



**Kamau v Gibb Africa Limited (Cause E859 of 2023)  
[2025] KEELRC 3038 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3038 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E859 OF 2023  
SC RUTTO, J  
OCTOBER 31, 2025**

**BETWEEN**

**MICHAEL NDUNG’U KAMAU ..... CLAIMANT**

**AND**

**GIBB AFRICA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The instant suit is part of a series of causes separately filed against the Respondent. Pursuant to the directions issued by the Court on 19<sup>th</sup> February 2025, the instant suit was tried as a test suit in accordance with Rule 62 of the Employment and Labour Relations Court (Procedure) Rules, 2024. Consequently, it was clustered with ELRC Cause Nos. E850 of 2023, E854 of 2023, E856 of 2023, E903 of 2023, E852 of 2023, E869 of 2023, E867 of 2023, E855 of 2023, and E868 of 2023.
2. It is common cause that the Claimant was employed by the Respondent with effect from 1<sup>st</sup> December 2004 in the position of Senior Project Engineer at job grade E8, at an initial salary being Kshs. 150,000/=.
3. The Claimant avers that he diligently discharged his duties for over 20 years, during which his exemplary performance earned him a promotion to the position of Operations Manager, Structures (Buildings), within the Structures and Facilities Department on 26<sup>th</sup> May 2009.
4. He further states that his salary was progressively reviewed over time, with the last adjustment raising his gross monthly pay to Kshs. 653,769/=.
5. The Claimant asserts that on 20<sup>th</sup> August 2021, he tendered his resignation to the Respondent, effective 30<sup>th</sup> September 2021.



6. He contends that at the time of his resignation, he was owed salary arrears amounting to Kshs. 11,673,312/=. As of 19<sup>th</sup> January 2023, the Respondent had paid him Kshs. 1,970,179.10, leaving an outstanding balance of Kshs. 9,703,132.90.
7. The Claimant maintains that his resignation was occasioned by constructive dismissal arising from the Respondent's failure to pay his salary arrears as and when the same became due.
8. He further avers that despite many promises by the Respondent to settle his salary arrears in full, the said promises have never been honoured.
9. It is against this background that the Claimant seeks the following reliefs against the Respondent:
  - a. A declaration that the Claimant's fundamental right under Article 41 of *the Constitution* of Kenya 2010 to fair labour practices has been violated and/or infringed by the Respondent.
  - b. A declaration that the claimant's resignation amounted to constructive dismissal.
  - c. An award of Ksh. 23,960,335.90/= made up as follows:
    - i. Unpaid Salary Ksh.9,703,132.90/=
    - ii. 12 Months' Salary as Compensation. Ksh.7,845,228/=
    - iii. Service Pay Ksh. 6,411,975/=
  - d. A mandatory directive to the Respondent to issue the Claimant with a Certificate of Service that is not prejudicial to the Claimant.
  - e. Costs for this suit
  - f. Interest at Court's rates on (c) and (e) until payment in full.
  - g. Any other relief that this Honorable Court may deem fit and just to grant.
10. The Respondent has opposed the Claim through a Statement of Response dated 4<sup>th</sup> December 2023, wherein it contends that the Claimant voluntarily resigned from his employment.
11. The Respondent, while putting the Claimant to strict proof, has denied any liability for payment of salary arrears.
12. Accordingly, the Respondent holds that the Claimant is not entitled to any of the reliefs sought in the Statement of Claim and prays that the suit be dismissed with costs.
13. The matter proceeded for hearing on 18<sup>th</sup> June 2025, during which both parties called oral evidence in support of their respective cases.

#### **Claimant's Case**

14. The Claimant testified in support of his case as CW1 and, at the outset, sought to adopt his witness statement together with the list and bundle of documents filed alongside the Statement of Claim as his evidence in chief.
15. In his testimony, the Claimant stated that he resigned from the Respondent's employment due to non-payment of his salary.
16. He further testified that prior to his resignation, the Respondent owed him net salary arrears amounting to Kshs. 9,703,132.90, having arrived at this figure by deducting the payments received



from the total amount due. He added that as of 19<sup>th</sup> January 2023, he had only been paid Kshs. 1,970,179.10 in respect of salary from January 2021.

17. The Claimant further explained that his claim was based on the net salary since the Respondent had been deducting his PAYE (Pay As You Earn) and remitting the same to the Kenya Revenue Authority despite failing to pay his actual salary.
18. He also averred that his resignation letter did not contain any indication that he was waiving or foregoing his salary or any other employment benefits.
19. In conclusion, the Claimant urged the Court to grant the reliefs sought in his Statement of Claim.

### **Respondent's Case**

20. The Respondent presented its oral evidence through Ms. Ruth Odengo, who testified as RW1. Ms. Odengo introduced herself as the Respondent's Human Resource Manager and similarly adopted her witness statement, together with the list and bundle of documents filed on behalf of the Respondent, as her evidence in chief.
21. RW1 testified that around the year 2020, the Respondent encountered financial difficulties occasioned by the Covid-19 pandemic, as several of its clients either delayed or failed to make payments. This in turn led to cash flow challenges that hindered the Respondent's ability to pay full salaries.
22. She explained that, as a result, the Respondent made partial salary payments as and when funds were received from clients, rather than waiting for lump-sum payments to clear the arrears in full.
23. RW1 further stated that through a letter dated 20<sup>th</sup> August 2021, the Claimant voluntarily terminated his employment with the Respondent. She added that the Claimant did not issue any prior notice of resignation as required under the terms of his employment contract.

### **Submissions**

24. The Claimant submitted that the Respondent's persistent failure to pay his salary arrears in full and on time amounted to a breach of the duty of trust and confidence that he placed on the Respondent. He contended that this sustained conduct became intolerable, ultimately compelling his resignation, as it was untenable to continue rendering services without remuneration.
25. In the same vein, it was argued that the Respondent's failure to remit the Claimant's salary when it fell due constituted a serious and fundamental breach that went to the root of the employment contract. On this score, the Claimant submitted that he was entitled to consider himself constructively dismissed and to resign.
26. In support of these submissions, reliance was placed on *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR) and *Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited* [2014] KEELRC 723 (KLR).
27. Referring to the case of *Kakai v Egerton University (Employment and Labour Relations Cause E045 of 2023)* [2025] KEELRC 2057 (KLR), the Claimant contended that even during the COVID-19 period, the Respondent remained contractually bound to remunerate him, as he continued to diligently discharge his duties.
28. The Claimant maintained that his untimely resignation from a permanent and pensionable position was occasioned solely by the Respondent's continued failure to pay his full salary as and when due. He therefore urged the Court to find that he was constructively dismissed.



29. On its part, the Respondent submitted that the delay in payment of the Claimant's salary was occasioned by financial constraints arising from delayed payments by its clients. It asserted that the situation was neither deliberate nor malicious and had been duly communicated to employees, with partial payments made as funds became available.
30. The Respondent added that all employees were informed of the financial challenges, following which some opted to resign while others entered into sub-consultancy arrangements. It argued that these circumstances did not amount to constructive dismissal, but rather reflected an employer experiencing genuine financial hardship while making reasonable efforts to meet its obligations.
31. Citing the case of *Kennedy Nyanguncha Omanga v Bob Morgan Services Limited* [2013] KEELRC 810 (KLR), the Respondent further submitted that the Claimant is excluded from claiming service pay under section 35(6)(d) of the *Employment Act*.

### **Analysis and Determination**

32. Flowing from the record, the Court has isolated the following issues for determination:
  - a. Whether the Claimant's resignation amounted to constructive dismissal; and
  - b. Whether the Claimant is entitled to the reliefs sought.

### **Constructive dismissal?**

33. The Claimant has averred that he was constructively dismissed by the Respondent, asserting that his resignation was precipitated by the Respondent's persistent failure to pay his salary as and when the same fell due. The Respondent, on its part, refutes this claim and maintains that the Claimant voluntarily resigned from his employment, adding that it does not owe him any salary.
34. In light of these rival positions, the central issue for determination is whether the Claimant was indeed constructively dismissed.
35. The Black's Law Dictionary (10<sup>th</sup> Edition, p.561) defines constructive dismissal as "an employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit."
36. Fundamentally, constructive dismissal arises where an employee is compelled to leave their employment, not by choice, but as a direct consequence of the employer's conduct.
37. In the leading authority of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal outlined the guiding principles for determining constructive dismissal, key among them being that, 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.
38. The central question, therefore, is whether, in the present case, the Claimant was entitled to regard himself as constructively dismissed due to the Respondent's alleged failure to pay his salary.
39. It is not in dispute that there were delays in the payment of the Claimant's salary. Indeed, the Respondent has admitted as much, explaining that the delays were occasioned by financial challenges arising from the Covid-19 pandemic and the failure of its clients to make timely payments.



40. This admission corroborates the Claimant's assertion that the Respondent failed to pay his salary as and when it fell due.
41. The obligation to remunerate an employee for work performed is a fundamental rule in employment relations. Section 17(1) of the [Employment Act](#) encapsulates this obligation as follows:

“Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...”
42. Applying the principles established in *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* (supra), it is evident that the Respondent's failure to pay the Claimant's salary as and when the same fell due amounted to a fundamental breach that went to the root of the employment contract.
43. Indeed, the Respondent's conduct clearly demonstrated an intention not to be bound by an essential term of the contract, namely, the obligation to pay wages.
44. Accordingly, the Claimant was justified in treating himself as constructively dismissed and was therefore entitled to resign, with or without notice. In cases of constructive dismissal, an employee may leave employment without notice. Such was the holding in *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* (supra).
45. It is this Court's view that, despite the financial difficulties cited by the Respondent, the prolonged failure to pay the Claimant's salary timely was unjustifiable and amounted to an unfair labour practice.
46. While the Respondent may have experienced cash flow challenges, it nonetheless had several lawful options available when it became apparent that the situation could not be remedied within a reasonable time, such as declaring redundancy.
47. The [Employment Act](#) provides mechanisms through which an employer may lawfully terminate an employment relationship where operational needs so require.
48. In the present case, the Respondent, however, chose not to invoke any of these measures, opting instead to retain the Claimant in employment without pay. Notably, there is no evidence or suggestion from the Respondent that the Claimant was not performing his duties during the period in question.
49. In the final analysis, the Court finds that the Respondent's actions amounted to constructive dismissal hence the Claimant's termination from employment was unfair and unlawful.

## Reliefs

### Compensatory damages

50. Having found that the Claimant's termination was unfair and unlawful by reason of constructive dismissal, the Court holds that he is entitled to compensation pursuant to Section 49(1) of the [Employment Act](#). Consequently, the Claimant is awarded compensatory damages equivalent to three (3) months of his gross salary. In making this award, the Court takes judicial notice that a substantial portion of the period in question coincided with the onset of the Covid-19 pandemic. Therefore, it is more than probable that the Respondent's operations were adversely affected, resulting in financial constraints.



### **Unpaid Salary Arrears**

51. Whereas the Respondent has contended that it did not owe the Claimant any salary arrears, it failed to adduce any evidence before the Court to substantiate this assertion or to rebut the Claimant's claims.
52. Given that Section 74 of the *Employment Act* places a statutory obligation on employers to keep and maintain proper employment records, it was reasonably expected that the Respondent would produce such records to demonstrate that the Claimant's salary had been fully paid as and when due. The absence of this material evidence leaves the Court with no reason to doubt the Claimant's assertions that his salary was not remitted in full.
53. Further, this omission raises doubt as to how the Respondent was able to monitor salary payments and determine any outstanding balances in the absence of proper records.
54. What's more, during cross-examination, RW1 conceded that she was unaware whether the Claimant was owed any salary arrears at the time of his resignation and equally did not know whether he was paid any outstanding salary thereafter.
55. In view of the foregoing, the Court is satisfied that the Claimant has proved, on a balance of probabilities, that the Respondent failed to pay his salary in full as claimed.
56. For the foregoing reasons, the Claimant's claim for unpaid salary succeeds.

### **Service pay**

57. The Claimant has also sought payment of Kshs. 6,411,975.00 as service pay.
58. However, a review of the Claimant's pay slips indicates that he was making contributions to the National Social Security Fund and was a member of the Respondent's Retirement Benefits Scheme. In view of this, the Claimant does not qualify for service pay, as he falls within the exclusions provided under Section 35(6) of the *Employment Act*.

### **Orders**

59. In sum, the Court enters judgment in favour of the Claimant against the Respondent on the following terms:
  - a. A declaration is hereby made that the Claimant was constructively dismissed from employment by the Respondent, and consequently, his termination was unfair and unlawful.
  - b. The Claimant is awarded net salary arrears in the sum of Kshs. 9,703,132.90.
  - c. The Claimant is further awarded compensatory damages of Kshs. 1,961,307.00, equivalent to three (3) months of his gross salary.
  - d. Interest shall accrue on the amounts awarded under (b) and (c) at court rates from the date of judgment until payment in full.
  - e. The Respondent shall bear the costs of this suit.
  - f. The Respondent is directed to issue the Claimant with a Certificate of Service within fourteen (14) days from the date of this judgment.
60. Since this matter was being tried as a test suit, the Court's finding on liability herein shall equally apply to all the other matters within the same cluster, namely: ELRC Cause No. E850 of 2023 – Solomon



Ngatia Nderitu v Gibb Africa Ltd; ELRC Cause No. E854 of 2023 – Tom Simiyu Muniolo v Gibb Africa Ltd; ELRC Cause No. E856 of 2023 – Charles Nzuki Mutunga v Gibb Africa Ltd; ELRC Cause No. E903 of 2023 – Mark Wanganga v Gibb Africa Ltd; ELRC Cause No. E852 of 2023 – Solomon Gichuru v Gibb Africa Ltd; ELRC Cause No. E869 of 2023 – Samson Mwangi v Gibb Africa Ltd; ELRC Cause No. E867 of 2023 – Desalegn Abanet v Gibb Africa Ltd; ELRC Cause No. E855 of 2023 – Thomas Olouch v Gibb Africa Ltd; and ELRC Cause No. E868 of 2023 – Peter Ndungu v Gibb Africa Ltd.

**\*\*DATED,SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2025.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Orina instructed by Mr. Omanga

For the Respondent Mr. Kimanzi

Court Assistant Millicent

**ORDER**

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

**STELLA RUTTO**

**JUDGE**

