



REPUBLIC OF KENYA



**KENYA LAW**  
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**Security Group Africa (SGA) Kenya Limited v Mbaluka & 7 others (Employment and Labour Relations Cause E266 of 2024) [2025] KEELRC 2888 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2888 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E266 OF 2024**  
**NJ ABUODHA, J**  
**OCTOBER 24, 2025**

**BETWEEN**

**SECURITY GROUP AFRICA (SGA) KENYA LIMITED ..... APPELLANT**

**AND**

**KENNETH MATHEKA MBALUKA ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL KIMWELI MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**BENJAMIN KUBONDO ONYANGO ..... 3<sup>RD</sup> RESPONDENT**

**PATRICK NDONGA MUTUA ..... 4<sup>TH</sup> RESPONDENT**

**FRANCIS OGOLA OKARA ..... 5<sup>TH</sup> RESPONDENT**

**JOHN MBAYA MUTINDA ..... 6<sup>TH</sup> RESPONDENT**

**ATHENUS MAITHYA MUTINDA ..... 7<sup>TH</sup> RESPONDENT**

**AUGUSTUS MALUKI MUTINDA ..... 8<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment of the Chief Magistrate Court at Nairobi (Hon. Rawlings Liluma Musiega) dated the 16th August 2024 in MCELRC/1376/2021)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 13<sup>th</sup> September 2024, the Appellant appeals against the whole of the Judgment of Hon. Rawlings Liluma Musiega.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in fact and in law in making a finding in favour of the Claimant/ Respondent against the weight of the evidence adduced before the court.



- ii. The Learned Magistrate failed to consider and take into account the issues agreed by the parties as the issues for determination before the commencement of the hearing.
  - iii. The Learned Magistrate erred in making a finding that the Claimants were constructively dismissed which was against the evidence adduced thus making a finding outside the law.
  - iv. The Learned Magistrate failed to find that the Claimants were to blame for the events leading to their desertion and failed to make a finding that the Claimants absconded.
  - v. The Learned Magistrate erred in fact and in law in making a finding that the Respondent/Appellant was liable to compensate the Claimants for service charge since it is the Respondent who did not register the Claimants for NSSF. This was against the pleadings and the evidence before Court.
  - vi. The Learned Magistrate erred in awarding special damages that had not been proved by way of any evidence and had not been pleaded.
  - vii. The entire judgment has no support in the evidence on record and the Court ought to have dismissed the Claimants claim.
3. The Appellant prayed that the judgment made by the Learned Magistrate be set aside in its entirety and be substituted with a judgment dismissing the Claimants claim with costs at the lower court and this appeal.
  4. The Appeal was disposed of by written submissions.

#### **Appellant's Submissions**

5. The Appellant's Advocates T.K. Kariba Mbabu & Company Advocates filed written submissions dated 21<sup>st</sup> January 2025. Counsel proposed to argue grounds 1 and 7 and the rest together.
6. On the issue of whether the judgment delivered was against the weight of the evidence on record, counsel submitted that some witnesses did not testify and that it was nowhere on record how the evidence of persons who did not testify came to form part of the records. That no evidence was presented in court to support any claim of service pay by the two Claimants or any other persons.
7. Counsel submitted that the court failed to capture the fact that it is the Claimants who requested for the withdrawal of the fuel cards as set out in their respective evidence which error has been carried forward to support the allegation for constructive dismissal.
8. Counsel submitted that the material facts set out by the Magistrate at page 566 finds no equal support in the evidence adduced in court, the facts were not captured properly thereby leading the court to misdirect itself.
9. Counsel submitted that the Claimant's Advocates applied for the review of judgment allegedly to correct an error which review seems to have been granted but judgment was never corrected. The other parts of the said finding were not altered, the claimants were not engaged till November 2021.
10. Counsel submitted that the findings at paragraphs 10 and 11 of the judgment seemed to be an airlift from a different matter as no issue of NSSF, rest days, untaken leave was ever raised in the matter.
11. On the issue of whether the Claimants were constructively dismissed, counsel relied on the Black's Law Dictionary (9<sup>th</sup> Edition) to define constructive dismissal. Counsel submitted that the doctrine



of constructive dismissal was not expressly provided for in the *Employment Act* but it has been given sufficient attention by the courts setting out the general guidelines on the same.

12. Counsel relied on among other cases, the case of *Sophie Muthoni Njagi v Rift Valley Railways (Kenya) Limited* [2020] eKLR on the basic ingredients of constructive dismissal. That the foundation of the Claimants' claim is that they were constructively dismissed following the Respondent's decision to reassign them to guard duties which the Claimants claimed amounted to a repudiatory breach of contract, making their working conditions intolerable and thus compelling them to leave.
13. Counsel submitted that the reassignment was neither a breach of contract nor an act that undermined the employment relationship to the extent required to establish constructive dismissal.
14. Counsel submitted that the genesis of the problem was prompted by the Claimants themselves, who vide their undated letter demanded that the Respondent's management withdraw the fuel allowance and ongoing motorcycle maintenance allowance with effect from 8<sup>th</sup> February 2021.
15. Counsel submitted that the Claimants prompted the Respondent to withdraw the fuel and motor vehicle allowances and be given new lease contracts, despite being aware of the frustration that such sudden withdrawal of their motorcycles will frustrate the activities of the Respondent. This pushed the Respondent to temporarily reassign the Claimant's to other duties.
16. Counsel submitted that despite the Honourable Magistrate setting out the ingredients for evaluation of the constructive dismissal as established by case laws, he erred in misapplying the facts in this matter. That the Magistrate set out the findings in the case of *Murray v Minister of Defence* (2008) but proceeded to make a finding contrary to the said holding.
17. Counsel submitted that the Learned Magistrate ignored the fact that the actions by the claimants of refusing to use their motor cycles and demanding that the fuel cards be withdrawn was the genesis of the whole dispute and goes ahead to blame the Respondent for trying to seek a solution. That there was no evidence presented before the learned Magistrate that the Claimants basic salary was bound to be affected to their detriment.
18. Counsel submitted that a finding of constructive dismissal requires a fundamental breach of contract by the employer which, in this case, the Respondent's action to temporarily reassign the Claimants to guard duties was not intended to frustrate them at work but was an operational decision driven by economic necessity and the lack of available motorbikes to facilitate the Claimants' inspector duties. The Claimants were informed of this reassignment with assurances that they would be considered for their inspector roles once new motorbikes were acquired.
19. Counsel relied on the case of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* to submit that for constructive dismissal to be established, the employer's conduct must create intolerable working conditions, the Respondent's reassignment of the Claimants to guard duties did not render their working conditions unbearable. That the court in *Coca Cola* case emphasized on the critical component of constructive dismissal that the employee must resign promptly in response to the alleged breach where in this case the Claimants did not promptly resign after being reassigned. That they opted not to return to work without tendering resignation letter. That this was voluntary decision to abandon their positions rather than a resignation in response to intolerable conditions.
20. Counsel submitted that the trial court erred in finding that the Claimants were constructively dismissed as the Respondent's conduct did not meet the legal standards for constructive dismissal as no fundamental breach of contract, intolerable working conditions or immediate resignation by the Claimants in response to the breach was evident.



21. On the issue of whether the Claimants were entitled to an award of damages, counsel submitted that the trial court awarded the Claimants compensatory damages equivalent to four months salary, service pay and unpaid untaken leave days. That they were not entitled to any of the awards granted.
22. On compensatory damages for unfair termination counsel submitted that Claimants did not meet the threshold for a finding that they were constructively dismissed but voluntarily left the work place, having triggered the dispute and absconded. In the absence of such proof, the Claimants could not be entitled to damages under section 49 of the *Employment Act*.
23. Counsel relied on the case of *Odera v Cooperative Bank of Kenya Limited (Cause 62 of 2019) [2023] KEELRC 380 (KLR) (10 February, 2023) (judgment)* to submit that where there has been no finding on unlawful termination, the claim for compensatory damages and salary in lieu of notice could not be sustained.
24. On the claim for service pay counsel submitted that the trial court erred by determining the issue of service pay, which was not disputed and erroneously awarded service pay to the Claimant despite evidence that the Respondent had complied with its statutory obligations to register the Claimants with the NSSF and remit contributions as required by law. That the payslips attached showed payment of NSSF.
25. Counsel relied on Section 35(6) of the *Employment Act* and the case of *Ochieng Okuku v Bidwood Suites Hotel (Employment and Labour Relations Cause 2180 of 2017) [2022] KEELRC 4011 (KLR)* on such exemption of an employer who remits NSSF or other pension scheme.
26. On the claim for leave pay counsel submitted that the same was not pleaded by the Claimants and it was not an issue before the court hence the trial court erred in awarding the Claimants leave pay equivalent to 21/30 days' salary for the last year of service. The evidence presented during the trial clearly demonstrated that the Claimants exercised their right to annual leave, which was duly granted and taken.
27. Counsel submitted that the claim lacked specificity regarding the periods during which leave was purportedly denied, the reasons for such denial, or the steps taken by the claimants to address the alleged denial during their tenure. Without such particulars, the claim lacked credibility and a factual basis for computation.
28. Counsel submitted that the trial court contradicted itself in granting this award. While acknowledging that the Claim for untaken leave lacked a proper basis for computation, the court nevertheless proceeded to compute and award 21/30 days' salary for the last year of service, contrary to its own reasoning.
29. Counsel submitted that the Claimants at the trial court failed to prove their claim on a balance of probabilities that they were constructively dismissed and that they are entitled to the reliefs sought.

### **Respondent's Submissions**

30. The Respondent's Advocates SED Legal LLP filed written submissions dated 27<sup>th</sup> February 2025.
31. On the issue of whether the judgment delivered was against the weight of the evidence on record, counsel submitted that the trial court considered the evidence on record, both the oral and documentary evidence filed, in arriving at its judgment dated the 16<sup>th</sup> August, 2024.
32. Counsel submitted that part A of the judgment is a chronology of the background of material facts. Paragraph 4 of the said chronology makes reference to the invitation by the Respondent's to a round



- table meeting with the Appellant vide a letter dated 27<sup>th</sup> October, 2020, to address the issue of the motorcycles. Paragraph 7 makes further reference to invitation by the Respondent's to the Appellant to talks, upon being informed that they had been redeployed to the position of guards and that they may be considered back, upon acquisition of company motorcycles.
33. Counsel submitted that in its analysis of issues, the trial court went at length, in defining what constructive dismissal amounted to, whilst citing case law both locally and internationally, including setting the test for constructive dismissal.
  34. Counsel submitted that the trial court made reference to the witness testimony by the Appellant's witness, including setting out the causal link to the events leading up to termination from employment by the Respondents and concluded that the Respondent's actions caused the termination of employment.
  35. Counsel submitted that whereas the Appellant alleged that only two witnesses testified and there existed no evidence by other claimants, page 582 of the record of appeal contained proceedings where parties recorded a consent for only two claimants to testify. The Appellant's counsel agreed to cross-examine on agreed issues of constructive dismissal, unpaid salary and notice pay.
  36. On the issue of whether the trial court failed to take into consideration the issues agreed upon by the parties, counsel submitted that the issues agreed upon vide the consent dated 1<sup>st</sup> December 2023, formed part of the trial court's chronological background of material facts. That the agreed issues never formed part of the judgment.
  37. On the issue of whether the trial court erred in awarding the Claimant's service pay, counsel submitted that the issue of service pay was pleaded by all the eight Claimants in the Memorandum of Claim dated 23<sup>rd</sup> July, 2021 and submitted upon at the trial court stage.
  38. On the issue of whether the Claimants were constructively dismissed, and thus entitled to an award of damages, counsel submitted that constructive dismissal occurs where the employer has made a fundamental change in the contract of employment, and where such change is unilateral, which situation is so intolerable, that the employee is unable to continue working.
  39. Counsel relied on Lord Denning's decision in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 222 or [1978] QB 761 on authoritative meaning of constructive dismissal. That prior to the issuance of the undated letter by the Claimants, the Claimants did issue a letter dated 27<sup>th</sup> October, 2020 addressed to the Appellants General Manager Guarding, raising a raft of issues among them being the renewal of motor cycle lease contracts, motor cycle insurance cover, logbooks and motor cycle workloads. That the said letter elicited no response from the Appellant, necessitating the issuance of the undated letter by the Claimants.
  40. Counsel submitted that sometime in October 2018, the Appellant introduced a scheme and /or Motor Cycle Agreement to its inspectors, in which the Appellant would assist them in the purchase of the motor cycles and in return the Respondents would pay and use the same in facilitation of their work and upon completion of their respective payments, the Respondents would eventually own the individual motorbikes.
  41. Counsel submitted that the agreements provided under clause 7.1 that there would be no extension of the lease at the end of the period stipulated in the individual agreements.
  42. Counsel submitted that the reason for the request to withdraw motorbike allowances was because the Respondents herein had on several occasions requested for renewal of the lease contract through verbal and written communication, which bore no fruit.



43. The Appellant issued letters to the Respondents dated 9<sup>th</sup> February 2021 informing them that a motorcycle was a mandatory requirement for the discharge of their duties, and further informing them to hand over their riding suits and fuel cards in their possession, to which the Appellant proceeded to grant each of the Respondents a mandatory leave, with immediate effect without their consent.
44. Counsel submitted that during the hearing at the trial court, the Appellant's witness, Nzomo Muasya did indicate and confirm that one could not operate and/or discharge their duties as an inspector without a riding suit and a fuel card.
45. Counsel submitted that the decision by the Appellant was appealed by the Respondents vide a letter dated 9<sup>th</sup> February 2021, requesting for a meeting with the Appellant, to address the grievances that they had, in order to reach to an amicable settlement.
46. Counsel submitted that the Appellants response towards the request for a meeting was to inform the Respondents herein, vide diverse letters issued to each of them, that they have been re-deployed as Guards and that they may be considered back to the position of inspector upon acquisition of company motorbikes.
47. Counsel submitted that the Respondents appealed the decision which letters were responded by the Appellant, informing the Respondents that the Appellant had already made alternative arrangements and confirming the earlier decision taken.
48. Counsel submitted that the Respondents through their shop steward, wrote to its union branch secretary being the Kenya National Private Security Workers' Union (KNPSWU) vide a letter dated 25<sup>th</sup> February, 2021 seeking the Unions' intervention.
49. Counsel submitted that the Union vide a letter dated 1<sup>st</sup> April 2021, wrote to the Appellant's Managing Director, demanding for a meeting with the Appellant, which letter elicited no response from the Appellant.
50. Counsel submitted that during the hearing at the trial court, the Appellant witness did indicate to the trial court that Inspectors and guards do not earn the same salary and that the demotion of the Respondents from the position of inspectors to guards was a fundamental change in their employment terms of contract. Further, the withdrawal of riding suits and fuel cards and which two were a necessity in the performance of the role of an inspector was a clear demonstration that the Respondents had been demoted, and that the leaving of the employment of the Appellant was a result of its actions.
51. Counsel relied on the case of Coca Cola East & Central Africa v Maria Kagai Ligaga (2015) eKLR to submit on the legal principles relevant in determining constructive dismissal and that the burden to prove repudiatory breach or constructive dismissal was on the employee.
52. Counsel further relied on among other cases, the case of Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR to submit that a constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.

### **Determination**

53. The court has reviewed and considered the grounds in the Memorandum of Appeal, the Record of Appeal and the submissions filed by the Appellant herein and authorities relied on and observes that it was now settled law that the duty of the first appellate court was to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions



as held in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR. That is to say:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

54. The Judgment of the trial court was that the Claimants’ were constructively dismissed by the Respondent. The Claimants were awarded their dues in terms of compensation for unfair termination, service pay and unpaid leave. The Appellant was aggrieved by the said judgment and fronted seven grounds in its Memorandum of Appeal dated 22<sup>nd</sup> October, 2024 which this court will condense in to two issues for determination as follows: -
- a. Whether the trial magistrate erred in finding that the Respondents were constructively dismissed by the Appellant.
  - b. Whether the trial court erred in awarding the Respondents the reliefs of damages for unlawful termination, service pay and unpaid leave.

**Whether the trial magistrate erred in finding that the Respondents were constructively dismissed by the Appellant.**

55. It is not in dispute that the Respondents were engaged as inspectors at the time of separation where they had been promoted to those positions having worked with the Appellant for quite some time up to some working for the Appellant for 29 years.
56. The court notes that the issue in dispute before the trial court was the redeployment of the inspectors to the guard role where their riding suits and fuel cards were withdrawn by the Appellant. The Appellant alleged that the Respondents were the author of the whole dispute when they issued an undated letter requesting for withdrawal of the fuel and motorcycle allowance from 8<sup>th</sup> February,2021. That the sudden withdrawal of motorcycles meant that the Appellant’s activities would be frustrated.
57. The Respondents on the other hand alleged that they entered in to motorcycle agreements where under clause 7.1 the same agreements would not be extended once they finished making their payments. That they all finished their payments and they wrote a letter dated 27<sup>th</sup> October,2020 addressed to the Appellant’s General Manager Guarding raising issues of renewal of motorcycle lease contracts, insurance cover, logbooks and workloads which letter elicited no response necessitating the issuance of the undated letter by the Respondents.
58. The Respondents alleged that the Appellant while acknowledging the motorcycles were essential in discharge of their duties vide the letter dated 9<sup>th</sup> February,2021 it requested them to hand over riding suits and fuel cards and they were sent on mandatory leave without their consent. That upon appealing this decision and requesting for a meeting for amicable settlement of the dispute the Appellant instead did redeploy them to the role of guards. That despite involving their union the Appellant never responded to their union’s letter.
59. The Appellant alleged that by redeploying the Respondents it was trying to seek for an alternative employment and there was no evidence that their salary was interfered with. The Respondents on the other hand alleged that the guards and inspectors earned different salaries and the redeployment was a repudiatory breach of their contract. The trial court found the actions of the Appellant to amount to constructive dismissal of the Respondents.



60. This court agrees with the trial court position since it is clear the inspector job could only be performed using motorcycles which lease period had since lapsed. It is also important to note the period the Respondents had worked with the Appellant some going to almost three decades and it was improper to demote them to guards. It was also not clear when the Appellant would secure the company motorbikes. Would they wait indefinitely?
61. As much as the Appellant alleged that the Respondents did not resign officially but absconded duties it was conceded that the respondents could not perform their inspector work without the riding suits and fuel cards hence their terms of engagement changed.
62. The supreme court in *Gatuma v Kenya Breweries Ltd & 3 others* (Petition E023 of 2023) [2024] KESC 52 (KLR) (Civ) (30 August 2024) (Judgment) held that: -

From the provisions of sections 10(5) and 13 of the *Employment Act*, any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and in case the same would lead to termination of employment the same may be deemed as constructive dismissal. The provisions of section 13 equally applied to remuneration. Any unilateral changes in remuneration and terms of employment without informing the employee would be tantamount to unfair labour practices.

That in case of any change of terms the employee ought to be consulted.

63. In this case there was no proof that the Respondents were consulted on their redeployment to guards from inspector role. In fact, this was a response when they appealed the decision of the Appellant to hand over the riding suits and fuel cards and requested for a meeting to settle the dispute amicably.
64. If at all the Respondents absconded duties after being redeployed as guards then why did the Appellant not start disciplinary process for absconding by the Respondents. The fact that they did not resign officially does not cure the situation that the Appellant caused the situation for the Respondents in which they could not continue with their work as inspectors without the riding suits and fuel cards.
65. The Court of Appeal explained this doctrine of constructive dismissal and in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR it was observed as follows: -

The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test.

66. This court notes from the above decision that the Appellant's actions of changing the employment terms of the Respondents by confiscating the riding suits and fuel cards when it knew the work of the inspector could only be performed using the said motorcycles and redeploying them to guards without their consent or consultation amounted to constructive dismissal as held by the trial court.



**Whether the trial court erred in awarding the Respondents the reliefs of damages for unlawful termination, service pay and unpaid leave.**

67. The trial court awarded the Respondents four months' salary as compensation for unlawful termination, service pay and the last year unpaid leave. Whereas the court in its judgment awarded one month salary as notice pay the same was not captured in the computation which was a mistake by the court.
68. The trial court having found that the Respondents were constructively dismissed it, was justified in awarding damages for unfair termination as provided for under section 49 of the Act while taking into the considerations parameters set out under section 49(4) of the Act. It must be remembered that this court will only interfere with the discretion of the trial court in awarding damages if a number of factors are proved as was held in the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR where the court held;
- The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.
69. The court notes that the Respondents had worked for long period some 29 years and they deserved the maximum compensation bearing in mind that they were constructively dismissed by the Appellant despite serving for a long time some almost three decades without any history of gross misconduct. However, the court acknowledges the fact that the employment relationship could have ended by either party invoking the termination clause or through other natural causes such as illness or death. The Court therefore retains the award by the trial court.
70. On the claim for unpaid leave this court notes that the Respondents pleaded for public holidays and not leave days. The trial court disallowed this prayer but proceeded to award unpaid leave for the last year something which was not pleaded by the Respondents. This court overturns this award and disallows it.
71. On the award for service pay the same was pleaded by the Respondents but the Appellant produced NSSF tabulations and pay slips showing that it used to remit NSSF dues on behalf of the Respondents. In such cases then the Appellant was not bound to pay any service pay as outlined by section 35(6) of the Employment Act which excludes employees who are members of the NSSF from receiving service pay.
72. In the upshot the Appeal partially succeeds while retaining the four months compensation for unfair termination and one month's pay in lieu of notice but disallowing the other prayers sought by the Respondents.
73. This appeal having partially succeeded each party shall bear their own costs of the appeal.
74. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025**

**DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF OCTOBER, 2025**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

