



**Kihara v Almasi Bottlers Limited & another (Civil Appeal E225 of 2021)
[2025] KECA 1893 (KLR) (7 November 2025) (Judgment)**

Neutral citation: [2025] KECA 1893 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL E225 OF 2021
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
NOVEMBER 7, 2025**

BETWEEN

WILSON MWANGI KIHARA APPELLANT

AND

ALMASI BOTTLERS LIMITED 1ST RESPONDENT

ALMASI BEVERAGES LIMITED 2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Employment and Labour Relations Court at Kisumu, (Radido, J.) dated 16th June, 2021 in KISUMU E&LRC CAUSE NO 5 OF 2018)

JUDGMENT

1. The appellant, Wilson Kihara Mwangi, by way of a Statement of Claim dated 24th January 2019, commenced an action against Almasi Beverages Limited and Almasi Bottlers Limited, (“the respondents”), jointly and severally before the Employment and Labour Relations Court at Kisumu, (“the ELRC”). He alleged that his separation from employment with the respondents was unlawful, unfair, and amounted to constructive dismissal. The appellant as a result sought a wide range of remedies, including 12 months’ gross salary as compensation for unfair termination, pay in lieu of notice, unpaid salary arrears, a refund of unlawful deductions, issuance of a certificate of service, and other terminal benefits. The appellant averred that he was first employed in 2015 as Operations Manager by Kisii Bottlers Limited, which was later acquired by the respondents. Upon acquisition, he executed a fresh employment agreement with the respondents on April 2018, under which he was designated as Regional Sales Manager of their products for the southern region of Kenya. His gross monthly salary was set at Kshs.449,540, inclusive of a fixed basic salary and a variable pay component.
2. Throughout his tenure, the appellant claimed that he discharged his duties with diligence and commitment, and was subsequently entrusted with additional roles, including acting as General Manager during brief periods. However, despite his loyalty and performance, the respondents engaged



in a series of unfair labour practices that made his working environment unbearable. These included the persistent denial of a stable job description, coupled with arbitrary departmental transfers executed without prior consultation or adequate training. He was also subjected to unattainable performance targets, often enforced under threat of dismissal, and required him to work overtime including nights, weekends, and public holidays without compensation. Moreover, he endured verbal abuse and humiliation from members of senior management, further undermining his dignity and morale. To compound matters, the respondents withheld his salary for the months of May and June 2018 without justification, aggravating his distress and rendering his continued employment untenable.

3. The appellant accordingly tendered his resignation letter to the respondents, giving the requisite three-month notice. He further requested that his accrued 15 days of leave be utilized during his notice period. Despite the foregoing, he was issued with a notice to show cause letter accusing him of absconding duty. He responded to the letter by disputing the allegations, citing prior approval of his leave and asserting that his email access had been disabled, and his communication channels with colleagues severed.
4. The respondents then convened a disciplinary hearing at which the appellant was confronted with fresh allegations, including insubordination and irregular invoicing of the respondents' products. He maintained that these charges were never raised prior to the hearing, were procedurally flawed, and amounted to a trial by ambush.

Subsequently, the appellant was summarily dismissed with the dismissal retrospectively backdated to two months earlier. The appellant thus instituted the claim, asserting that the purported summary dismissal lacked substantive justification, was procedurally unfair, and that his employment had in fact been constructively terminated before the purported disciplinary action even commenced.

5. The claim was defended by the respondents, who filed a joint Memorandum of Response and Counterclaim. The respondents' case was that the appellant was lawfully dismissed following a series of grave breaches of his contractual and fiduciary obligations which rendered his continued employment untenable. The respondents asserted that the appellant, while serving as Regional Sales Manager at their Kisii plant, tendered his resignation with three months' notice. However, during the intervening period, it came to the respondents' attention that he had allegedly engaged in irregular invoicing practices. Specifically, they contended that he fraudulently caused the dispatch of Dasani water worth Kshs.2.6 million from the Nyeri plant by misrepresenting that such invoicing had received verbal approval from the Commercial Manager. They averred that these products were never sold to customers but instead warehoused at the Kisii plant, which was at the time not operational, with the intention of inflating his regional performance figures to qualify for commission-based variable pay.
6. The respondents further averred that the appellant was asked to return to work on 28th June 2018, following the lapse of approved leave period, in order to reconcile his account and explain the discrepancies. However, he failed to do so and absconded duty. This conduct, coupled with what they described as a blatantly insubordinate response to a show cause letter, led them to invite the appellant for a disciplinary hearing. Following deliberations of the Disciplinary Committee where the issues of insubordination, absconding duty, and falsification of sales data were examined, the respondents concluded that the appellant's actions constituted gross misconduct under section 44 of the *Employment Act*. Accordingly, they issued a summary dismissal letter. In addition to denying liability, the respondents raised a counterclaim of Kshs.4,400,000, comprising of outstanding liabilities owed by the appellant, including the value of the irregularly invoiced products and an unsettled car loan.



7. At the plenary hearing of the claim, the appellant's case was presented by himself as the sole witness. In his evidence, he expounded on the circumstances surrounding his employment, his resignation, and what he considered to be oppressive treatment by the respondents. Specifically, he stated that after submitting his resignation letter, he was placed on compulsory leave, but despite giving the required notice, he was subsequently issued with a notice to show cause and later dismissed summarily. He maintained that the disciplinary proceedings were procedurally flawed, introduced new charges that had not been raised earlier, and that his subsequent appeal against the decision was never dealt with on the merits. He then prayed that the claim be allowed.
8. The respondents' case was prosecuted through one witness, Mr. Timothy Muthini, the Chief Human Resource Officer. In his testimony, the witness defended the lawfulness of the summary dismissal by asserting that the appellant had committed serious acts of misconduct that warranted termination of his employment. He claimed that the appellant had irregularly invoiced products worth Kshs.2.6 million, allegedly by falsely indicating that he had received verbal authorization from the Commercial Manager. Furthermore, he stated that despite being expressly instructed to report back to work following the expiry of his leave days, the appellant failed to do so, thereby absconding duty. Mr. Muthini also characterized the appellant's written response to the show cause letter as openly dismissive and insubordinate, reinforcing, in his view, the justification for disciplinary action and ultimate dismissal. He testified that the appellant was invited to a disciplinary hearing, was informed of his rights, and that the process was fair and justified. In the result he asked for the dismissal of the claim with costs.
9. After considering the pleadings, evidence, the written submissions, cited authorities and the law, the ELRC in a judgment dated 16th June 2021 found that the appellant had failed to prove any claim of unlawful or constructive dismissal. The Court held that the resignation letter dated 1st June 2018 was voluntary and lacked any explicit or contemporaneous link to the alleged grievances, which only surfaced after resignation. The appellant's assertions that the workplace environment had become intolerable were therefore found unpersuasive. On procedural fairness, the Court determined that the respondents had complied with section 41 of the *Employment Act*; issued a proper show cause notice referencing the allegation of absconding duty, appellant was afforded an opportunity to respond in writing, and was later invited to a disciplinary hearing where he was permitted to make representations.
10. Although additional allegations were raised during that hearing, namely, insubordination and irregular invoicing, the court declined to base its decision on those grounds, noting that they were not included in the initial notice and thus violated procedural clarity. The Court accepted that the appellant had failed to report to work as directed after his approved leave ended, and that he had not offered a convincing explanation for that absence. The argument that he lacked "bus fare" due to withheld salary was found insufficient, particularly since the respondents had an established reimbursement policy. Consequently, the Court held that there was a valid and fair reason for his summary dismissal on the ground of absconding duty. The claim for July and August salary was similarly rejected.
11. The Court upheld the respondent's position that since no services were rendered during that period, no salary was due. On the claim for overpayment of a car loan, the Court found no evidence to substantiate the alleged Kshs.100,000 refund. However, it ordered the respondent to issue the appellant with a certificate of service in compliance with section 51 of the *Employment Act*. In the final analysis, the Court dismissed the entire claim save for the directive to issue a certificate of service. The counterclaim had earlier been abandoned upon confirmation that the appellant had settled the debt. There was no order as to costs.



12. The appellant, being aggrieved by the judgment and decree filed this appeal contending that the ELRC erred in law and in fact by concluding that the appellant's resignation was voluntary; misapprehending the applicable law and facts; in holding that the appellant was accorded procedural fairness during the disciplinary process; in upholding the summary dismissal despite the disciplinary proceedings being fatally flawed; to appreciate that backdating the effective date of dismissal was both unlawful and prejudicial; failing to find that the respondents had violated the appellant's constitutional right to a fair hearing under Articles 47 and 50 of Constitution; and in declining to award damages for unfair and unlawful termination in breach of statute.
13. The appeal was heard by way of written submissions with limited oral highlights. When called out, Ms. Wanjala, learned counsel appeared for the appellant, while Ms. Okello, learned counsel, was present holding brief for Mr. Ouma, learned counsel for the respondent.
14. In brief, counsel for the appellant submitted that the ELRC failed to give due weight to the pleadings, submissions, and oral evidence presented, particularly regarding the flawed disciplinary proceedings. She maintained that the show cause letter referenced only one charge of absconding duty, while fresh allegations, including irregular invoicing and insubordination, were introduced without notice to the appellant and during the disciplinary hearing. In support thereof, counsel cited the case of OH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2019] 40 ILJ 2477, where the Labour Appeals Court of South Africa emphasized that fairness requires charges to be clearly articulated and disclosed in advance. She further invoked the case of Patrick Abuya v Institute of Certified Public Accountants of Kenya & Another [2015] eKLR, where the Court held that an employee must be afforded a proper opportunity to respond to specific allegations, and that a hearing devoid of impartiality violates principles of natural justice, particularly the rule against bias (*nemo iudex in causa sua*).
15. Counsel also noted that the appellant's internal appeal was never considered on the merits. Accordingly, it was submitted that the ELRC erred in concluding that procedural fairness was observed in the dismissal of the appellant. Counsel submitted that the appellant's job description was switched from Operations Manager to Regional Sales Manager without issuance of a proper job description or the requisite training, contrary to section 10(2)(c) of the *Employment Act*. She contended that this undermined clarity in performance expectations and facilitated an unfair performance assessment regime.

Additionally, it was argued that the ELRC failed to interrogate the irregularities in the disciplinary process, which undermined both its procedural and substantive fairness.
16. Counsel also submitted that the retrospective backdating of the termination letter was illegal and calculated to defeat his entitlement to salary for two months. It was counsel's position that the respondents' internal processes were manipulated to rationalize the withholding of the two months' salary.
17. Counsel contended that the ELRC erred in failing to award the appellant damages for constructive and unfair dismissal despite evidence of statutory breaches. She argued that the summary dismissal violated sections 41 and 44 of the *Employment Act*, and also ran afoul of Articles 27, 41, 47, and 50 of *the Constitution*. To that end, she cited the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the Court held that procedural fairness requires adequate notice and an opportunity to be heard before adverse action is taken.
18. Counsel criticized the ELRC for shifting the burden of proof away from the respondents' and applying a standard higher than the balance of probabilities. Citing the case of Simon Gichuru v Package



Insurance Brokers Ltd (Petition No. 36 of 2019), she underscored that it is the employer who bears the burden to prove fair procedure and valid grounds for dismissal under section 45(2) of the *Employment Act*. She also referred to the case of Fred A. Odhiambo v Attorney General & Another [2013] KEELRC 100 (KLR), where the Court held that once an employee establishes a prima facie case of unlawful termination, the evidentiary burden shifts to the employer to prove otherwise.

19. Counsel also submitted that the appellant was subjected to unfair trial in breach of Article 50 of *the Constitution* since the trial was conducted before two judges, Nduma and Radido JJ. That Radido J took over the suit from Nduma J after the appellant had closed his case. Instead of Radido J proceeding from where Nduma J. had left, instead directed the respondents who had hitherto not filed their witness statements to do so without according the appellant opportunity to challenge the decision. She concluded by urging this Court to find that the dismissal was unfair, procedurally defective, and in breach of constitutional and statutory provisions, and to allow the appeal with appropriate remedies.
20. Counsel for the respondent in answer submitted that the termination of the appellant's employment was fair, lawful, and procedurally compliant. In support thereof, the respondent cited the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015], eKLR, where this Court held that the key test for constructive dismissal is whether the employer's conduct amounted to a repudiatory breach of contract, a principle the court adopted to emphasize that the employer's behavior must render further service untenable. Further, in the case of Ingado v One Acre Fund [2024] KEELRC 1074 (KLR), the court reaffirmed that for a claim of unfair dismissal to succeed, the employee bears the burden of proving the dismissal was unfair, while the employer must justify the termination, citing section 47(5) of the *Employment Act* in support thereof.
21. Counsel also reverted to the case of Simba Corporation t/a Acacia Premier Hotel v Omondi [2024] eKLR, to underscore that fair termination must comply with sections 41, 43, 45, and 47(5) of the *Employment Act*, particularly relating to procedural fairness and the validity of reasons for dismissal. Additionally, in the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013], the Court detailed the procedural safeguards for fair dismissal, including the right to be heard and adequate notice. Counsel emphasized that the appellant was informed of the charges, given an opportunity to respond, and a disciplinary process was duly conducted, thus negating any claim of unfair or constructive dismissal and the remedies sought in consequence thereof.
22. In the end, counsel prayed for the dismissal of the appeal.
23. This being a first appeal, the court is required by the well-established principles in Peters v Sunday Post Ltd [1958] EA 424, as affirmed in Selestical Limited v Global Programs for Research and Training & Another [2021] KECA 164 (KLR), to act thus:

“...a first appeal is by way of a retrial where this Court is mandated to re-evaluate the evidence on record, examine and analyze it in order to reach its own conclusions...”
24. The duty of this Court, therefore, is to carefully interrogate the factual record, legal findings, and judgment of the ELRC to ascertain whether the court erred in fact or law. To our mind, the following issues arise for determination whether: the appellant's dismissal amounted to constructive dismissal; the disciplinary process violated the principles of procedural fairness; the appellant was subjected to unfair trial in breach of Article 50 of *the Constitution* and whether the trial court erred in declining to award the reliefs sought.
25. On the first issue, Constructive dismissal, or constructive discharge or termination, refers to situations where an employee is forced to part ways with the employer due to the employer's conduct that makes his working conditions intolerable and extremely difficult for the employee to continue working,



leaving the employee with no option but to leave. The *Employment Act* does not explicitly mention or define what amounts to constructive dismissal. However, section 45 of the Act provides the foundation by protecting employees from unfair termination resulting from breaches of fundamental employment terms by the employer. Constructive dismissal has therefore been recognized and developed through judicial interpretations and key court decisions. According to Black's Law Dictionary (9th Edition), 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.”

26. Lord Denning, MR, in the case of *Western Excavating (ECC) Ltd*

v. *Sharp* (1978) ICR 222, stated thus: –

“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 essentials of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract because of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave instantly without giving any notice and say that 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.”

27. In the case of *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* [2015] eKLR, the Court stated:

“The key test... is whether the employer's conduct amounted to a repudiatory breach going to the root of the contract, thereby rendering continued employment intolerable.”

28. The Court went ahead and emphasized that the working conditions must be so severe to justify resignation. The said court laid down the following legal principles in determining cases of constructive dismissal:

1. What are the fundamental or essential terms of the contract of employment?
2. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
3. 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.
4. An objective test is to be applied to evaluate the employer's conduct.
5. 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.
6. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
7. 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.



8. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
9. Facts giving rise to repudiatory breach or constructive dismissal are varied.
29. In light of the foregoing principles, we now proceed to examine whether the appellant’s circumstances met the legal threshold for constructive dismissal. The appellant’s employment contract designated him as Regional Sales Manager with clearly defined roles and remuneration, and there is no credible evidence that these fundamental terms were unilaterally altered by the employer. While the appellant cited issues such as unfair transfers, lack of a job description, and verbal abuse, these allegations were not contemporaneous with his resignation and were only raised after the fact. No substantive evidence was tendered to establish that these complaints constituted a fundamental breach going to the root of the employment contract. Applying an objective test, the alleged conduct whether taken individually or cumulatively did not rise to the level of intolerability necessary to justify resignation. Constructive dismissal, as restated in the Coca-Cola case, cannot be founded on subjective perception alone.
30. Further, the requirement of causation was not met. The appellant’s resignation letter did not make reference to any form of grievance or intolerable working conditions; instead, it took the form of a conventional notice of resignation. He further sought to utilize part of his notice period as leave, suggesting an amicable separation rather than one provoked by the employer’s conduct. As clarified in Coca-Cola case, the burden to prove a repudiatory breach lies squarely on the employee. In this case, the appellant failed to discharge that burden. Although constructive dismissal claims must be evaluated based in the context and facts on case-to-case basis, the appellant’s scenario does not satisfy the required muster. The absence of any contemporaneous objection or protest further undermines the claim. Accordingly, and in full alignment with the principles articulated in Coca-Cola case we are satisfied that the appellant did not establish a case of constructive dismissal and the ELRC’s finding that the resignation was voluntary cannot in the circumstances be impugned.
31. Did the Disciplinary Process Violate the Principles of Procedural Fairness? The appellant contended that the show cause letter cited only absconding duty, yet additional charges were introduced at the hearing stage. While procedural fairness under section 41 of the *Employment Act* is mandatory, this Court has previously held in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR that:

“Where an employer substantially complies with the procedural safeguards—notice, hearing, and opportunity to respond—the process is deemed fair.”
32. The record confirms that the appellant was invited to a disciplinary hearing, was informed of his rights, and participated in the process. While fresh charges emerged during the hearing, the ELRC rightly declined to rely on them as a basis for upholding dismissal and focused solely on the charge of absconding from duty. Just like the ELRC, the disciplinary proceedings were fair to the appellant and we see no basis to interfere.
33. Turning on the issue as to whether the appellant was subjected to unfair trial in breach of Article 50 of *the Constitution*, having already found that the appellant was subjected to a fair hearing, it cannot be said again that the process was unfair to the appellant. Indeed, it was only raised by counsel for the appellant in her submissions.
34. On the last issue, we take the view that, the grant of remedies following termination of employment must align with the findings of unlawful or unfair dismissal. In the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR, the Supreme Court held that remedies under section 49 of the *Employment Act* must follow a proved violation of rights.



35. Given our concurrence that the appellant voluntarily resigned, that he failed to return to duty despite communication, and that he was heard before dismissal, we find no basis for setting aside the order dismissing the appellant's claim. The ELRC's conclusion that the respondents had a valid and fair reason to terminate the appellant's employment and followed fair procedure is well-grounded.

36. For the foregoing reasons, we find the appeal is wholly unmerited.

It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF NOVEMBER, 2025

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

