the Claimant's word against the Respondent's word, with nothing more to buttress the probative value of the Claimant's evidence. Constantly, sight should not be lost on the fact that the weight of evidence is not determined mathematically or by fervent or sometimes emotive pleas, but its sum effect in inducing and convicting the Court's belief. In this connection, the Claimant's word would have borne more weight had corroborative evidence been tendered, at minimum carried in the resignation letter, but none such evidence was so tendered to corroborate the Claimant's averments.
77. And so, on the scale of preponderance of probabilities, it is arduous to conclude that it is more probable than not that the Claimant was subjected to a harsh, unconducive and intolerable environment as to make it unimaginable to survive and perform.
78. The foregoing findings yield only one conclusion that the Claimant's evidence has thus failed to surmount the test and threshold of constructive dismissal that the working conditions were so intolerable or that the treatment by the Respondent was sufficiently bad or that the breach went to the root of the contract of employment or that the Respondent's conduct depicted a picture that it no longer intended to be bound by one or more of the essential terms of their contract, that the Claimant felt compelled to quit.

**(vi) Whether the Claimant has proved on a preponderance of probabilities that there was an Employment Termination Agreement and whether it stands the legal test of an instrument or**



**document which can legally and properly so bind the Respondent; and whether the Claimant is entitled to the reliefs arising therefrom**

79. The Claimant avers that after tendering her resignation letter on 1<sup>st</sup> February 2021, the Respondent was not desirous of the Claimant's service for the month of February and in this connection, through the Respondent's General Manager, one Jennifer Mulee Kyengo, the Claimant was on 9<sup>th</sup> February 2021 invited to execute an Employment Termination Agreement of even date.
80. The Respondent admitted that the subject Employment Termination Agreement was executed by its General Manager but contested that it was executed through collusion between the Claimant and the said general Manager, without knowledge and authority of the directors of the Respondent and contrary to the express term of Clause 14 of the contract of employment between the General manager and the Respondent dated 2<sup>nd</sup> January 2020 (exhibited as the Respondent's Exhibit 3).
81. This Court, as of necessity, must turn to consider and conduct a deep excavation of the corporations law and in particular, the internal processes and procedures of executing documents and in particular, instances where an officer of a company financially commits it, to answer the question whether the said agreement can legally and properly so bind the Respondent; and whether the Claimant is entitled to the reliefs arising therefrom.
82. In regard to the view taken by the Respondent, this is Court is alive to the special relationship between a corporation and a Director. In particular, I wish to restate the law that in a corporation framework, a Director is not an ordinary mortal. Cognizant of this, the law has imposed onerous duties and responsibilities in a Director, fiduciary in nature. The fiduciary nature of the duties come complete with the common law duty of care and skill. Unlike an employee, when a Director speaks, when a Director acts, he oozes with authority. Before I invoke old English decisions, I wish to restate that our company law did not start from scratch. We build our system on the English common law system. The "alter ego or directing mind" principle was laid in an English cause celebre decision of the House of Lords in *Lennard's Carrying Co Ltd vs. Asiatic Petroleum Co Ltd* [1915] AC 705. In this decision, springing from the reasoning and rebuttable presumption that Directors are the controlling minds of the company, Lords Viscount Haldane, Dunedin, Atkinson, Parker and Parmoor held that liability could be imposed on a corporation for the acts of the Directors. In his words, building his jurisprudence on the earlier decision of the House of Lords holding in *Salomon vs. Salomon* [1897] AC 92 to the effect that a company is a separate legal entity from its promoters, Lord Viscount Haldane established the "directing mind" principle of corporate liability in the following words: "...a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. .... It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so...whatever is not known about Mr. Lennard's position, this is known for certain, Mr. Lennard took the active part in the management of this ship on behalf of the owners, and Mr. Lennard, as I have said, was registered as the person designated for this purpose in the ship's register. Mr. Lennard therefore was the natural person to come on behalf of the owners and give full evidence not only about the events of which I have spoken, and which related



to the seaworthiness of the ship, but about his own position and as to whether or not he was the life and soul of the company. For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself...”

83. However, it is now established practice that *companies act* through their officers. And so, the question whether directors and/or officers who act in breach of the internal rules of a corporation can bind the corporation was a conundrum as early as 1856. In this regard, in circumstances where an officer of a company acts with ostensible authority of the company but in breach of the internal rules, the English Court of Exchequer Chamber enunciated what is now variously dubbed as the rule in *Turquand's case* or internal management rule or the indoor management rule to mitigate the harshness, injustice and inequity engendered in the strict application of the alter ego (directing mind) and the constructive notice principles, in *Royal British Bank vs. Turquand* [1856] 6 E & B 327, per Sir John Jervis, CJ with Pollock CB, Alderson B, Cresswell J, Crowder J and Bramwell B concurring. In 1875, the rule in *Turquand's case* received endorsement and thus entrenched in English law in the House of Lords in *Mahony vs. East Holyford Mining Co.* (1875) LR 7 HL 869, where Mahony had signed a cheque without authority and thus financially committing the company, Lord Hatherly re-stated the rule as follows: “When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, those so dealing with them externally are not to be affected by irregularities which may take place in the internal management of the company.” The heart and purport of this rule is that a person dealing in utmost good faith with an officer of a company acting with ostensible authority of the company - in the absence of facts or reasons compelling the person to inquire - is entitled to assume that the company has complied with its internal procedures and formalities and such person is under no obligation to investigate whether what, prima facie, appears to be the practice of the company has the blessings of the Directors or shareholders or is in accord with the Articles of Association of the company. In other words, the obligation of due diligence does not extend include investigations of internal decisions and how a company decides to run its affairs. The validation of this rule lies in the motivation to constrict prospective mischief where, in an undesirable transaction, a company internally instructs an officer who is within the knowledge of the directors/ company that (s)he is unqualified to undertake the undesirable assignment, with a conspiratorial view of later turning around citing the contractual plea of non est factum, it's not my act. And so, this rule is anchored on the equitable maxim that equality is equity and equity is equality, with the result that equity and justice - a win-win situation – is engendered to serve both the claimant and respondent. In this connection, if at all a company is genuine that director or officer acted without their knowledge and authority, the company is at liberty to seek indemnity from the director or officer using internal recovery mechanisms.
84. What then is the status of the rule in *Turquand's case* in Kenya? In Kenya, the rule in *Turquand's case* has been received, adopted and deployed in a legion of superior Court decisions notably the ELRC decision and the subsequent Court of Appeal decision in *Board of Trustees National Social Security Fund vs. Micheal Mwalo* [2015] eKLR, per Linnet Ndolo, J. and G.B.M. Kariuki, JA (as he then was), Ouko & J. Mohammed JJ.A.; *Florence Wangu Mwangi & Another vs. British American Insurance Company Limited & Another* [2010] eKLR, per Koome, J. (as she then was) now CJ; *Bougainville Estate Limited vs. Kenya Deposit Insurance Corporation (sued in their capacity as Receiver Managers of Imperial Bank Limited (In Receivership) & 3 others* [2017] eKLR, per Olola, J.; *Elgon Road Development Co Limited vs. Centre for Development Consult Limited* [2017] eKLR, per Sergon, J.; *East Africa Safari Air Limited vs. Anthony Ambaka Kegode & Another* [2011] eKLR; *Akuisi Farmers Company Limited vs. Robert Ndiritu Gitonga* [2019] eKLR, et alia.



85. First, in regard to the alleged collusion between the Claimant and the GM, like fraud, both the averment and evidence of collusion must of necessity be characterized with specificity, exactitude, precision and clarity. Both in the Statement of Response and Counter-Claim, and the witness statement of the only Respondent's witness, the Respondent did not deem it fit to plead and adduce particulars of the alleged collusion. At the close of the Respondent's evidence, it was the Respondent's word against the Claimant's word, with nothing more to buttress the probative value of the Respondent's evidence regarding the alleged collusion.
86. In accord with the rule in *turquand's* case and having considered Clause 4 of the Claimant's contract of employment dated 5<sup>th</sup> August 2020 (the Claimant's Exhibit 1) which provides that during her service, the reporting line is directly to the GM, it is the firm finding of this Court that in the absence of facts or reasons compelling the Claimant to inquire into the GM's authority to bind the Respondent, the Claimant was entitled to assume that the GM had complied with the Respondent's internal procedures and formalities and as such, the Claimant was under no obligation to inquire whether the said Employment Termination Agreement had the blessings of the Directors or shareholders of the Respondent.
87. Wherefore this Court concludes that on a preponderance of probabilities, the Claimant has proved that there was an Employment Termination Agreement and that it stands the test of an instrument or document which can legally and properly so bind the Respondent and the Claimant is, hence, entitled to the reliefs arising therefrom.

**(vii) Whether the Respondent has on a balance of probabilities made a case for restitution of Kshs. 170,000 by the Claimant**

88. An averment and evidence of financial loss just like an averment and evidence on constructive dismissal must of necessity be characterized with specificity, exactitude, precision and clarity. In its Statement of Response and Counter-Claim, and in the witness statement of the only Respondent's witness, the Respondent did not deem it fit to plead and adduce particulars of the alleged financial loss. This Court finds that both Respondent's averment and evidence in this regard, lacking in specificity. Again, this Court does not find difficulty in concluding that both the averment and evidence in this regard are generalized, woolly, imprecise, underprovided and thus easily contestable. At the close of the Respondent's evidence, it was the Respondent's word against the Claimant's word, with nothing more to buttress the probative value of the Respondent's evidence regarding the alleged financial loss. In this, the word of the Respondent would have borne more weight had corroborative evidence been tendered, but none was so tendered to corroborate the Respondent's averments.
89. Consequently, on the scale of preponderance of probabilities, it is arduous to conclude that there were losses amounting to Kshs. 170,000, occasioned by the Claimant.

**(viii) Which party will shoulder the costs of the claim and Counter-claim?**

90. This Court is reposed with discretionary power to determine not only whether costs shall be payable in a particular matter but also the person who shall shoulder the costs, the property which may be levied and the extent of the costs. Section 27 of the *Civil Procedure Act* provides that "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise



of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order. (2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

91. Whenever a Decree is for payment of money, a Court is reposed with discretionary power to award interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit. However, where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum. Section 26 of the [Civil Procedure Act](#) provides that “(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit. (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum.”
92. The law on costs and interest as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See *Morgan Air Cargo Ltd vs. Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See *Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another* [2016] eKLR, per C. Kariuki, J.
93. How then is this discretion exercised? Discretion is not the same thing as *carte blanche*. Beacons demarcating how discretion is exercised are as follows.
94. The first beacon is that discretion ought to be exercised with circumspection and judiciously. See *Christopher Kiprotich vs. Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and Another vs. Shah* [1968] EA 93 and *Mohindra vs. Mohindra* (1953) 20 EACA 56. Speaking of discretion, Lord Halsbury L. C., in the case of *Sharp vs. Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173 held that: “When it is said that something is to be done within the discretion of the authorities, that thing is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. It must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself.” In *Rooke’s case*, 5 Rep. 99b (1598), adverted to in approval by Mativo, J. in *Republic vs. Public Procurement Administrative Review Board & 2 others* [2018] eKLR, the Court attempted a definition of discretion as follows: “Discretion is a science, not to act arbitrarily according to men’s will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by *the Constitution* entrusted with.”



95. The second beacon is that costs follow the event unless the Court finds a good cause to negate this trajectory. See *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & another* [2016] eKLR. In this context, the meaning ascribed to the words “costs shall follow the event” is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J. (as he then was), *Judicial Hints on Civil Procedure* 2<sup>nd</sup> edition at page 99; *Dipchem East Africa Limited vs. Karutturi Limited (In Receivership)* [2015] eKLR, per Gikonyo, J.; *Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another* (2016) eKLR, per Mativo, J.; and *Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.
96. The third beacon which is closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See *Joseph Oduor Anode vs. Kenya Red Cross Society* [2012] eKLR, per Odunga, J.
97. The fourth beacon which is closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in *Jasbir Singh Rai & 3 others vs. Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ.
98. The fifth beacon which connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. See *Orix Oil (Kenya) Ltd vs. Paul Kabeu & 2 Others* (2014) eKLR; and *Morgan Air Cargo Ltd vs. Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J.
99. Regarding costs, upon considering the Claim and Counter-Claim, this Court has found no good cause to depart from the general proposition of the law that costs follow the event and accordingly, this Court exercises its discretion in favour of the Claimant.
100. Regarding interest, the Respondent having failed to promptly settle the claim at the date of the claim or soon thereafter, it translates that the Claimant would have had a capital sum to invest with gains thereon. On this premise, again, I exercise my discretion in favour of the Claimant.

## Part VI: Disposition

101. Wherefore this Court enters Judgement in favour of the Claimant in the following terms:
  - i. A declaration is hereby issued that the Claimant is entitled to payment of the terminal benefits as more particularly set out under Clauses 2 and 3 of the Employment Termination Agreement dated 9<sup>th</sup> February 2021.
  - ii. Accordingly, the Respondent shall pay the Claimant Kshs. 160,000 in terminal benefits composed of the following:
    - i. Full salary of January 2021 in the sum of Kshs. 80,000.
    - ii. One month’s salary (for the month of February) in lieu of notice in the sum of Kshs. 80,000.
    - iii. In accord with section 49(2) of the *Employment Act*, 2007, the terminal benefits in (b) supra are subject to statutory deductions.



- iv. The Respondent shall issue the Claimant with a Certificate of Service within a period of 60 days.
- v. The Respondent shall shoulder the costs of the Suit and Counter-Claim.
- vi. The sums supra shall attract interest, at Court rates, from 9<sup>th</sup> February 2021 until payment in full.

102. It is so ordered.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS  
23<sup>RD</sup> DAY OF MARCH, 2023**

.....

**C.N. Ondieki**

**Principal Magistrate**

Advocate for the Claimant

Advocate for the Respondent

Court Assistant: Mr. Kamau

