



Ndungu v Optimum Current Healthcare (Employment and Labour Relations Cause E090 of 2024) [2025] KEELRC 3107 (KLR) (6 November 2025) (Judgment)

Neutral citation: [2025] KEELRC 3107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E090 OF 2024
AN MWAURE, J
NOVEMBER 6, 2025**

BETWEEN

ALVIN KAGARI NDUNGI CLAIMANT

AND

OPTIMUM CURRENT HEALTHCARE RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim dated 13th November 2024 seeking the following reliefs:
 - a. A declaration that the Respondent's non-payment of the Claimant's procedure fees amounting to Kshs.142,000 constituted a summary dismissal of the Claimant by the Respondent, and consequently a contravening of section 45(1) of the *Employment Act*.
 - b. One(1) month's salary in lieu of notice Kshs.177,613.00
 - c. Twelve (12) months' salary for unfair termination Kshs.2,131,356.00
 - d. Salary arrears for June 2024 Kshs.177,613.00
 - e. Unpaid procedure fees Kshs.142,000.00
 - f. Accrued leave not taken of 14 days Kshs.88,806.50
 - g. Costs of the suit
 - h. Interest on d & e above at court rates from the date of filing of the suit till payment in full
 - i. Interest on b, c & f above from the date of judgment till payment in full.



Claimant's case

2. The Claimant avers that he was employed by the Respondent as a Resident Medical Officer from 1st March 2023, earning a monthly salary of Kshs.177,613/=, with an initial three-month probation ending 31st May 2023.
3. Despite no formal confirmation, the Claimant avers that he continued working and receiving pay, implying de facto confirmation into permanent employment.
4. The Claimant further avers entitlement to procedure fees for surgeries performed, totalling Kshs.142,000/= which the Respondent failed to pay, despite repeated efforts to resolve the issue.
5. The Claimant avers that, citing persistent non-payment, erratic salary disbursements, and a deteriorating work environment, the Claimant resigned effective 1st July 2024.
6. The Claimant avers that the Respondent then withheld his June salary and accrued leave, citing lack of notice.
7. The Claimant contends this amounted to constructive dismissal due to the Respondent's fundamental breach of contract and failure to uphold agreed employment terms.

Respondent's memorandum of response

8. In opposition to the Statement of Claim, the Respondent filed a memorandum of response dated 19th December 2024.
9. The Respondent denies the Claimant's allegations regarding permanent employment, unpaid procedure fees, and constructive dismissal.
10. The Respondent avers that the Claimant served on probation from 1st March to 31st May 2023, then signed a one-year contract from 1st June 2023 to 31st May 2024, followed by an enhanced contract effective 29th February 2024 to 28th February 2026.
11. The Respondent contends that any monetary incentives given were discretionary and not contractual entitlements.
12. The Respondent further denies that the claim of Kshs. 142,000/= in unpaid fees and maintains that the Claimant was professionally obligated to attend to patients.
13. The Respondent avers that the Claimant did not raise complaints during his tenure and only resigned after being summoned for disciplinary action over gross misconduct.
14. The Respondent also denies being unresponsive to the Claimant's demands and asserts that the resignation was an attempt to evade accountability.
15. Consequently, the Respondent urged the dismissal of the claim with costs and a declaration that no dues are owed.

Claimant's evidence in court

16. The Claimant, CW1, adopted his witness statement dated 13th November 2024 together with the list of documents dated even date and a further list of documents dated 16th May 2025 marked as exhibits 1 to 14 as his evidence in chief.



17. CW1 stated that there were other contracts one from 1st July 2023 to 31st May 2023 and 29th February 2024 to 28th February 2026. He stated that although he formally resigned, his departure amounted to constructive dismissal due to the Respondent's creation of a hostile work environment and significant changes to his employment terms, rendering the dismissal legally unfair. He also strongly disputed the Respondent's claim that procedure fees were merely occasional incentives, insisting instead that these payments were a negotiated component of his remuneration from the outset of his employment. He relied on exhibits 8 to 10, which were payment vouchers issued by the Respondent Hospital for professional procedures performed, including one dated 5th April 2023 during his probationary period.
18. CW1 stated that he wrote emails to the Respondent's managing director in which he raised concerns over unpaid procedure fees dating back to May 2023. In response, the Respondent's Director acknowledged the debt and attributed the delay to cash flow issues, affirming that payment was due regardless of insurance reimbursements.
19. CW1 stated that other professionals involved in the same procedures had been paid. He stated that during his 16-month tenure from March 2023 to June 2024, he only took 14 out of 28 accrued leave days. He denied resigning to avoid disciplinary action over allegedly receiving money directly from a patient, explaining that the hospital had a policy allowing doctors to receive such payments and that the transaction in question was facilitated by the hospital's front office.
20. CW1 emphasized that his resignation stemmed from persistent frustration, including non-payment for services rendered, unequal treatment compared to peers, and unfounded disciplinary threats. He also stated that the hospital withheld his June salary due to his failure to give a one-month notice and urged the Court to grant the relief sought in his Statement of Claim.
21. In cross-examination, CW1 stated that although he did not sign the contract dated 29th February 2023, he accepted its terms by continuing to work for the Respondent. He noted that his previous contract, dated 1st June 2023, expired on 31st May 2024, yet he continued working beyond that date, implying he was operating under the newer contract set to expire on 28th February 2026. Regarding procedure fees, he affirmed they were based on a verbal agreement with the employer to be paid monthly, irrespective of whether insurance companies had reimbursed the hospital. When asked why he failed to give a one-month resignation notice, he reiterated that he was compelled to resign due to persistent frustration caused by the Respondent.
22. In re-examination, CW1 pointed to his September 2024 payslip, which showed that he was paid for June 2024 and simultaneously penalized for not giving notice evidence; he argued that a valid employment contract was in effect as of 30th June 2024.
23. CW2, Kelly Odhiambo, a former chief accountant who worked at the Respondent hospital, testified that he served from February 2023 to mid-September 2024 and adopted his witness statement dated 16th May 2025 as evidence in chief.
24. CW2 stated that procedure fees paid to doctors were consultancy fees, not motivational incentives, and disputed the hospital director's claim of a cash flow problem on 31st March 2024, asserting that other doctors continued to receive payments during renovations.
25. Regarding CW1's alleged misconduct, CW2 stated that he was unaware of any disciplinary proceedings and explained that the Kshs.10,000/= received directly from a patient was consistent with the hospital's practice of allowing such payments to facilitate referrals and streamline fee settlements. He concluded that there was no valid basis for accusing CW1 of wrongdoing.



26. In cross-examination, CW2 stated that he resigned from the Respondent's hospital, and he was not fired for misconduct. He stated that the renovations done were an insurance payment and part of a loan. He stated he did not hear of any disciplinary hearing of CW1.
27. CW2 stated that the procedural payments were either paid by the insurance or cash, as insurance was made on a monthly but cash was paid at discharge. He stated that professional fees were cash payments and are different from salary, and he does not recall what was owed to CW1.
28. In re-examination, CW2 stated that the hospital has records of what was owed to CW1.

Respondent's evidence in court

29. RW1, John Saiyu, adopted his witness statement dated 17th April 2025 together with the list of documents dated even date marked as exhibits 1 to 15 as his evidence in chief.
30. RW1 testified that procedural fees were introduced in 2021 as motivational incentives for resident doctors and were payable upon receipt from insurance companies. He stated that CW1 had been paid all his procedural fees except for Kshs.37,690/=, which remained unpaid due to pending insurance reimbursements.
31. RW1 confirmed that CW1 was employed on 1st March 2023, initially placed on probation, and later issued a one-year contract dated 1st June 2023. Although a subsequent two-year contract dated 29th February 2024 was offered, CW1 declined to sign it but continued working until his resignation. RW1 further noted that CW1 was issued a show-cause letter for allegedly soliciting direct payment from a patient, failed to attend the disciplinary hearing, and resigned without raising any formal complaints prior to his departure.
32. In cross-examination, RW1 acknowledged that the Claimant had formally raised concerns about unpaid procedure fees through emails dated 28th and 31st March 2024. He stated that the hospital's managing director had acknowledged an initial agreement to pay procedure fees regardless of insurance reimbursement and verified the authenticity of payment vouchers issued to the CW1. Notably, RW1, employed as Human Resource Manager from May 2024, claimed to have signed a contract dated 29th February 2024, raising questions about document authenticity, especially since the show cause letter he presented differed from the one received by the Claimant, suggesting possible retrospective fabrication.
33. RW1 also confirmed that the Claimant worked Monday to Friday and was off-duty on 22nd June 2024, the date of the alleged misconduct, aligning with CW1 and CW2's testimony that the payment was facilitated by the hospital's front office. Lastly, he affirmed that the Claimant took only 14 leave days over a 16-month period, marking the close of the Respondent's case.
34. In re-examination, RW1 stated that CW1 used to work 5 days a week, but a show cause letter was served and showed charges against him that he took Kshs.10,000. =
35. Parties were directed to file their respective written submissions.

Claimant's submissions

36. The Claimant submitted that during the hearing, the Respondent argued that the Claimant lacked a valid employment contract at the time of his resignation on 1st July 2024, citing his failure to sign the acknowledgement section of the contract dated 29th February 2024. However, this claim is contradicted by clear evidence showing the Claimant continued working beyond the contract's issuance. Notably, Respondent's exhibit 3, a payslip confirmed by RW1 to reflect June 2024, demonstrates ongoing employment. Additionally, Respondent's exhibit 1, a letter to the County



Labour Office dated 8th July 2024, refers to the Claimant as “the employee” and acknowledges his resignation on 1st July 2024 after being absent since 28th June. These facts affirm the existence of an employment relationship, rendering the Respondent’s argument baseless and unconvincing.

37. The Claimant submitted that section 2 of the *Employment Act* defines remuneration as all payments owed to an employee from their work. Both parties agree that the Respondent owes the Claimant procedure fees, whether Kshs.147,000/= or Kshs.37,390/=. Despite the Respondent’s claim that these fees were motivational, the emails and payment vouchers show they were a negotiated part of the Claimant’s pay, due regardless of insurance reimbursement. Since the Respondent drafted the contracts and routinely paid the fees, it cannot deny that they formed part of the Claimant’s lawful remuneration.
38. In Black’s Law Dictionary, 9th Edition defines constructive dismissal is defined as a termination of employment brought about by the employer making the employee’s working conditions so intolerable that the employee feels compelled to leave.
39. The Claimant’s resignation on 1st July 2024 was a direct response to the Respondent’s fundamental breach of the employment contract, specifically the persistent non-payment of procedure fees for surgical work performed, often outside regular hours and without support or compensation. Despite the Respondent’s attempt to classify these fees as incentives, email correspondence and payment vouchers confirm they were part of the agreed remuneration.
40. The Claimant relied on the cases on Coca Cola East & Central Africa Ltd v Maria Ligaga [2015] KECA 394 and Milton M Isana v Aga Khan Hospital Kisumu [2017] KEELRC 571 (KLR), affirm that such breaches justify constructive dismissal. The Claimant’s resignation was not to evade disciplinary action, as alleged, but stemmed from intolerable working conditions and the employer’s failure to honour contractual obligations. Evidence shows the payment in question was facilitated by the hospital’s front office, consistent with its own policy, and the disciplinary claims were unfounded. Thus, the resignation was legally justified and triggered by the Respondent’s repudiatory conduct.
41. For the relief sought, the Claimant submitted that he is entitled to them and urged this Honourable court to allow the claim as prayed.

Respondent’s submissions

42. The Respondent submitted that the parties are bound by their pleadings as set out in the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] KEHC 5465 (KLR). The Respondent also submitted that the Claimant was employed under three successive contracts: a probationary contract from 1st March to 30th May 2023, a one-year contract from 1st June 2023 to 31st May 2024, and a proposed two-year contract dated 29th February 2024, which the Claimant received but declined to sign. The Respondent relied on the Court of Appeal William Muthee Muthami v Bank of Baroda [2014] KECA 591 (KLR), which set out the principles of contract law, comprising offer, acceptance and consideration. The Respondent argues that without acceptance, the third contract is unenforceable. Therefore, the Claimant’s employment was governed by the second contract, which expired on 31st May 2024. The Claimant worked through June 2024 and was paid accordingly, as shown in Claimant’s exhibit 3, confirming he only worked one month beyond the contract term.
43. The Respondent submitted that the Claimant’s resignation on 1st July 2024 was voluntary and strategically timed to avoid a disciplinary process, rather than resulting from constructive dismissal as set out in Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga (supra). The Respondent argues that the Claimant failed to demonstrate a repudiatory breach of fundamental employment terms or intolerable working conditions. The Claimant continued working after being assured that delayed



procedure fees would be paid upon insurance reimbursement, and even received a new contract offer, indicating the Respondent's intent to retain him. Additionally, the Claimant did not raise complaints during his self-appraisal and resigned the same day he was summoned for a disciplinary hearing. Drawing parallels with *Julius Michael Ooko v Tata Chemicals Magadi Limited* [2019] KEELRC 2015 (KLR), the Respondent contends that the resignation was a calculated move to avoid disciplinary action, and the Claimant is estopped from alleging constructive dismissal.

44. The Respondent submitted that it acknowledged that procedure fees were agreed upon with medical staff as motivational payments, not part of salary, and claims to owe the Claimant Kshs.37,690 following an audit, while the Claimant asserts a higher amount. The Respondent also submitted that the agreement was oral, and financial strain was cited as the reason for delayed payments.
45. Regarding leave, the Respondent submitted that the Claimant took 14 days and is entitled to 7 additional days under Section 28 of the *Employment Act*. The September 2024 payslip confirms that the June salary arrears were paid. The Respondent is willing to issue a certificate of service upon the Claimant's clearance.
46. The Respondent urged this Honourable Court to find that the Claimant was employed under a one-year contract dated 1st June 2023, which was not renewed, and that his resignation on 1st July 2024 was voluntary, prompted by an impending disciplinary process, not constructive dismissal. The Respondent acknowledges owing the Claimant Kshs.37,690 in unpaid procedure fees, and concedes he is entitled to 7 days of untaken leave. It further asserts that the Claimant was fully paid for June 2024, and may collect his certificate of service upon clearance. Lastly, the Respondent seeks to be awarded costs of the suit.

Analysis and determination

47. The court has considered the pleadings together with the rival submissions by the counsels; the issues for determination are as follows:
 - a. Whether the claimant was constructively dismissed or he was voluntarily and unlawfully terminated;
 - b. If (a) above is in the affirmative, whether the claimant is entitled to the reliefs sought; and
 - c. Who should bear the costs of the suit?
48. In *Coca Cola East & Central Africa Ltd v Maria Ligaga* (supra), the Court of Appeal held at paragraph 30 of its judgment, outlined the principles relevant in determining constructive dismissal as follows-
 - a. What are the fundamental or essential terms of the contract through the conduct of the employer?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
 - c. The conduct of the employer must be a fundamental breach 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 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 the 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.
49. In this instant case, the Claimant was employed on 1st March 2023, earning a monthly salary of Kshs.177,613/=, with an initial three-month probation ending 31st May 2023. On the other hand, the Respondent argues that the Claimant had two other contracts from 1st June 2023 to 31st May 2024, followed by an enhanced contract effective 29th February 2024 to 28th February 2026. The Claimant resigned on the grounds that he was frustrated as he was not paid the procedure fee amounting to Kshs.142,000/=. The Respondent acknowledged that it owes money to the Claimant amounting to Kshs.37,690/= following an audit which was done. The Respondent argued that the Claimant had taken Kshs.10,000 from a patient, leading to a disciplinary hearing against him.
50. The Claimant was demanding his procedure dues from the Respondent from as early as 28th March 2024 and he claimed his procedure dues were not paid from May 2023 to the whole of 2024 March. He received a response and was told there were financial procedure issues and once they are resolved he would be paid.
51. The Respondent did not deny they owed these procedure dues but it is unfortunate the parties are in disagreement as to how much is owed. The Claimant is asking for Kshs.142,000/= in his claim but the Respondent admits to Kshs.37,690/=. The Respondent did not produce the audit report that showed Claimant was owed Kshs.37,690/=.
52. The court holds that the Claimant was a term employee of the Respondent even though he had not signed the contract dated 29th February 2024 which was to commence on 29th February 2024 to 28th February 2026. The Contract as well as the former one that expired on 3rd May 2024 provided that each party could terminate the engagement upon giving one month notice or salary in lieu of notice.
53. The terms of the contract are fortified by Section 35(c) of the *Employment Act* which provide that:
- “where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.”
54. The Claimant resigned from his employment as he admits in his statement of claim from 1st July 2024. Curiously enough, neither the Claimant nor the Respondent produced the resignation letter. The court would have benefited to read the resignation letter to decipher if resignation was voluntary or not. The Claimant claimed he was frustrated by the Respondent's obstinacy, high-handedness, and aloofness to his plight and hence his resignation.
55. It is regrettable the court does not have factual evidence to support constructive dismissal as the Claimant is claiming.



The principals set out to justify constructive dismissal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) KECA among others are not met in this case. In the above case the court held that constructive dismissal occurs where an employee is forced to leave his job against his will because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad so that the employee regards himself as having been unfairly dismissed.

56. The court is seized of some emails exchanged between the Claimant and the Respondent pertaining to the payment of procedure fees. The Respondent did respond and promised the same would be paid once some financial hitches and cash flow problems were resolved. In the meantime, the Claimant does not demonstrate that his salary was otherwise withheld.
57. The court also noted that the Claimant had not signed his renewed contract dated 29th February 2024. It would appear he was contemplating exit but the court cannot affirm that with certainty.
58. All the court can state is that there are no solid grounds that would support the Claimant's assertion of constructive dismissal.
59. He had also received some Kshs.10,000/= from a patient and he claimed the hospital had allowed doctors to collect procedure fees from the patients. That would contradict the evidence of past payment vouchers that demonstrated the hospital paid him procedure fees direct.
60. The court finds no tangible evidence that the Claimant was unfairly terminated from employment due to constructive dismissal. Rather the Claimant resigned voluntarily and without evidence of a hostile working environment created by the Respondent. This claim of unlawful termination therefore fails.
61. However, the Respondent through his own admission owed the Claimant unpaid procedure fees. Since he did not tender documents to prove how much was the procedure fees the court will consider the amount prayed by the Claimant on his claim amounting to Kshs.142,000/=.
 - (a) There is no salary arrears as the same was utilised to pay for failure to give notice.
Similarly, there is not notice pay as Claimant was the one who left employment without notice.
 - (b) He is awarded 14 days leave not taken having worked for about 2 years- Kshs.88,806/=.
62. Interest will accrue from the date of judgment at 14% per annum until full payment.
63. Each party will meet their respective costs of the suit.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 6TH DAY OF NOVEMBER, 2025.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COvID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

