



**Muriithi v MAF Carrefour Retail Limited Kenya (Cause E532 of 2022)  
[2025] KEELRC 3007 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3007 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E532 OF 2022  
JW KELI, J  
OCTOBER 30, 2025**

**BETWEEN**

**NELLY GAKII MURIITHI ..... CLAIMANT**

**AND**

**MAF CARREFOUR RETAIL LIMITED KENYA ..... RESPONDENT**

**JUDGMENT**

1. Vide an amended memorandum of claim dated the 19<sup>th</sup> of March 2024, the Claimant sued the Respondent and sought the following Orders:-
  - a. A declaration that the Respondent's action in failing to assign lighter duties to the Claimant following the injuries suffered and fully facilitating for her treatment made it intolerable to continue working, thus amounted to constructive dismissal.
  - b. Spent.
  - c. Spent.
  - d. Payment of used costs by the Claimant that remains un-refunded at Kshs. 5,000/-
  - e. Spent.
  - f. Compensation damages at 12 months' salary for the unlawful and flawed termination being Kshs. 32,280/- x 12 months at Kshs. 387,360/-.
  - g. Costs of this suit.
  - h. Interest on (d), (e), (f) and (g).
  - i. Any other relief or further order as may be just, expedient and necessary in the circumstances of this suit



2. The Claimant, in support of the claim, filed her list of witnesses dated March 19, 2024, an amended witness statement of the same date, and a list of documents of the same date, with the bundle of documents attached.
3. The Respondent appeared through the law firm of Hamilton Harrison & Mathews Advocates and filed an amended statement of response dated April 16, 2024. To support the amended statement, the respondent submitted a list of witnesses, a witness statement from Hellen Ilavonga, and a list of documents with an attached bundle of documents, all dated September 22, 2022. Additionally, the respondent filed a further witness statement dated November 22, 2023, from Daniel Ponde, which was adopted as their evidence in chief.
4. The Respondent also filed a Notice of Preliminary Objection dated 16<sup>th</sup> April 2024 challenging the jurisdiction of the court to hear and determine the portion of the claim that relates to work injuries, and this culminated the court's ruling of 18<sup>th</sup> November 2024 allowing the preliminary objection, and referring prayers (b), (c) and (e ) of the amended memorandum of claim to the Director of Occupational Safety and Health Services.

### **Hearing and evidence**

5. The claimant's case was heard before me on March 25, 2025. The claimant testified as the only witness in her case, adopted her amended witness statement dated March 19, 2024, and the amended claim of the same date. She also produced her documents listed on the same date as C-exhibits 1-9. The claimant was cross-examined by counsel for the respondent, Ms. Muthiani, who appeared together with Mr. Makori. She was then re-examined.
6. The respondent's case was heard on the same date as RW1, Daniel Ponde, who adopted his witness statement dated November 22, 2023, as the respondent's evidence in chief. He produced documents filed by the respondent under a list dated September 22, 2022, as R-exhibits 1-3. RW1 was cross-examined by the Claimant's counsel, Ms. Akinyi, and re-examined.

### **The Claimant's case in summary**

7. The Claimant's case is that she was employed by the Respondent on 12th March 2018 as a stocker under vide a contract of employment. On Thursday 3rd December 2020, the Claimant began experiencing back pain while arranging a soda delivery. Despite pausing her work and resting at the canteen inside the mall for some time, the pain persisted. She was then taken to the reception for first aid. The Human Recourse Manager was called and he directed that the Claimant be rushed to Amber Medical Center situated at the Hub, where she was injected with a painkiller to suppress the pain. The doctor recommended that an x-ray of the Claimant's back be taken. The Claimant was then referred to the German Medical Centre in Upper Hill, and the doctor that she saw recommended an MRI instead, as it was determined to be more precise. The Claimant updated the Respondent's Human Resource Manager who gave a go ahead and instructed the Claimant to share a digital photograph of the quotation and remitted payment for the MRI. The Claimant was further instructed to deliver the original receipt to the Respondent. Once she returned the original hard copy of the MRI to Amber Medical Facility, the doctor concluded that the Claimant's injury, severe back pain secondary to thoracic muscle spasms, was a result of heavy lifting. The doctor directed that she takes some time off work to rest, and prescribed medication. After utilizing her sick leave, the Claimant resumed work but continued to take the prescribed medication, as she still experienced pain.
8. On 9<sup>th</sup> September 2021, the Claimant's back pains returned. She informed the Human Resource Manager who recommended that she visits a hospital near her and inform him on the progress. She took



painkillers to manage the pain. On 11<sup>th</sup> September 2021, the Claimant visited St. Peters Orthopedic Hospital where she was prescribed advanced medication and asked to start physiotherapy sessions. She purchased the medication at Transchem Pharmacy in the CBD on the same day amounting to Ksh 3, 440/-. Upon updating the Human Resource Manager on her condition and the treatment she had received, the Claimant was instructed to send him all the documents from the hospital including all the original receipts that were proof of payment for reimbursement to be effected. The Claimant has never received reimbursement, to date. The Respondent had previously paid for physiotherapy sessions directly through the hospital pay bill number. On this occasion in September 2021, the Claimant was given 7 days as sick off by the doctor, after which she resumed work.

9. On 28<sup>th</sup> February 2022, the Company received a new Human Resource Manager. The Claimant's back pain returned on 19<sup>th</sup> March 2022 while the Claimant was at work. She was directed to go back to the hospital by the assistant Human Resource Manager. The Claimant went back to St Peters Orthopedic Hospital who recommended an X-ray to ascertain where the problem was as she had also started becoming numb on the right side of her body. The Claimant called the Assistant Human Resource Manager to inform him of the hospital's recommendation and he directed her to cater for her medical bill since the incumbent Human Resource Manager had not yet reported. She was scheduled to report on 21st March 2022, and would then access her employee file. The Claimant underwent an x-ray and the doctor recommended 6 weeks of physio therapy as she continued taking the prescribed medication. She was also advised to abstain from heavy lifting as it was the trigger for the pain. Further, the Claimant was given a week off.
10. On 21st March 2022, the Claimant avers that she received a telephone call from the Human Resource Manager, who asked her if she had an Occupational Safety Certificate, which she didn't. According to the Claimant, it is the mandate and responsibility of the Human Resource Manager to ensure employees comply with the requirements before and not after an injury has taken place. The Claimant called the Human Resource Manager later in the day for feedback since she was required to commence her physiotherapy immediately as she was in excruciating pain. The Claimant was informed that her issue had been forwarded to the Head Office and the Human Resource Manager was awaiting feedback. She was requested to provide documentation from Amber Hospital to prove that she indeed sustained injuries, as well as details of witnesses that were present when the Claimant was arranging the warehouse at the time when the injury occurred. The Claimant obliged and shared on 24<sup>th</sup> March 2022 the reports from Amber Medical Center prepared by one Dr. Lindiwe Chunda. The hospital, Amber Medical Center which had been recommended by the previous Human Resource Manager at the time of the injury, also provided all the requested data via email but there was no response from the Respondent. The Claimant's sick leave ended and she resumed work. No feedback was, however forthcoming from the Human Resource Manager on her treatment and the refunds on her medical expenses.
11. Owing to the persistent back pain, the Claimant again went back to hospital and was given more sick days to rest her back. More than 21 days passed and no one from the Respondent communicated with the Claimant until she completed her sick leave. She, again, resumed work and wrote an email to the General Manager, copying the Human Resource Manager. She demanded for her right to treatment. The Human Resource Manager responded to her email on 14th April 2022 indicating that she had booked an appointment on the Claimant's behalf with Dr. Litunya of the Department of Occupational Safety and Health Services, which was later scheduled for 22nd April 2022. The Respondent would pay for consultation. The Claimant visited the said doctor on 22nd April 2022 at a residential house that the Human Resource Manager and the doctor directed her to, and presented her medical reports from Amber Medical Facility and St Peters Orthopedic Surgical Hospital. The doctor quickly concluded that the Claimant's injury was not work related and that he would share his report



- with the Respondent. It is the Claimant's case that this was an indication that the doctor had been compromised and would share a report in favour of the Respondent. The residential house where she saw the doctor did not have any medical facility or resources for proper diagnosis or treatment. On the following day, the Claimant wrote a protest email to the Human Resource Manager explaining what had happened: that the consultation was done at someone's residence, no physical examination was done to pre-determine scope of injury nor was there a triage area and neither did the doctor have the tools of trade. She communicated that the fact that she was sent to a residential house was inappropriate and unprofessional. The Claimant never received a response to her email.
12. On 30th April 2022, the Claimant received a text message that the Department of Occupational Safety and Health Services doctor had shared the report and I should find time to go to her office. She received the report on 4th May 2022. It concluded that the cause of the Claimant's injury was due to head positioning and not heavy lifting. This was the last time that the Respondent dealt with the matter. The Claimant complains that she was not given lighter duties after she sustained her injury, and neither was she deployed to another role with lighter duties nor did receive treatment, until her resignation on 30<sup>th</sup> May 2022. The Claimant had been undertaking the same tasks which made her condition worse and her body started going numb, despite taking her medication. She was yet to start the recommended physiotherapy treatment because it was costly for her to facilitate at her own cost especially as the injury occurred in the line of duty.
  13. It is the Claimant's case that she did not resign voluntarily but as a result of the excruciating pain that she suffered while discharging my duties, hence constructive dismissal. She was never refunded any monies spent on her medical expenses. On the occasions when the Respondent paid for the Claimant's medical treatment, the former Human Resource Manager would pay directly to the St Peters Hospital Pay bill. Dr. Litunya who the Claimant was sent to for examination did not conduct any assessment as he did not have any medical tools at his presumed home in Prudential Estate. The X-ray report submitted to him by the Claimant is contained in a compact disc; there was no hard copy given to him to give a conclusive verdict and the doctor at the time did not have a personal computer or a laptop to analyze the data in it. The doctor's report is therefore not conclusive and is deemed null and void. According to the findings of the first hospital - Amber Ray Medical Facility – where the Claimant was examined, they concluded that the Claimant's injury was caused by heavy lifting, thus nullifying Dr. Litunya's report on head positioning. Dr. Litunya's report is based on an unscientific opinion as he did not perform any medical examination nor did he view the Claimant's back through a physical examination or a review of the X-ray report. While Dr Litunya recommended further medication, the Respondent did not facilitate any expenses to Kijabe Hospital to enhance or fast track the Claimant's treatment. His recommendation that the Claimant be assigned lighter duties was also ignored by the Respondent, worsening her back condition.
  14. The Claimant acknowledges that on 8th September 2021, she submitted herself to an examination by the Department of Occupational Safety and Health Services who stated that she was fit for work. However, on the same day, the Claimant's condition worsened and she was seen at Amber Hospital and given sick leave. Two days later, St. Peters Hospital recommended an additional sick leave and physio therapy for the Claimant's back. The Claimant avers that the first document from the Department of Occupational Safety and Health Services was prepared before her injury. The Respondent failed to adequately cater for the Claimant's treatment and also neglected and frustrated the Claimant continuously making her work environment unsuitable for her health condition. Although the Claimant's notice period lapsed on 28th June 2022, she is yet to be paid her terminal dues.
  15. The Claimant faults the Respondent for discriminating against her as she was not provided with medical attention for a work-related injury; she was not provided with an Occupational Safety



Certificate and, consequently, compensation; the Respondent failed to maintain an insurance policy with respect to Section 7 of the Work Injuries Benefits Act (WIBA); the Respondent failed to report an accident to the Director, WIBA, in the prescribed manner within seven days after having received notice of the accident; the Respondent failed to determine a medical and lasting solution that would enable the Claimant carry out her functions as an employee; and the Respondent subjected the Claimant to unfair labour practices by causing her to be unprofessionally treated in a residential home rather than a medical facility, and causing to be prepared a simple a report that was generated without proper medical examination. The Claimant also complains that she was frustrated to the point of resigning which amounts to constructive dismissal under the *Employment Act*.

### **Respondent's case in brief**

16. The Respondent admits that the Claimant is their former employee. Prior to her employment by the Respondent, the Claimant worked as a merchandiser for one of the Respondent's suppliers. She was seconded by the supplier to the Respondent's store at the Hub, Karen. As part of her duties, the Claimant was required to unpack, sort and arrange the supplier's stock on the store shelves. On 8th March 2018, the Claimant applied to be absorbed into the Respondent's employment. The Respondent obtained a letter of no objection from the Claimant's former employer and the Claimant began her employment with the Respondent at its store at the Hub, Karen, on 12<sup>th</sup> March 2018, as a stocker. The Claimant's duties included cleaning and arranging received merchandise in the warehouse as per the planogram; cleaning and stocking selling area shelves in the beverages section; and price labelling, segregating, and wasting expired merchandised as per the respondent's policy.
17. The circumstances of the present case according to the Respondent are that on 3rd December 2020, the Claimant complained that she was experiencing back pain and was advised by the Human Resource Manager at the time, Robert Marete to seek medical attention. The Claimant was treated at Amber Clinic and was advised to undergo an imaging test on her back to establish the problem. The imaging report showed that the lumbar areas (lower back) were normal, but there was a muscle spasm of the cervical area which was likely positional. The Claimant's doctor Dr. Doris Ngila from Amber Clinic, directed that the Claimant takes three (3) days off to rest. It was also recommended by Dr. Chunda that the Claimant abstains from work to allow for rest and recovery. Following the hospital visit, the Respondent granted the Claimant sick leave with full pay. Further, the Respondent catered for the costs of the medical expenses incurred and reimbursed the claimant for any costs incurred out of pocket.
18. The Respondent states that the Claimant resumed her duties and continued to work without any complaint for over 8months until 8<sup>th</sup> September 2021, when she complained that she was once again experiencing back pain. The Claimant was advised by the then Human Resource Manager to go to the hospital for treatment, and she was treated at Amber Clinic. Again, the doctor recommended that the Claimant takes two (2) days off work. On 11th September 2021, the Claimant proceeded to St. Peter's Orthopaedic and Surgical Speciality Centre for treatment, where Dr. J.B. Kimani recommended that she take 7 days to rest. The Respondent complied with the doctor's recommendation and granted the Claimant sick leave with full pay. The Claimant, having provided the receipts and proof of payment, was re-imbursed for the medical expenses arising from this visit.
14. The Claimant resumed her duties and continued to work without any complaint until 19th March 2022, when she once more complained that her back pain had returned, and she was advised to visit the hospital. Again, the claimant was attended at St. Peter's Orthopaedic and Surgical Specialty. On 2nd April 2022, the doctor recommended that the Claimant takes nine (9) days off. The Respondent accordingly granted the Claimant sick leave with full pay as recommended by the doctor. On



14th April 2022, the Respondent's Human Resource Manager recommended that the Claimant be examined by a certified and approved Occupational Safety and Health practitioner, one Dr. W B J Litunya. The Claimant was informed that the appointment was scheduled for 22nd April 2022 and advised to visit the doctor with her previous medical records for assessment and evaluation. The Claimant was examined on 22nd April 2022 by Dr. Litunya and she presented her previous medical reports to him. On 27th April 2022, Dr. Litunya shared his report with the Respondent which was subsequently shared with the Claimant. It was Dr. Litunya's medical opinion that the cervical spasm being experienced by the Claimant was not related to the back problem which she had complained of earlier that arose during the course of her employment, but due to head positioning. Dr. Litunya further recommended that the Claimant be referred to Kijabe Mission Hospital for further medical examination to ascertain the cause of the cervical spasm. The Claimant elected not visit Kijabe Mission Hospital for a diagnosis.

15. The claimant disagreed with Dr. Litunya's assessment and communicated her dissatisfaction to the Respondent vide an email dated 29th April 2022. On 30th May 2022, the Claimant resigned from her employment as a stocker. On 31st May 2022, the Claimant was advised by the Human Resource Manager to submit a signed resignation letter, and did so.
19. The Respondent is adamant that they provided the Claimant with the necessary support during her illness by paying all her medical costs and allowing her to take sick leave as recommended by her doctors. They blame the Claimant for failing to adhere to the doctor's recommendation that she visits Kijabe Mission Hospital, a specialist hospital, for further diagnosis and treatment. They state that the Claimant's resignation from employment was voluntary hence she is not entitled to the orders sought.
20. The court issued directions for filing of written submissions after the hearing. Only the respondent complied

## **Determination**

### **Issues for determination**

21. Vide a ruling dated 18<sup>th</sup> November 2024, the court, following the filing of a Notice of Preliminary Objection on jurisdiction, held that it had no jurisdiction on the claim for compensation for work injury and referred the claims founded under *Work Injury Benefits Act* (WIBA) to the Director of Occupational Safety and Health (DOSHS). The court held that the only issue for determination in the claim would be whether the claimant's termination of employment was constructive dismissal and the question of compensation for unfair termination.

### **Whether the termination of employment by the claimant amounted to constructive dismissal**

#### **Claimant's case**

22. The facts of the case are summarised above. On the specific issue of constructive dismissal the claimant's case was as below-
23. It is the Claimant's case that she did not resign voluntarily but as a result of the excruciating pain that she suffered while discharging my duties, hence constructive dismissal. She was never refunded any monies spent on her medical expenses. On the occasions when the Respondent paid for the Claimant's medical treatment, the former Human Resource Manager would pay directly to the St Peters Hospital Pay bill. Dr. Litunya who the Claimant was sent to for examination did not conduct any assessment as he did not have any medical tools at his presumed home in Prudential Estate. The X-ray report submitted to him by the Claimant is contained in a compact disc; there was no hard copy given to him



to give a conclusive verdict and the doctor at the time did not have a personal computer or a laptop to analyze the data in it. The doctor's report is therefore not conclusive and is deemed null and void. According to the findings of the first hospital - Amber Ray Medical Facility – where the Claimant was examined, they concluded that the Claimant's injury was caused by heavy lifting, thus nullifying Dr. Litunya's report on head positioning. Dr. Litunya's report is based on an unscientific opinion as he did not perform any medical examination nor did he view the Claimant's back through a physical examination or a review of the X-ray report. While Dr Litunya recommended further medication, the Respondent did not facilitate any expenses to Kijabe Hospital to enhance or fast track the Claimant's treatment. His recommendation that the Claimant be assigned lighter duties was also ignored by the Respondent, worsening her back condition.

24. The Claimant acknowledges that on 8th September 2021, she submitted herself to an examination by the Department of Occupational Safety and Health Services who stated that she was fit for work. However, on the same day, the Claimant's condition worsened and she was seen at Amber Hospital and given sick leave. Two days later, St. Peters Hospital recommended an additional sick leave and physio therapy for the Claimant's back. The Claimant avers that the first document from the Department of Occupational Safety and Health Services was prepared before her injury. The Respondent failed to adequately cater for the Claimant's treatment and also neglected and frustrated the Claimant continuously making her work environment unsuitable for her health condition. Although the Claimant's notice period lapsed on 28th June 2022, she is yet to be paid her terminal dues.
25. The Claimant faults the Respondent for discriminating against her as she was not provided with medical attention for a work-related injury; she was not provided with an Occupational Safety Certificate and, consequently, compensation; the Respondent failed to maintain an insurance policy with respect to Section 7 of the Work Injuries Benefits Act (WIBA); the Respondent failed to report an accident to the Director, WIBA, in the prescribed manner within seven days after having received notice of the accident; the Respondent failed to determine a medical and lasting solution that would enable the Claimant carry out her functions as an employee; and the Respondent subjected the Claimant to unfair labour practices by causing her to be unprofessionally treated in a residential home rather than a medical facility, and causing to be prepared a simple a report that was generated without proper medical examination. The Claimant also complains that she was frustrated to the point of resigning which amounts to constructive dismissal under the [Employment Act](#). As stated above, the claimant did not file written submissions.

### **Respondent's submissions**

26. On 22<sup>nd</sup> May 2025, the court directed the claimant to file submissions within 7 days. The respondent was then to file its submissions within 21 days of service of the claimant's submissions. The claimant's time to file submissions lapsed on 29<sup>th</sup> May 2025. As of the date of filing these submissions, the claimant had not filed or served his submissions.
27. The claimant's case is for constructive dismissal and breach of [Work Injury Benefits Act](#) (WIBA). The claimant sought inter alia payment of used costs of Kshs. 5,000/-, compensation for work injury and treatment of Kshs. 500,000/-, Kshs. 387,360/- being the equivalent to twelve months' pay, costs of the suit and interest. By a ruling delivered on 18<sup>th</sup> November 2024, the court struck out the portion of the claimant's claim that relates to work injury as set out at prayers b, c and e of the Amended Memorandum of Claim. As a result, the outstanding claim is that of constructive dismissal for which the claimant seeks Kshs. 387,360- being the equivalent to twelve months' pay, the claim for Kshs. 5,000/- for amounts used by the claimant and remain unrefunded, costs of the suit and interest.



28. The claim is denied. The respondent's case is that the claimant voluntarily resigned and was paid her terminal dues. The respondent has filed and relies on its Amended Statement of Response dated 16<sup>th</sup> April 2024, the List and Bundle of Documents dated 22<sup>th</sup> September 2022, and the Witness Statement of Daniel Ponde dated 22<sup>nd</sup> November 2023. To prove that she was constructively dismissed, the claimant was required to discharge the burden as outlined by the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR:-
- a. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
  - b. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. An objective test is to be applied in evaluating the employer's conduct.
  - c. 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.
  - d. 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.
  - e. The burden to prove repudiatory breach or constructive dismissal is on the employee.
29. The respondent submits that the claimant did not discharge the burden of proof and that she does not in fact have any cause of action against the respondent. It is the claimant's case that she was compelled to resign because the respondent's action in failing to assign her lighter duties following her injuries and fully facilitate her treatment made it intolerable for her to continue working.
30. The respondent submits that it discharged its obligations to the claimant during her illness. In December 2020, when the claimant fell sick at work, she was rushed to the hospital and received treatment. The claimant was granted 3 days sick leave with full pay on the recommendation of her doctor. The claimant confirmed this in cross-examination. The claimant continued working for over 8 months until September 2021. The claimant received treatment at Amber Clinic and the doctor recommended she take 2 days off. On 11<sup>th</sup> September 2021, the claimant received treatment at St. Peters Orthopaedic and Surgical Speciality Centre. The claimant's doctor recommended that the claimant take 7 days to rest. In cross-examination, the claimant testified and confirmed that the respondent granted her paid sick leave as per her doctor's recommendation and paid the medical bills for her visits. At the lapse of the sick leave, the claimant resumed work without any complaint until 19<sup>th</sup> March 2022 when the claimant complained that her back pain had resumed. The claimant was attended at St. Peters Orthopaedic and Surgical Speciality where the doctor recommended that the claimant take sick leave with full pay. The respondent once again honoured this recommendation and granted the claimant paid sick leave. The respondent also catered to the claimant's medical bills. None of the claimant's doctors recommended that the claimant be assigned lighter duties. The claimant did not also make a request to be assigned lighter duties. Consequently, the claim that the respondent failed to assign the claimant lighter duties lacks any basis. In February 2022, the claimant engaged a new Human Resources Manager who needed to familiarize herself with the claimant's case. In April 2022, the respondent recommended that the claimant be examined by Dr. Litunya, a certified Occupational Safety and Health (OSH) practitioner. Mr. Litunya's name appears at number 21 of the list of OSH certified medical practitioners. See page 6 of the respondent's bundle of documents. The claimant was examined on 22<sup>nd</sup> April 2022. She presented her medical records. Dr. Litunya's medical opinion was



that the cervical spasms being experienced by the claimant were not related to the claimant's earlier complaint of back problem. Dr. Litunya recommended that the claimant be referred to Kijabe Mission Hospital for further medical examination to ascertain the cause of the cervical spasm. See page 55 of the claimant's bundle. The medical report was shared with the claimant. The claimant failed to visit Kijabe Mission Hospital for further examination. In cross-examination, the claimant testified that previously, when she was ill, she would visit the hospital and the respondent would either make payments directly to the hospital or reimburse her for any costs incurred. The claimant did not give any valid explanation why she did not do the same when she was referred to Kijabe Mission Hospital. The respondent catered to all the medical costs of the claimant and granted her sick leave as recommended by her doctors. As the claimant did not visit Kijabe Mission Hospital as recommended, she cannot complain that the respondent failed to facilitate her treatment when she did not do as the doctor recommended. The respondent submits that its conduct did not amount to a repudiatory breach of the fundamental terms of the contract.

## Decision

31. The claimant was employed as a stocker by the respondent vide employment offer letter dated 8<sup>th</sup> March 2018 which she accepted on the 12<sup>th</sup> March 2018, the effective date of the employment. (C-exhibit 1). She produced certificates of fitness to work of 17<sup>th</sup> February 2020 and another dated 8<sup>th</sup> September 2021 which certificates were issued under the Factories and Other Places Of Work Act, Medical Examination Rules 2005. The certificates of fitness are issued on employment or to employees returning from sick leave. The certificates having been issued in 2020 and 2021 the court concluded they were issued when the claimant was returning to work after sick leave. They were all issued by Dr. Litunya, and the court will revert back to the doctor later in the judgment.
32. The claimant resigned from employment with the respondent vide email dated 30<sup>th</sup> May 2022 (page 65 of the claimant's documents). In the email, the claimant issued the employer 30 days' notice and stated the reason for the resignation to be as follows: 'The company understands that I had to reach this decision owing to my condition and injury at work, which continues to deteriorate my health.' The respondent disputed the allegations and responded to the claimant on the resignation in email dated 31st May 2022 as follows- 'We have reviewed the contents of the said electronic mail and note that you have cited the reason for your resignation to deteriorating health due to injury at work.

We bring to your attention the various confidential medical documents in our records including the latest one 27 April 2022 and the information therein which invalidates the allegations in your said electronic email. Nonetheless, do submit a resignation letter, duly signed by yourself, should you wish to proceed with your voluntarily resignation from the company. (page 64 of the claimant's trial bundle) The court did not find a subsequent letter by the claimant on the resignation. The Respondent produced a letter accepting the resignation and dated 11th June 2022 in which it accepted the resignation and complained of breach of privacy by the claimant for having copied the resignation email to a third party called Kelly Ng'ang'a. (C-exhibit 8) The respondent further indicated how the claimant would be paid final dues on clearance. The claim, thus, of unfair termination in this case is based on the common law doctrine of constructive dismissal, which has not been legislated in Kenya but is now accepted in our jurisdiction. The concept was restated by the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR relied on by both parties where the Court found that the Claimant was constructively dismissed from employment and held at para 39 as follows: "Based on our independent re-evaluation of the evidence and the context in which the letter dated 16th June, 2009 was written we are satisfied that the letter of termination by the Respondent was not voluntary. In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the



contract with notice, or no notice the departure must be within a reasonable time and the employer's conduct must be effective cause of leaving or termination..." The Court of Appeal further set out the applicable legal principles in constructive dismissal claims as follows- '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.'" A key factor in the doctrine of constructive dismissal is that the employer's conduct must be an effective cause of the leaving or termination of employment. The court discerned three issues under which the claim for constructive dismissal was hinged.

- a. Complaint against Dr. Litunya on his medical report of 27<sup>th</sup> April 2022 as reflected on email by the claimant dated 25<sup>th</sup> July 2022 at 3.16 pm.
- b. Whether light duties were recommended for the claimant.
- c. Whether the conduct of the respondent towards the claimant led to the resignation

On a Complaint against Dr. Litunya on his medical report of 27<sup>th</sup> April 2022 as reflected on email by the claimant dated 25<sup>th</sup> July 2022 at 3.16 pm

33. The court found that email written on 25<sup>th</sup> July 2022 by the claimant was post the resignation on 30<sup>th</sup> May 2022 hence outside the employment relationship. Was there merit in the complaint? I said earlier in the judgment I would revert back to Dr. Litunya. The respondent, at the request of the claimant, had her checked by Dr. Litunya, who prepared a medical report dated 27<sup>th</sup> April 2022 on the claimant's illness. The claimant contended the report was null as per the said email, which stated that the doctor directed her to his home for an official doctor's appointment while she expected to be seen in a medical facility. She stated that he had no tools of trade. That it was unprofessional to evaluate her outside a medical facility. That he relied on hard copies of her treatment record which she had been asked by one Hellen of the respondent to take with her. The claimant in witness statement stated that Dr. Litunya asked her for the past medical reports from Amber Hospital and St.Peters Orthopedic Surgical Hospital which she obliged. The doctor concluded that her illness was not work-related, and she took this to be that the doctor was compromised. The claimant produced the medical report dated 27<sup>th</sup> April 2022 (page 55 of the claimant's documents). The report is reproduced as follows- 'Nelly Gakii Murithi

Thank you for referring Nelly aged 26 years to me for assessment of her condition.

### **History**

Nelly sustained an injury of the lower back in December 2020 while lifting crates of soda at her place of work.

She went to Amber Medical Centre where she was given some pain killers and sent for an MRI of the back.



MRI was done and showed muscle spasm of the cervical area but lumbar areas (lower back) was normal. The muscle spasm of the cervical area was believed to be due to wrong positioning of the head and not due to the injury she got while lifting crates.

She was referred in October/September to St. Peter's Orthopedic Centre who also gave her some pain killers and recommended Physiotherapy of the whole back.

She has not improved. In fact now she complains of numbness of the right hand and leg? Due to the cervical problem she has. She had an X-ray of the back done (results on the disc) and recommended for further physiotherapy and pain killers.

She hasn't improved much and the hospital has recommended another MRI (Not yet done).

### **Conclusion**

I suggest Nelly should be referred to Kijabe Mission Hospital for Orthopedic surgeon to ascertain the cause of cervical spasm which in my opinion is not related to the lower back problem she sustained while lifting crates. Meanwhile she should be exempted from pushing or lifting any heavy objects.

Regards

Dr. Litunya W.B.J"(page 55 of the claimant's documents ).

34. The report by Amber Medical Center and the orthopaedic hospital were also produced by the claimant (see pages 54 and 63 ) The diagnosis at Amber Medical Center was ' severe back pain secondary to thoracic muscle spasms" I find these are medical terms of which the claimant had no authority to question Dr. Litunya on his finding that- 'the muscle spasm of the cervical area was believed to be due to wrong positioning of the head and not due to the injury she got while lifting crates." Further the court had no basis to question the professionalism of Dr. Litunya as he was a designated health practitioner by the Directorate of Occupational Safety and Health Services at the material time (Respondent's exhibits- was a copy of a public notice of OSHA approved medical practitioners with Dr. Litunya No. 21 in the list. ) The court took notice that the claimant produced certificates of fitness issued by the same doctor (at pages 23 and 24 of the bundle. )The claimant was referred to Kijabe Mission Hospital by Dr. Litunya as per the medical report. The MRI done by German Medical center stated that the straightening of the cervical spine was likely positional or secondary to muscle spasm. The court found no merit, on prima facie basis, of the complaint by the claimant against the said Doctor based on the evidence before the court.

### **Whether light duties were recommended for the claimant**

35. Dr. Litunya, in his medical report, which was trashed by the claimant, and upheld by the Court recommended light duties. The doctor recommended that 'Meanwhile she should be exempted from pushing or lifting any heavy objects." The claimant in witness statement asserted that recommendation for lighter duties was not adhered to . I evaluated the pleadings and found the respondent did not address the issue in its pleadings. During re-examination, the claimant told the court that she resigned because her right side had become numb and she would no longer perform her duties and the respondent could no longer pay her bills. The issue of light duties was brought up at the cross-examination of the respondent's witness. On cross-examination, the witness confirmed that the claimant was given sick leave with full pay in 2021. He was asked, ' after the report did you adjust her duties? He said no. Did you accommodate her duties as per injuries? Answer No. RW1 confirmed the claimant reported back pain to the human resources. The cross-examination disclosed that the claimant was not placed in light duties as recommended by Dr. Litunya.



### **Whether the conduct of the respondent towards the claimant led to the resignation**

36. It was not in dispute that the claimant developed back pains while in employment. The cause of the pain was disputed. During cross-examination the claimant confirmed that the Human resources officer recommended her treatment at Amber Medical Facility of which the respondent paid. That she proceeded on paid sick leave and then worked for 8 months. She was treated in another facility, which the employer paid for, plus paid sick leave. She confirmed that Dr. Litunya recommended she visit Kijabe hospital for assessment. The claimant told the court that she did not visit Kijabe hospital as the company did not facilitate. She confirmed in the past she would visit the medical facility and the respondent would pay. She had no evidence to the contrary. The recommendation to visit Kijabe hospital was in April 2022 and she resigned in May 2022.
37. The court on evaluation of the evidence before it, concluded that the respondent complied with the medical provision. The claimant was to blame for failing to visit Kijabe hospital for the evaluation as to the actual cause of the back pain. I say no more on the issue, having referred the work injury claim to DOSH in my ruling dated 18<sup>th</sup> November 2024. The court found that the respondent did not place the claimant on lighter duties as recommended by Dr. Litunya. To some extent, this contributed to the claimant resigning as heavy work would aggravate the injuries. The court noted that only Dr. Litunya recommended the light work despite the claimant having been treated earlier in other facilities. The claimant was a stocker meaning she was obliged to lift things. Any reasonable employer would have placed the claimant on lighter duties following the persistent complaints and specifically post 2021. The court finds merit in the claim for constructive dismissal for failure by the respondent to comply with the recommendation of Dr. Litunya.

### **Reliefs sought.**

38. On Prayer for Kshs. 5,000/- being payment of used costs that are unrefunded - The respondent submits that it reimbursed the claimant for the medical expenses that she incurred in the course of her treatment. The claimant has not pointed this court to the payment which she alleges was not paid. This claim ought to fail. The court agreed there was no proof of claim of special damages of Kshs. 5000.
39. On issue of compensation for constructive dismissal. The claimant sought for compensation equivalent of 12 months salary which is the maximum award. The respondent submitted as follows- On claim for Kshs. 387,360/- being 12 months' pay compensation for unlawful termination. The respondent has proven that the claimant voluntarily resigned from employment and is therefore not entitled to compensation for unfair termination. However, should the court be persuaded that the claimant was constructively dismissed, we invite the court to consider the principles set out by the Supreme Court in Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR where the court stated:

“When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. The Black's Law Dictionary 9th edition at page 534 defines judicial discretion as follows: 'the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right' .. On an award on damages, the Act limits the award a court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the *Employment Act*." (Emphasis added) The Court of Appeal in Kiambaa Dairy Farmers Co-Operative Society Limited versus Rhoda Njeri & 3 others



[2018] eKLR stated that: "... the compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and, even where appropriate, there must be an assessment with the range of zero to twelve months in mind. To my mind, this means, as it must, that the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Awards of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal." [Emphasis added] That Considering the support that the respondent accorded the claimant during her illness, and the claimant's contribution by failure to visit Kijabe Hospital, the respondent submits that a month's salary which is equivalent to the claimant's notice period would be adequate compensation.

40. The court upholds the cited decision of the Supreme Court in Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR and the decision of the Court of Appeal in Kiambaa Dairy Farmers Co-Operative Society Limited versus Rhoda Njeri & 3 others [2018] eKLR. The court considered the factors under section 49(4) of the *Employment Act*. The claimant worked for the respondent from March 2018 to May 2022. During her employment, she was provided with medical care by the respondent when she was diagnosed with a back pain condition, she was afforded paid sick leave, and she refused to be evaluated at Kijabe Hospital as recommended by Dr. Litunya. The respondent always settled her medical bills. The only issue was the failure by the respondent to place her on light duties as recommended by Dr. Litunya and for which the court faulted it and held there was a case of constructive dismissal. Taking the foregoing into account. I was persuaded that compensation equivalent of 6 months' salary was sufficient and is thus awarded.

### **Conclusion**

41. In conclusion, the judgment is entered for the claimant against the respondent for the equivalent of 6 months' salary, thus KShs. 32,280 x 6 for total sum of KShs. 193,680 plus costs of the suit with interest at court rate from the date of judgment.
42. Stay of 30 days is granted.
43. 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: Ms. Gathoni h/b Mbaabu

Respondent: Ms. Muthiani

