



**Kisenga v Ongair Limited (Cause E1090 of 2024)
[2025] KEELRC 3004 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3004 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1090 OF 2024
JW KELI, J
OCTOBER 30, 2025**

BETWEEN

LILY MKANJALA KISENGA CLAIMANT

AND

ONGAIR LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated the 29th of January 2025, the claimant, following her resignation from employment, sued the respondent and sought the following Orders:-
 - a. A declaration that the Claimant was constructively dismissed from employment by the Respondent.
 - b. An order directing the Respondent to pay the Claimant the unpaid salary of KES 772,450/-.
 - c. An order directing the Respondent to pay the Claimant one year's salary as compensation in lieu of termination of notice.
 - d. An order directing the Respondent to immediately remit the Claimant's statutory dues.
 - e. A mandatory injunction directed to the Respondent to remove the Claimant's name and image from its website forthwith.
 - f. General damages, exemplary damages and aggravated damages.
 - g. Interest on (v) at Court rates from the date of filing suit until payment in full.
 - h. Costs and interest of the suit.
2. The claimant, in support of the claim, filed her verifying affidavit, sworn on 19th September 2023; a list of witnesses of even date; a witness statement of even date; and a list of documents of even date,



with the bundle of documents attached. The claimant later filed a supplementary list of documents dated 30th July 2019.

3. The Respondent failed to file a Defense or accompanying documents, despite being properly served with the claim and the claimant's documents. The matter proceeded to a formal proof hearing on May 20, 2025.

Hearing and evidence

4. The claim was unopposed and proceeded for formal proof on May 20, 2025, where the claimant adopted her witness statement dated September 19, 2023, as her evidence in chief, along with the statement of claim. The claimant also produced her documents dated September 19, 2023. The claimant told the court she was 35 years old.

The Claimant's case in summary

5. The Claimant's case is that she was employed as the Head of Operations and Customer Success by the Respondent in mid-April 2016, and formalized the contract effective from 1st June 2016 at a gross salary of Kshs. 72,983/-. The parties later entered into a second contract of employment from 1st May 2017 at a gross salary of Kshs. 107,543/-. Starting two months after the Claimant joined the Respondent's employment, to the date of her departure, the Respondent unlawfully and unfairly withheld the Claimant's salary, and only paid the same intermittently leaving unpaid arrears, thereby creating working conditions that were unbearable. As a result of the denial of salary and the uncertainty surrounding the Claimant's employment status, she was constrained to resign in July 2018. As at the date of her resignation, the Respondent owed the Claimant salary arrears of Kshs. 772,450/- particularized hereunder:



Month	Salary (net) (Kshs)	Paid (Kshs)	Arrears (Kshs)
July-16	55,000	0	55,000
Aug-16	55,000	0	55,000
Sep-16	55,000	30,000	25,000
Apr-17	80,000	69,600	10,400
May-17	80,000	40,000	40,000
June-17	80,000	37,500	42,500
Jul-17	80,000	70,950	9,050
Aug-17	80,000	5,000	75,000
Sep-17	80,000	0	80,000
Oct-17	80,000	40,000	40,000
Nov-17	80,000	50,000	30,000
Dec-17	80,000	14,500	65,500
Jan-18	80,000	25,000	55,000
Feb-18	80,000	8,000	72,000
Mar-18	80,000	50,000	30,000
Apr-18	80,000	50,000	30,000
May-18	80,000	50,000	30,000
June -18	80,000	60,000	20,000
Sub Total	764,450		
Refunds	8,000		
TOTAL	772,450		

6. The Claimant states that for the duration of her employment, she was directed to file nil returns even though the pay slips showed that PAYE and other statutory deductions had been deducted, as the Respondent's directors indicated that they were "hiding certain tax issues". PAYE, NSSF and NHIF were not remitted by the Respondent despite them being deducted from the Claimant's salary.



7. In consideration for payment of the salary arrears, the Claimant was permitted by the Respondent to retain a work laptop she held as a lien. The agreement was that the salary arrears would be remitted despite the Claimant keeping the laptop. The Respondent compelled the Claimant to accept the sum of Kshs. 652,450/- only because the Respondent's Director felt that the Claimant had worked part-time for some months. However, this issue was never raised nor a warning letter issued during her employment. Another term of the settlement agreement between the parties was that the arrears would be paid through monthly payments of Kshs. 45,000/- starting October 2018. The monthly instalments were paid consistently until 19th February 2019 when the Respondent paid Kshs. 20,000 and went silent. While the Respondent admitted that the salary arrears were due and owing to the Claimant, they have never cleared the remainder of the arrears to date.
8. Despite the Claimant's exit from the Respondent's employment, the Respondent still maintains the Claimant's profile in its website <https://ongair.im/about>, where they misrepresent her as their customer success manager.
9. Flowing from the Respondent's conduct, the Claimant avers that she has suffered the following injuries:
 - a. Failure to remit the mandatory contribution under the National Social Security Fund under the National Social Security Funds Act; leaves her exposed to lack of pension.
 - b. Failure to remit the deducted PAYE to KRA; leaves her exposed to the crime of tax evasion.
 - c. Failure to remit the deducted National Hospital Insurance Fund (NHIF); leaves her exposed to lack of medical insurance to guarantee my right to highest attainable standards of health.
 - d. Misrepresenting her as the Respondent's employee whereas she is not; violates her freedom to change jobs and right to quit. When people look her up on search engines, they have an impression that she is still employed by the Respondent.
 - e. Discrimination-where other employees received their pay when she did not.
 - f. Denial of salary which infringes on her right to own property, right to adequate standard of living, right to access to further education, right to social security, right to medical assistance, right to adequate nutrition, right to social welfare benefits, right to enjoyment of scientific advancement, right to protection of wealth and right to human dignity

Determination

Issues for determination

10. The claimant outlined the following issues for determination in the undefended suit which the court adopted as the issues-
 - a. Whether the Claimant's resignation constituted constructive dismissal amount unfair termination.
 - b. Whether the Claimant is entitled to reliefs sought.
 - c. Whether the Claimant is entitled to costs of this suit.
 - a. Whether the Claimant's resignation constituted constructive dismissal amount unfair termination.



Claimant's submissions

11. The Claimant resigned from employment with the defendant in July 2018 following the unbearable working conditions. It is our humble submission that Respondent's fundamental breach of the employment contract led to the claimant's resignation which constitutes constructive dismissal. Payment of salary dues as and when they fall due constitutes of a material breach that leads to constructive dismissal. The Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR established the principles that amount to constructive dismissal:

“ 30. The legal principles relevant to determining constructive dismissal include the following:

- a. What are the fundamental or essential terms of the contract of employment?
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”

12. The claimant submitted that the Respondent's unlawful withholding of the Claimant's salary constituted a fundamental breach of the terms of the employment contract dated 15 June 2016 and 1st May 2017. This breach was legitimate cause for the Claimant to involuntarily resign rendering it an unfair termination. The unlawful withholding of the Claimant's salary is a material breach that goes to the root of the contract. The breach is admitted by the Respondent's director who promised to pay the salary on different occasions but failed to do so. See the e-mail correspondences between page 17 to 21 of the Claimant's List and bundle of documents. The position that an employer's conduct can amount to constructive dismissal was reiterated in *Nathan Ogada Atiagaga v David Engineering Ltd* (2015) eKLR where the court stated that: "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. "The Respondent neglected to pay the Claimant's salary which was in arrears making the working environment unbearable and causing the Claimant severe financial constraints. The Claimant was forced to take loans as exhibited at page 22 to 26 of the Claimant's list and bundle of documents.



13. The claimant contended that she relied on the threshold for a claim based on constructive dismissal reiterated as in *Seema Dahnani v Standard Chartered Bank Ltd* (Cause 489 of 2018) [2025] eKLR where the court stated as follows: "47. Back to the concept and principles governing constructive dismissal, the Court had earlier observed that it was fundamental that for a claim based on constructive dismissal to succeed, the employee must sufficiently demonstrate that the employer has either directly or indirectly created a near-impossible environment for the employee to continue working and it was no longer reasonable to consider the contractual relationship as existing. The conduct and or the obtaining environment must be so egregious that no reasonable employee would bear but terminate the relationship. "Lastly in *Kariamburi v Bins (Nairobi) Services Ltd* (Cause E433 of 2021) [2024] eKLR this Court found that resignation by the employee can be deemed as termination by the employer by stating the following: The law on constructive dismissal from employment is now fairly settled. An employee is considered as having been constructively dismissed from employment when the employer subjects him to an intolerable working environment which pushes the employee into resigning. Although the contract is terminated through the employee's act of resigning, the law considers the contract as terminated by the employer. This is because the employee is forced into resigning in order to escape the intolerable work environment. Thus, the resignation is considered as involuntary.
14. The claimant submitted that the factors that may force an employee into resigning in circumstances that constitute constructive dismissal are many. They include: unilateral variation of fundamental terms and conditions in a contract of service by the employer; demotion of an employee from his position at work; failure to allocate an employee work; and persistent failure or refusal to remunerate an employee among others." From the foregoing, it is evident that the Claimant was unfairly terminated contrary to Section 45 (1) of the *Employment Act* on account of constructive dismissal.
15. The claimant submitted that the concept of constructive dismissal is a common law legal principle. It is not provided for under the *Employment Act*. A Constructive dismissal is non-voluntary termination of employment by the employee on account of the conduct of the employer, which conduct is tantamount to repudiation of contract. The leading decision on issue of constructive dismissal is decision relied on by the claimant in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court of Appeal set out the legal principles to determine constructive dismissal as follows:- "The legal principles relevant to determining constructive dismissal include the following:-
 - a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
 - d. An objective test is to be applied in evaluating the employer's conduct.
 - e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
 - f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.



- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”The court upheld the decision to apply in the determination of the instant case.

Decision

16. The claimant submitted her letter of resignation dated July 18th, 2018, effective immediately (page 15 of the claimant’s bundle of documents). In the letter, the claimant stated it was not an easy decision to make, appreciated the support received during employment, and added that working with the CEO and the team had been a pleasure. To demonstrate the foregoing was not a voluntary resignation, the claimant produced email correspondence with Trevor, the CEO of the respondent, from December 27th, 2017, to January 3rd, 2019, which discussed non-payment of salary.
17. The claim for constructive dismissal was grounded on the allegation of salary delays throughout the entire period of employment. The court noted that the claim filed, initially via petition, was filed in court on February 10th, 2020. That the contract expired, and the claimant was issued a new contract for a different position on May 1st, 2017 (page 12 of the claimant’s bundle). The claims under the 2016 contract should have been filed in court within three years, that is, before May 1st, 2019 (section 89 of the *Employment Act*). Since that was not done, those claims expired. The court can only decide on claims related to the contract of May 1st, 2017 and will do so.
18. The employer admitted to salary arrears in communications before the court (see email correspondence at pages 17-19 of the claimant’s bundle). Payment of salary is central to the employment relationship, and the failure to pay salary when it is due amounts to repudiation of the contract. Applying the legal principles in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR) the court finds that the non-payment of salary was a material repudiation of the contract and meets the test stated in the said decision of Court of Appeal- ... ‘Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer? The conduct must be a fundamental or significant breach going to the core of the employment contract or which shows that the employer no longer intends to be bound by one or more of the essential terms’’. The court finds that the resignation was not voluntary, as it was driven by chronic non-payment of salary. The claimant even raised issues of unpaid rent, which was undoubtedly stressful. As a result, the resignation is deemed a constructive dismissal, and thus, an unfair termination of employment.

Whether the Claimant is entitled to the relief sought.

19. The claimant sought various reliefs and submitted on the same.
 - i. On the prayer for a Declaration that the Claimant was constructively dismissed and compensation for the same.
20. The claimant submitted that Section 49 of the *Employment Act* permits the trial court to award compensation up to a maximum of twelve (12) months’ salary. The claimant implored the Court to award the said 12 months as compensation for the unfair termination. The Court in *Rukunga v Epix Investments Limited (Cause E495 of 2023) [2025] KEELRC 1616 (KLR) (29 May 2025) (Judgment)* awarded 6 months and held as follows: ‘The Respondent’s overall conduct clearly made it impossible for the Claimant to discharge his duties. I therefore have no difficulty in reaching the conclusion that



he was constructively dismissed. Pursuant to the foregoing, I award the Claimant six (6) months salary in compensation. In making this award, I have considered the Claimant's length of service and the Respondent's conduct which forced him out of employment. I have further taken into account the withholding of the "Claimant's terminal dues for a period of five (5) months." The claimant contended that in her case the Respondent has never paid the Claimant's dues for over 5 years and thus a maximum of 12 months salary compensation is fair in the circumstances.

21. The court notes that the relevant period of employment is under contract of 1st May 2017, whose claims are within the 3-year statutory limitation period but the previous contract of 1st June 2016 is relevant in the computation of total period of service with the employer. The claimant resigned on 18th July 2018. Taking into account the 2 and 2-month period of work and the non-payment of the salary, the court finds that compensation equivalent to 5 months' salary is adequate compensation for the constructive dismissal.

On Claim for Salary arrears

Claimant's submissions

22. The Respondent is in arrears with respect to the Claimant's unpaid salary dues. At the time of the Claimant's constructive dismissal, the Respondent owed the Claimant Kshs. 772,450 as unpaid salary. This is contrary to Section 17 (1) of the [Employment Act](#) which provides that subject to the 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 directly, in the currency of Kenya...' The tabulation is as follows-



Month	Salary (net) (Kshs)	Paid (Kshs)	Arrears (Kshs)
July-16	55,000	0	55,000
Aug-16	55,000	0	55,000
Sep-16	55,000	30,000	25,000
Apr-17	80,000	69,600	10,400
May-17	80,000	40,000	40,000
June-17	80,000	37,500	42,500
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Sep-17	80,000	0	80,000
Oct-17	80,000	40,000	40,000
Nov-17	80,000	50,000	30,000
Dec-17	80,000	14,500	65,500
Jan-18	80,000	25,000	55,000
Feb-18	80,000	8,000	72,000
Mar-18	80,000	50,000	30,000
Apr-18	80,000	50,000	30,000
May-18	80,000	50,000	30,000
June -18	80,000	60,000	20,000
Sub Total	764,450		
Refunds	8,000		
TOTAL	772,450		

23. An employee's right to wages and salaries was emphasized in *Arodi v Kobian (Kenya) Limited* (Cause 987 of 2018) [2024] eKLR where the court stated as follows: "116. It is common ground that wages and salaries are protected by Part IV of the *Employment Act, 2007*



117. The provisions of Section 17 to 25 of the Act address various aspects of salaries and wages including mode of payment, when due, deductions, payslip deductions as well as repayment of remuneration wrongfully withheld or deducted.
118. An employer who violates the provisions of Part IV of the *Employment Act*, 2007 commits a criminal offence and is liable to criminal sanctions and the amount withheld or wrongfully deducted is repayable." Further reliance was placed on *Mburu v Medecines Sans Frontieres* (Cause E713 of 2023) [2024] eKLR where the court had the following to say on payment of an employee's salary:"⁴⁵. It requires no emphasis that wages or salary is the cornerstone of an employment relationship as exemplified by the definition of the term "employee" under Section 2 of the *Employment Act*, 2007.
46. The foregoing is also underscored by Article 41 of *the Constitution* of Kenya, 2010.
47. Article 41(2)(b) provides that; "Every worker has the right to fair remuneration.
48. More significantly, Part IV of the *Employment Act*, 2007 addresses protection of wages and salaries exclusively in relation to payment, when due, deduction of wages itemised, pay statement and statutory deductions among others."
24. The claimant submitted that the Respondent without any color of right or justification failed to pay to the Claimant salary dues and made arbitral salary deductions. In light of the foregoing, the Respondent is liable to pay the Claimant all the unpaid salary dues.

Decision

25. The court held that the claims under the contract of June 1, 2016, expired before June 1, 2019. The claim was first filed in court on February 10, 2020, and therefore, the claims under the 2016 contract had long expired. Regarding the salary claim, the court noted that in the email of October 17, 2018, the claimant agreed to three months less salary, which the employer accepted in the email of October 30, 2018. The claimant presented these documents in court and adopted them as her evidence. The court found that as of October 30, 2018, the parties were in agreement that the due salary was Kshs. 652,450. The court further observed that, following the email and in the demand letter, the claimant admitted to receiving Kshs. 45000 in October 2018, Kshs. 40000 in November 2018, Kshs. 45000 in December 2019, and Kshs. 20000 in January 2019, totaling Kshs. 150,000. The court concluded that the claim, without deducting the paid amounts, amounts to unfair enrichment. It found that the total outstanding salary is Kshs. 652450 minus the Kshs. 150000 paid, resulting in a balance of Kshs. 502450. To compensate for the unfair withholding of salary, the court awards interest at court rates from the date of filing the suit.

An order directing the respondent to immediately remit the claimant's statutory dues

The claimant's submissions

26. The Respondent has failed and or neglected to remit the requisite statutory dues. The Respondent neglected its statutory obligations by failing to remit the mandatory contributions to the National Social Security Fund (NSSF) in accordance with the provisions of the *National Social Security Fund Act*, thereby jeopardizing the Claimant's entitlement to pension benefits. Furthermore, the Respondent failed to remit Pay-As-You-Earn (PAYE) deductions to the Kenya Revenue Authority (KRA), unlawfully exposing the Claimant to potential liability for tax evasion. Additionally, the Respondent defaulted in remitting deductions to the National Hospital Insurance Fund



(NHIF), consequently depriving the Claimant of access to medical insurance and undermining her constitutionally protected right to the highest attainable standard of health.

27. In support of her case the claimant relied on the decision *Paul Irungu Mwangi & 32 others v Orthodox Archbishopric of Kenya & Irinoupolis & another* [2014] eKLR emphasized that failure to remit statutory dues is an illegality by stating the following:- "It is apparent that the Respondent's hands are tainted by the illegality of failure to remit statutory dues of its employees and other monies lawfully deducted from the employees but has not been timeously remitted to entities the employees have lawfully instructed the Respondent to remit the money deducted to." In this case the court found that subsequently in *Paul Irungu Mwangi & 32 others v Orthodox Archbishopric of Kenya & Irinoupolis; Miliki Savings and Credit Society Limited (Interested Party)* [2021] KEELRC 1629 (KLR) the court held:- 'As was observed by the Court, all the remedies sought in the claim are in respect of statutory deductions and all the entities to which the deductions were payable are capable of enforcing the payments thereof by the Respondent independently of the Claimants. There is no claim that is due to any of the Claimants personally.'

Decision on unremitted statutory deductions

28. On NSSF claim, the claimant produced her statement by NSSF dated 14th November 2019 which indicated zero remittance from 2016. The claimant had had NSSF deducted of 1080 in the month of June 2018. NSSF is a pension for the benefit of the claimant. The claimant sought an order to remit the statutory dues. She was no longer an employee, hence no basis for such an order. The court orders the claimant be refunded the NSSF deduction for the period May 2017 to June 2018 thus Kshs . 14,040/-
29. On the deduction for NHIF and PAYE, these are monies for the benefit of these statutory entities. They are not due to the claimant. I am persuaded by the decision of Justice Linnet Ndolo in *Kenneth Odhiambo Akumu v Allied East Africa Limited* [2017] KEELRC 605 (KLR) that- 'With regard to the claim for unremitted statutory deductions, the only thing to say is that any such dues are payable to the respective statutory bodies and not to the Claimant.'" The claims are disallowed.
30. On the claim for aggravated damages - The remedies available to the claimant on basis of constructive dismissal were under unfair termination as stated under section 49 of the *Employment Act*. There is no remedy of aggravated damages under the provision. The claimant has been adequately compensated by way of general damages above and interest.

Conclusion

31. In conclusion, the claim is held as proved on a balance of probabilities and judgment is entered for the claimant against the respondent as follows-
- a. A declaration that the Claimant was constructively dismissed from employment by the Respondent.
 - b. Compensation for the wrongful dismissal equivalent of 4 months salary @Kshs, 108257 total sum of Kshs. 433,028/-
 - c. Payment of salary arrears of Kshs. 502450/- .
 - d. An order for refund of NSSF contributions for the total sum of Kshs. 14,040/-
 - e. A mandatory injunction directed to the Respondent to remove the Claimant's name and image from its website forthwith.



f. Interest on the total sum Kshs. 949,518 (b, c and d above) awarded at Court rates from the date of filing suit until payment in full.

g. Costs of the suit.

32. Stay of 30 days.

33. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF OCTOBER 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant: Muhizi h/b Ongeru

Respondent: No appearance

