



**Otengo v Bidco Africa Limited (Cause E073 of 2024)
[2025] KEELRC 2938 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2938 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E073 OF 2024
NZIOKI WA MAKAU, J
OCTOBER 29, 2025**

BETWEEN

JESSICA MATILDA OTENGO CLAIMANT

AND

BIDCO AFRICA LIMITED RESPONDENT

JUDGMENT

1. Through a memorandum of claim dated 9th September 2024 the Claimant sued the Respondent alleging constructive dismissal. She sought the following reliefs:
 - a. A declaration that she was constructively dismissed;
 - b. Kshs. 5,400,000/- in 12 months' salary compensation for unlawful termination;
 - c. 1 months' pay in lieu of notice;
 - d. Kshs. 450,000/- unpaid salary for December 2023;
 - e. Refund of Kshs. 74,000/- expended on fuel;
 - f. Refund of Kshs. 263,000/- expended in purchase of expired and near expiry goods from distributors in order to push for higher market sales of the company's products between March 2023 and December 2023;
 - g. Certificate of service;
 - h. Costs and interest of the suit; and
 - i. Any other remedy the court deems just.
2. The Claimant's case was that she was employed as the Respondent's Regional Head of Distribution by an appointment letter dated 7th February 2023 at a gross monthly salary of Kshs. 450,000/-. She



averred that she diligently performed her duties until 9th January 2024, when she was compelled to resign following the unjustified withholding of her December 2023 salary. According to her, this was the culmination of several actions by the Respondent that rendered her employment untenable. She alleged that the Respondent unlawfully withheld her salary on the basis of delayed payments by distributors, yet her remuneration was not pegged on distributor collections. Further, she stated that she was issued with products that were near expiry mixed with others of longer shelf life which were subsequently rejected by distributors, making it impossible to achieve sales targets. She also averred that she was compelled to purchase expired and near-expiry products to create the impression of higher sales but was never reimbursed. In addition, she claimed that she was forced to personally pay for fuel due to inaccuracies in the Respondent's "Bizom" vehicle tracking system and was not refunded the sums spent.

3. The Claimant further cited other circumstances that made her working environment unbearable, including the Respondent's failure to service company vehicles, making field operations difficult; failure to honour credit notes agreed with distributors; persistent harassment and intimidation from the Respondent's directors through unsubstantiated allegations of poor performance; and discriminatory treatment, by withholding her salary while exempting an Asian colleague, one Keval Dodhia, whose salary was paid despite pending distributor payments. In view of the foregoing, the Claimant contended that the sustained frustration and mistreatment forced her resignation, which amounted to constructive dismissal.
4. In response to the claim the Respondent filed a statement of defence dated 28th October 2024. While admitting that it had employed the Claimant, it contended that she voluntarily resigned after failing to account for goods collected from the Respondent's distributors. The Respondent maintained that the sums being claimed from her were in respect of goods delivered to outlets without approved credit arrangements and denied all other allegations, putting the Claimant to strict proof.
5. At the hearing, each party called one witness. In support of her case the Claimant (CW1) adopted her witness statement dated 29th August 2024 as her evidence in chief and produced the documents contained in her list of documents dated 9th September 2024 as Exhibits 1 -19. Upon cross-examination, she stated that she gave a 1 months' notice and left on 8th February 2024. She narrated that she was not paid dues for the notice period neither was she paid her final dues. She further admitted that the Mpesa statement relied upon did not indicate that the money originated from her and that she had not produced ETR receipts for fuel purchases. She also acknowledged that it was part of her duties to ensure distributors made payments.
6. On its part, the Respondent called Mr. Dheeraj Belwal its Human Resource Manager as RW1. He adopted his witness statement dated 20th January 2025 as his evidence in chief and produced the documents in the list of documents dated 20th January 2025 and further list of documents dated 12th May 2025 as REXH 1-10. On cross-examination RW1 acknowledged that he had not availed the signed targets to court.
7. At the close of hearing both parties filed written submissions.

Claimant's Submissions

8. In support of her case the Claimant identified the issues for determination as:
 - a. Whether constructive dismissal has been proven; and
 - b. Whether she is entitled to the reliefs sought.



9. On constructive dismissal, she urged the court to be guided by the definition in the Black's Law Dictionary (Tenth Edition) that defined it 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.”

10. Additionally, she relied on the decision in the case of *Western Excavating ECC Ltd v Sharp* [1978] 2 WLR 344, in which Lord Denning stated as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instance without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

11. Further reliance was placed on the case of *Coca Cola East & Central Africa Limited v Kagai Ligaga* [2015] eKLR, where the Court of Appeal set out two tests for constructive dismissal: whether the employer's conduct was so unreasonable that the employee could not be expected to stay, or whether it amounted to a repudiatory breach of contract.

12. The Claimant submitted that applying the above principles, the Respondent's conduct met the threshold for constructive dismissal. She cited among other acts the withholding of her salary for reasons beyond her control, such as non-payment by distributors yet some of them had debts even before she was recruited and expecting her to recover debts from distributors yet no security had been pegged on them. Additionally, she drew attention to the unsubstantiated and unnecessary salary deduction of Kshs. 114,000/- from her December 2023 for allegedly missing two days at work yet she was meeting a board member. Further instances were, harassment and intimidation, case in point being threats to expose her in a WhatsApp group containing directors for failure to make collections, coercion to sell expired or near expiry goods failure to which deductions would be made on her salary and failure to reimburse her for buying expired or near expiry goods and for fuel expenses.

13. The Claimant submitted that the Respondent's actions were so grave as to constitute a repudiatory breach of contract, particularly the unilateral tampering with her salary, which went to the root of the employment relationship. On the reliefs claimed, the Claimant submitted that she was entitled to the same in line with section 49(1) of the *Employment Act* having proven constructive dismissal. She urged the court to award the maximum 12-month compensation for unlawful termination based on the decision in *Joshua Otiego Apiyo v Modern Coast Express Ltd* [2019] eKLR. She also urged the court to award the other reliefs as prayed.

Respondent's Submissions

14. The Respondent, on its part, identified the following issues for determination:



- i. Whether the claim meets the legal and evidential threshold for constructive dismissal; and
 - ii. Whether the Claimant is entitled to the reliefs sought.
15. On the first issue the Respondent urged the court to take cognisance of the principles of constructive dismissal set out in the cases of *Western (ECC) Ltd v Sharp* [1978] ICR 221 and *Coca Cola East & Central Africa Limited v Maria Ligaga* [2015] eKLR. It submitted that the mere withholding of salary for eight (8) days due to reconciliation challenges did not meet the threshold of constructive dismissal. It maintained that the delay arose from the Claimant's failure to account for Kshs. 84,200/- advanced to her in June 2023 as "I owe you", despite repeated email requests, as shown in its further list of documents dated 12th May 2025.
16. The Respondent submitted that since it usually does reconciliation of accounts at the end of the year, the Claimant's failure to tender proof was the main cause of the delay. Additionally, it asserted that it was forced to deduct the amount from her salary after she failed to render account. Consequently, the Respondent urged the court to decline the award sought for compensation. As for the other grievances, the Respondent submitted that the Claimant failed to utilize the internal grievance mechanisms provided in its Human Resource Manual and was therefore estopped from relying on them.
17. On the reliefs sought, the Respondent contended that the claims were in the nature of special damages which must be specifically pleaded and strictly proved. It relied on the decision in the case of *George & another v Babu* [2024] eKLR, *Siree v Lake Turkana El Molo Lodges* [2000] 2 EA 521, and *Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited* [2016] eKLR. Regarding 1 months' salary in lieu of notice, the Respondent submitted that the Claimant was paid for the notice period of January 2024. It drew attention to the payslips at pages 8-9 of the further bundle of documents dated 12th May 2025. As for unpaid salary for December 2023, the Respondent maintained that it was paid on 8th January 2024 less the rightful deduction of Kshs. 84,200/- unaccounted "I owe you".
18. As to the claim for Kshs. 74,000/- for fuel and Kshs. 263,000/- for purchasing expired products, the Respondent submitted that no formal refund requests were made, nor did the Claimant produce documentary proof such as receipts or certified M-Pesa statements. Furthermore, it asserted that by belatedly raising these claims, the Respondent was deprived the chance to investigate, approve, modify or reject the claim with valid reasons. With respect to special damages of Kshs. 400,000/- for being forced to sell her vehicle, the Respondent proclaimed that the Claimant had not demonstrated that the sale was as a result of late payment of salary. It further asserted that there was no evidence of completeness of the sale as the copy of records still indicated the vehicle was owned by Tinsa Motors, even though the buyer in the sale agreement was indicated as Boniface Mwangi Gichimu. Moreover, the Respondent contended that the valuation report was of no probative value as it was not produced by its maker. The Respondent relied on *Moonglow Assets Limited v Commissioner of Lands & 4 others* [2023] eKLR, which underscored that documents are meant to be produced by their makers unless it is demonstrated that the maker is dead or cannot be found, or is not able to give evidence, or their procurement would cause unreasonable delay and expense. It also relied on *County Lands Registrar, Kiambu & 2 others v Reuben Wambora Karoba* [2019] eKLR, where the court declined an award of special damages on the basis of a Bill of Quantities that was not produced by an expert. Consequently, it urged the court to disallow the claim as it was not amongst those sought in the memorandum of claim. On the prayer for Kshs. 300,000/- for mental anguish, the Respondent asserted that it was not pleaded



and, in any event, general damages are not recoverable for breach of contract. It relied on *Ndungu v Ndungu & another* (Civil Appeal E034 of 2021) [2024] eKLR, in which it was stated:

“That in any event as a general rule general damages are not [sic] recoverable in a case of alleged breach of contract, damages in such cases are compensation to the aggrieved party and a restitution of what was lost as a result of the breach as was held in *Tourist Development Corporation v Sundowner Lodge Limited*. It was pointed out to this court that the Court of Appeal set aside an award of general damages in *Kenya Women Microfinance Limited v Martha Wangari Kamau* [2021] eKLR stating that ‘the law is that general damages are not awardable for breach of contractual obligations if breach would lead to compensation for the specific loss suffered as a result of the breach’. The authorities cited clearly demonstrate that the appellant was not entitled to general damages. He did not prove any of the losses alleged to have been incurred due to the alleged breach.”

19. The Respondent further submitted that having served her full notice period, the Claimant could not validly claim that the work environment was intolerable. It cited *Seema Dahnani v Standard Chartered Bank Limited* [2025] eKLR, where the Court dismissed a constructive dismissal claim because the claimant continued to work for three months after resignation. As regards costs the Respondent submitted that in the unlikely event that the Claimant succeeds the court should order each party to bear its own costs as each party had a part to play in the resultant litigation, based on the decision in *Godfrey Mwangi Wanjohi v Mitchell Cotts Kenya Ltd* [2002] eKLR. Additional reliance was also placed on the case of *Capital Fish Kenya Limited v Kenya Power and Lighting Company Limited* [2016] eKLR, in which the Court of Appeal ordered each party to bear their own costs having both partially succeeded in their claims.

Disposition

20. The case revolves around constructive dismissal. The elements of constructive dismissal are as espoused in the celebrated case of *Maria Kagai Ligaga v Coca Cola East & Central Africa Limited* [2011] eKLR per my brother Rika J. where he held thus:

...constructive dismissal is a repudiatory breach by the employer of the contract of employment. The employer’s behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer’s conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract.

[Emphasis supplied]

21. The Claimant herein continued to work and served her notice period. The Claimant did not prove that the Respondent’s behaviour was so heinous, so intolerable, that it made it considerably difficult for her to continue working for the Respondent. The Claimant did initiate the termination but she needed to show that the Respondent had without reasonable or proper cause conducted itself in a manner likely to destroy or seriously damage the employment relationship. There was no demonstration that the Respondent’s conduct showed the employer was no longer interested in being bound by the terms of the contract between it and the Claimant.



22. Regarding the monetary claims, the Claimant failed to produce statements showing the payments she allegedly made for the repairs she asserts she made or service undertaken on the company vehicle. The Claimant was paid 1 months' salary in lieu of notice, the salary for December 2023 which was paid on 8th January 2024 less an amount deducted as being unaccounted for IOU of Kshs. 84,200/-. There were no formal requests made for the refund for fuel or purchase of expired products. The Claimant did not produce documentary proof such as receipts or certified M-Pesa statements. The Claimant did not demonstrate by way of evidence that the sale of the vehicle – whose ownership details indicate the owner as M/s Tinsa Motors in the transfer to a Mr. B. Mwangi – was an element of the alleged constructive dismissal. The fact the Claimant failed to seek redress on the claims regarding surcharge and raising the same in the suit long after the incidents raises more doubts about the provenance of the claims than satisfies the requirements for a relief by this Court.
23. In sum, the Claimant has failed to prove her case on a balance of probability and the suit is dismissed. Each party shall bear their own costs as the Respondent itself was not a paragon of virtue.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF OCTOBER 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

