

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. E073 OF 2024

(Before D. K. N. Marete)

KIPKEMBOI MALEI..... APPELLANT

VERSUS

URYSIA LIMITED.....RESPONDENT

JUDGMENT

This matter arose out of a Memorandum of Appeal dated 21st March 2024, challenging the judgment and decree of the trial court delivered on 29th February, 2024 in **CMEL No. E1636 of 2021**, wherein the Appellant’s claim against the Respondent was dismissed in its entirety. The Appeal was filed on grounds *inter alia* that the learned trial magistrate erred in law and fact by failing to find a case of constructive dismissal and unlawful termination. There was also default in failing to award the Appellant the reliefs sought.

The issues in dispute at the trial court are;

1. Whether the Appellant was unlawfully terminated or constructively dismissed from employment.
2. Whether the Appellant was entitled to the reliefs sought in the Memorandum of Claim.

The background of this case is not materially disputed. The Appellant was employed by the Respondent as a Senior Technical Advisor around February, 2016. The onset of the COVID-19 pandemic in early 2020 necessitated a review of the Respondent's business operations. On 30th April 2020, the Respondent issued an inter-office memo to all staff, notifying them of business continuity

measures, including unpaid leave and salary reviews, which were to prevail for an indefinite period but subject to continuous review. Subsequently, on 4th May, 2020, the Appellant was individually notified via a letter from the Human Resource Manager that he was selected to proceed on unpaid leave. The Appellant countersigned this letter, acknowledging that he had read and accepted its terms. He then proceeded on leave and did not contact the Respondent until he filed his Claim at the trial court on 16th September, 2021.

I have carefully considered the Record of Appeal, the written submissions filed by both parties, and the authorities cited. This being a first appeal, this court has a duty to re-evaluate the evidence adduced before the trial court and arrive at its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses testify.

On the first issue for determination, the Appellant contends that being sent on indefinite unpaid leave with no subsequent communication for over three years constituted a repudiatory breach of the employment contract, amounting to constructive dismissal. He relies on the definition of constructive dismissal from *Black's Law Dictionary* and the principles enunciated in ***Kenya Union of Sugarcane Plantation and Allied Workers v Othira***, which cited with approval, ***Western Excavating (ECC) Ltd v. Sharp [1978]***, where it was held that an employer's conduct which is a significant breach going to the root of the contract entitles the employee to treat themselves as discharged. Further, the Court of Appeal in ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR*** outlined the key elements of constructive dismissal, noting that the employee must be entitled to leave without notice due to the employer's conduct, which is either so unreasonable that the employee cannot be

expected to stay - the unreasonable test, or so grave that it constitutes a repudiatory breach the - contractual test.

The Appellant also seeks to rely on the authority of *Humphrey Sitati v Board of Management Lenana School and Ben Murage Njogu vs Ramani Warehouse Limited [2021] eKLR* where the courts found that sending an employee on indefinite unpaid leave without clear communication demonstrates that the employer no longer intends to be bound by the contract. Most notably, in *Kihura v Amazon Motors Limited (Cause E830 of 2021) [2024] KEELRC 1168*, this very court, faced with strikingly similar facts involving the same Respondent entity and an identical unpaid leave letter dated 4th May 2020, held that such actions amounted to constructive dismissal.

The Respondent, in defence, argues that the unpaid leave was a necessary business continuity measure prompted by the unprecedented COVID-19 pandemic, a force majeure event. It emphasizes that the process was undertaken in good faith, with prior notification to all staff, individual consultation, and the Appellant's voluntary consent evidenced by his countersignature on the leave letter. The Respondent relies on *Justina Mutitu Nyaga –V Kenya Civil Aviation Authority (2017) eKLR* which states that changes to employment status must be communicated and consented to in writing, and also *Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Ashari Education Board t/a Jaffery Academy [2020] eKLR* which held that consultation does not necessarily require agreement. It further seeks to rely on authority of *Joseph Wanjohi Wambugu v Paws Africa Safaris Limited [2018] eKLR*, where an employee who acquiesced to a pay cut was estopped from later challenging it.

The Respondent also contends that the Appellant failed to discharge the burden of proving unfair termination as required by Section 47(5) of the Employment Act, 2007 and Section 107 of the Evidence Act, Chapter 80, Laws of Kenya. It asserts that for constructive dismissal to be inferred, the employee must resign within a reasonable time due to the employer's hostile treatment, as espoused in the authority of *Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR* and *Nathan Ogada Atiagaga v David Engineering Limited (2015) eKLR*. The Respondent points out that the Appellant never formally resigned or followed up on his employment status before filing the suit. Additionally, it highlights a procedural defect, noting that the Appellant's pre-action demand letter was erroneously addressed to "Amazon Motors Limited," a separate legal entity, thus violating the doctrine of separate legal personality as affirmed in *Imranali Chandbhai Abdulhussein –vs- Bamburi Portland Cement Company Ltd [1994] eKLR*.

The Respondent's action in dealing with the sad Covid 19 situation and its impact on the work place were well thought out, organized and clearly implemented. It is upon these measures that the Appellant left his place of work on a harmonious though unhappy note. He now claims that the silence and lack of recall or communication on a return-to-work formulae has prompted this reactions and suit. The Respondent does not agree and deems this mischievous and an intent at unjust enrichment. What with the Appellant taking all this time without enquiring on his employment only to come up with this claim and appeal?

I agree with the Respondent, a case of constructive dismissal or even unlawful termination of employment does not arise in the circumstances. Such circumstances and situations do not call for a case of constructive dismissal. It does not arise and is neither supported by evidence. The

circumstances of Covid 19 and its implications on employment relation was cut throat and dire to employers. The industry had to be sustained by genius approaches as was in this case.

I am therefore inclined to dismiss this appeal with orders that each party bears their costs of the same.

Delivered, dated and signed this 22nd day of October 2025.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Joseph Nyasimi instructed by Nchogu, Omwanza & Nyasimi Advocates for the Appellant.
2. Mr. Ondari instructed by Ogetto, Otachi & Company Advocates for the Respondent.