



**Owiti v Usiku Entertainment Limited (Employment and Labour Relations Cause E075 of 2023) [2025] KEELRC 3362 (KLR) (28 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3362 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E075 OF 2023  
BOM MANANI, J  
NOVEMBER 28, 2025**

**BETWEEN**

**ALEX OWITI ..... CLAIMANT**

**AND**

**USIKU ENTERTAINMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The dispute between the parties was triggered by the manner in which the employment relationship between them was closed. Whilst the Claimant asserts that the Respondent unlawfully terminated the relationship by constructively dismissing him from employment, the Respondent contends that the Claimant voluntarily resigned from employment.
2. The Claimant avers that the Respondent hired his services as Director of Communications with effect from 1<sup>st</sup> June 2020. It is his case that his gross salary was Ksh. 556,000.00 per month. He contends that he discharged his duties diligently until the Respondent constructively terminated the contract between them.
3. The Claimant avers that despite the Respondent having hired him to work for it as its Director of Communications, the Respondent's management forced him to take up additional responsibilities at Pan African Gaming Group (PAGG) without remuneration. He contends that this exerted pressure on him leaving him with a feeling of exploitation.
4. The Claimant avers that the Respondent's failure to address this matter stirred a sense of frustration in him. He contends that this contributed to his eventual decision to resign from employment.
5. Further, the Claimant contends that the Respondent used to intermittently withhold his salary despite it (the salary) being due. He avers that the Respondent started to fall into salary arrears from July 2022 until November 2022 when he resigned. He contends that the failure to pay his salary consistently left him exposed because he could no longer meet his financial obligations as and when they fell due.



- He further contends that the failure to remit his pay resulted in a fundamental breach of the contract between the parties.
6. The Claimant avers that efforts to have the Respondent regularize the payments did not yield positive results. He contends that this contributed to his decision to resign from employment.
  7. The Claimant contends that when he exerted pressure on the Respondent to settle the salary arrears, it responded with threats of his demotion. He contends that the Respondent's management sent him a letter purporting to demote him from his position of Director of Communication to a junior position of Public Relations Assistant.
  8. The Claimant contends that the letter sent him into shock and anxiety. He avers that although the Respondent subsequently rescinded the decision to demote him before he tendered his resignation, its actions left him in a state of anxiety and frustration which contributed to his decision to resign from employment.
  9. Further, the Claimant avers although that the Respondent accused him of underperformance in its communication to him on 18<sup>th</sup> November 2022, it had commended him for his excellent performance in October of the same year. He wonders how the Respondent could accuse him of perennial poor performance in November 2022 when it had showered him with compliments about his good performance in October 2022, just a few days earlier.
  10. The Claimant contends that the Respondent's actions were actuated by malicious intent. He avers that this contributed to his sense of frustration at the workplace.
  11. The Claimant avers that the Respondent's actions amounted to a repudiatory breach of his contract of service which entitled him to resign from employment and plead constructive dismissal. As such, he contends that the Respondent constructively terminated his services.
  12. On its part, the Respondent affirms that the parties had an employment relationship. It avers that it engaged the Claimant's services as Director of Communications with effect from 1<sup>st</sup> June 2020 at a monthly gross salary of Ksh. 556,000.00.
  13. The Respondent avers that the Claimant's role entailed: managing and monitoring its marketing team; overseeing its public relations activities; preparing monthly press releases on its activities; scheduling its media interviews; and maintaining an accurate and updated journalist database.
  14. The Respondent contends that in the course of execution of the Claimant's duties, various performance concerns were noted. It avers that the Claimant's supervisor raised these concerns with him with the hope that he was going to improve on his performance but to no avail.
  15. The Respondent asserts that the Claimant's dwindling performance adversely affected its operations. It contends that as a result of the Claimant's inability to discharge his duties, it suffered on many fronts including: failure to meet deadlines for projects; exposure of sensitive data to its competitors; and reassignment of the Claimant's responsibilities to its CEO to personally attend to them.
  16. The Respondent avers that the Claimant's inability to discharge his duties forced it to consider deploying him to a different position. It contends that it notified the Claimant of this intent vide its email dated 18<sup>th</sup> November 2022. According to the email, the Claimant was to be deployed from the position of Director of Communications to Junior PR Assistant.
  17. The Respondent avers that when the Claimant was informed of the proposed deployment, he rejected it. As such, it avers that it sent him an email dated 21<sup>st</sup> November 2022 withdrawing the proposed changes.



18. The Respondent avers that after the Claimant received the aforesaid email, he wrote a letter of resignation from employment dated the same date (21<sup>st</sup> November 2022). It contends that he alleged that: his position had been unilaterally changed; the Respondent intended to terminate his contract without following the law; and that the Respondent had forced him to work for PAGG without remuneration.
19. The Respondent contends that although it did not agree with the Claimant's claims, it nevertheless accepted his resignation from employment. It avers that it did so in order to amicably end the employment relationship between them.
20. The Respondent contends that despite the Claimant having not worked for the entire of November 2022, it paid him salary for the full month. It further contends that the Claimant resigned without giving notice of his intention to resign at least one month to the date of resignation.
21. The Respondent denies the Claimant's contention that he was a victim of constructive dismissal from employment. It denies that it demoted him from his position as he asserts. It contends that although it intended to deploy the Claimant to a different position, he declined the proposal with the consequence that he kept his position.
22. The Respondent further contends that it consulted the Claimant on the proposed deployment to the new position. It contends that the decision was made in good faith but was withdrawn when the Claimant did not buy into it.
23. The Respondent contends that the failure to pay the Claimant's salary on time was occasioned by the economic challenges it was experiencing at the time. It contends that owing to these challenges, it consulted all employees, including the Claimant, on the matter and obtained their concurrence to stagger payment of their salaries. It further contends that the Claimant consented to a payment schedule for his back pay and that the arrears were settled before he resigned from employment.
24. The Respondent denies that it forced the Claimant to work for PAGG without pay. It contends that it (the Respondent) is a subsidiary of PAGG. It further contends that PAGG was being launched at the time and that this fell in the Claimant's domain as its (the Respondent's) Director of Communications.
25. The Respondent avers that it did not require the Claimant to take up a second job at PAGG. It contends that he was only tasked to undertake a single press activity for PAGG in February 2022.
26. The Respondent contends that contrary to the Claimant's assertions that it constructively terminated his contract of service, he is the one who had been urging it to terminate his services with the hope that it (the Respondent) will take adverse action against his employment. It avers that the Claimant voluntarily resigned from employment.
27. The Respondent contends that it paid the Claimant all his dues in full. As such, it asserts that his claim for accrued leave days is unfounded.
28. The Respondent contends that the Claimant resigned without giving notice in contravention of section 35 of the *Employment Act*. As such, it counter claims for notice pay equivalent to his salary for one month.
29. In response, the Claimant asserts that the key ingredient in constructive dismissal is that the employee is entitled to leave employment without notice because of the employer's intolerable conduct. He contends that the Respondent's actions entitled him to exit employment without notice and plead constructive dismissal. As such, he contends that the Respondent is not entitled to counter claim for notice pay.



## Issues for Determination

30. After evaluating the pleadings, evidence and submissions by the parties, the following issues arise for determination:-
- a. Whether the contract of service between the parties was terminated through constructive dismissal of the Claimant from employment.
  - b. Whether the Claimant is entitled to the reliefs which he seeks through these proceedings.
  - c. Whether the Respondent is entitled to the reliefs which it seeks through the Counter Claim.

## Analysis

31. The law on constructive dismissal from employment in Kenya is not codified. It is based on case law.
32. Constructive dismissal occurs when an employee resigns from employment in reaction to an intolerable work environment which has been created by the employer. The conduct of the employer must be sufficiently disconcerting to lead to the conclusion that he intended to repudiate the contract of service between the parties or that he was no longer willing to be bound by fundamental terms of the contract.
33. Once an employee is faced with an intolerable work environment, he is entitled to end the employment relationship by resigning. Although it is the employee who tenders the resignation, the law deems the contract of service as terminated by the employer and hence the concept of constructive dismissal.
34. Because the law on this aspect of employment is not codified, there is no fixed definition of what constitutes intolerable conduct by the employer. Any conduct which is significantly offensive to an employee may amount to intolerable conduct.
35. Alluding to this, the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR), stated as follows:-
- “The factual circumstances giving rise to constructive dismissal are varied. 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.....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 [or if]...the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment-this is the contractual test.”
36. In the aforesaid case, the Court of Appeal was of the view that in determining whether there has been constructive dismissal, the court should lean more towards inquiring whether the employer’s conduct amounted to a repudiation of the contract between the parties. It expressed itself on the issue as follows:-
- “.....whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law.”
37. Importantly, the court underscored the reality that the employer need not have been intentional about his offensive action. What the law is concerned with is whether the conduct was, as a matter of law



and fact, intolerable irrespective of the employer's intention whilst engaging in it. The court, in the aforesaid decision, observed on the subject as follows:-

“The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory.”

38. In the instant case, the Claimant has alluded to a number of matters which he contends demonstrated the Respondent's intolerable conduct. He contends that his decision to resign from employment was triggered by this conduct.

39. In line with the guidelines which have been alluded to above, what this court is called upon to do is to examine the impugned actions by the Respondent and determine whether they amounted to repudiation of the Claimant's employment. In doing so, the court has to apply the test of a reasonable man on the street. However, it (the court) is reminded that it should not be concerned with the Respondent's actual motivation for engaging in the impugned conduct.

40. The first complaint which the Claimant raised relates to the erratic payment of his salary by the Respondent. He contends that the Respondent breached a fundamental term of the contract between them by delaying payment of his salary.

41. It needs no gainsaying that the stipulation on payment of salary in a contract of service is a fundamental term of the contract. This is because remuneration provides consideration for the contract, a critical component of any contract. As such, nonpayment of salary certainly constitutes a fundamental breach of a contract of service.

42. In the case of *Mwaniki v Tihan Limited* [2025] KEELRC 1208 (KLR), the learned Judge expressed herself on the subject as follows:-

“Failure by the Respondent to pay the Claimant a salary, is no doubt an express breach of his employment contract. Salary being an essential term of the contract between the parties, goes to confirm that the breach was sufficiently serious to constitute constructive dismissal.”

43. In *Lokamiti & 4 others v Olsuswa Farm Limited* [2025] KEELRC 992 (KLR), the learned Judge observed on the subject as follows:-

“When their salaries were delayed, or not paid for as many as 5 months, the Appellants (who were the employees in the cause) were entitled to conclude that the Respondent had repudiated their contracts, and was no longer interested, in honouring a fundamental term of the contract. They were entitled to consider their contracts to have been terminated constructively, by the Respondent.”

44. In *Karimi v Katheri Farmers' Co-operative Society Limited* [2024] KEELRC 2195 (KLR), the learned Judge commented on the subject as follows:-

“Constructive dismissal takes various forms including unilateral variation of the contract of employment; non-payment or delay in payment of salaries, indefinite suspension without pay, failure to assign duties, overworking, negative discrimination, and mistreatment such as verbal abuses. When the employer subjects his employee to the above conditions, the employee may resign or leave the employment without notice and sue for constructive dismissal because the resignation is not voluntary.”

45. Unlike in the case of *Saro v Evans Sunrise Centre* [2024] KEELRC 977 (KLR) where the learned Judge expressed the view that non-payment or delay in payment of salary is not a ground to plead constructive



dismissal, all the decisions alluded to above affirm the reality that failure to pay or unreasonable delay in paying an employee's salary constitutes a fundamental breach of the contract of service between the parties which entitles the aggrieved employee to resign and plead constructive dismissal. I agree with this latter view.

46. The Claimant's case is that the Respondent begun delaying to remit his salary in the month of July 2022. He contends that this continued until November 2022 when he quit employment.
47. The Claimant contends that Respondent did not give a cogent explanation for the delayed salary. He contends that all that it (the Respondent) did was to call group meetings to inform employees that their outstanding salaries will eventually be paid.
48. The Claimant contends that the Respondent did not have an individualized engagement with him regarding delayed payment of his salary until he begun exerting pressure on the matter. He avers that it is only after he threatened to take legal action against the Respondent that it gave him a payment plan for the salary arrears.
49. The Claimant tendered in evidence a payment schedule which suggests that as at October 2022, the Respondent owed him salary arrears of up to Ksh. 998,846.30. The Respondent did not deny this contention. Whilst acknowledging the arrears, the Respondent justified the nonpayment of the Claimant's salary on the difficult economic conditions it was facing.
50. In a number of email correspondence with the Claimant, the Respondent explained that a number of its clients had delayed to settle their accounts thus affecting its cash flow. However, it expressed optimism that it was going to resolve the challenge once it was in funds.
51. In the Respondent's Chief Executive Officer's email to the Claimant on 21<sup>st</sup> November 2022, he stated, in part, as follows:-

"Good Morning Alex,

I hope that you had a nice weekend and that with the benefit of time and with the almost 1 million shillings in back pay that we have now completely cleared for you, that cooler heads may prevail and we can have a more civilized conversation than last week."

52. Through this email, the Respondent acknowledged that prior to 21<sup>st</sup> November 2022, it owed the Claimant salary arrears of close to Ksh. 1,000,000.00. It further contended that it had now settled the arrears.
53. This email corroborates the Claimant's narrative that the Respondent had fallen into arrears on his salary. This was a breach of a fundamental term of the contract between the parties.
54. It is important to note that Part IV of the *Employment Act* protects an employee's right to earn salary that has accrued to him. The employer is under legal obligation to ensure that accrued salary by an employee is paid to the employee as per law.
55. Speaking to this fact, section 18(2) of the *Employment Act* stipulates as follows:-

"Subject to subsection (1), wages or salaries shall be deemed to be due:-

- a. in the case of a casual employee, at the end of the day;
- b. in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;



- c. in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;
- d. in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date.”

56. A perusal of the letter dated 1<sup>st</sup> June 2022 by which the Respondent engaged the Claimant’s services implies that the contract of service between them was for an indefinite term. As such, the Claimant’s salary was to be paid at the close of every month.
57. The law does not excuse an employer for failure to pay salary as and when it falls due because of the financial constraints he (the employer) may be experiencing. All that it (the law) is concerned with is that the employer discharges this obligation as per law required.
58. Payment of an employee’s salary on the due date is not a favour which the employer extends to an employee. This is the right of the employee. Conversely, it is the duty of the employer to ensure that salary is paid on the appointed date.
59. As such, if the employer is not able to pay an employee salary on the due date, he must engage the employee on the matter with a view to entering into an arrangement (if the employee agrees) on how the unpaid salary will be paid. It is in the employer’s interest to document the employee’s concurrence to the arrangement.
60. Alternatively, the employer may resort to other lawful means to close the employment contract for want of ability to perform his obligations under the contract. This includes declaring redundancies.
61. Speaking to this matter, this court (differently constituted) stated as follows in the case of *Lokamiti & 4 others v Olsuswa Farm Limited* (supra):-

“The salary payable to an Employee, is a fundamental term of the contract of employment. It is always, at the heart of the *essentialia negotii*, during contract making. An Employer can trifle with other terms, but not the salary. So sacrosanct is the term, that the *Employment Act*, dedicates a whole part IV, on its protection. When it is withheld, an Employer is in breach of a fundamental term of the contract..... A work environment in which an Employee is rendering his labour with no income, or with persistently delayed income, fits well the description of a hostile work environment, and borders on conditions of slavery and servitude, outlawed by *the Constitution*..... If an Employer is encountering tough economic times as stated by the Trial Court, there are legal options of meeting the challenges, including resort to Section 40 of the *Employment Act*. An Employer is not allowed to unilaterally take away the statutory protections conferred on an Employee’s salary by Sections 17 and 18 of the *Employment Act*. When such protection is removed, and the salary paid at the convenience of an Employer, a hostile work environment is inevitable. A fundamental term of the contract of employment, perhaps the most fundamental, is vandalized, warranting the presumption on the part of an Employee, that his contract has been terminated.”

62. As pointed out above, non-payment of salary by the employer amounts to breach of a fundamental term of a contract of service. This is irrespective of the reasons why the salary was delayed. The fact that the employer was having financial challenges at the time does not cure the breach unless the employee is willing to accommodate him (the employer) in this respect.
63. Having regard to what has been set out above, it is apparent that the Respondent breached a fundamental term of the contract of service between the parties when it failed to consistently settle



- the Claimant's salary as and when it fell due. The fact that it (the Respondent) managed to settle the arrears some days before the Claimant resigned does not change the fact that there had been breach of a fundamental term of the contract of service which entitled the Claimant to resign and plead constructive dismissal from employment.
64. The moment the Claimant's salary was delayed, he became entitled to consider that the Respondent had engaged in conduct which amounted to repudiation of the contract of service between them. Therefore, he became entitled to leave employment with or without notice and plead constructive dismissal.
  65. The Respondent asserts that the Claimant agreed to late payment of his salary. However, it did not present cogent evidence to affirm this assertion.
  66. On the contrary, there is evidence that the Claimant kept pushing the Respondent to provide a payment plan for his arrears but to little avail. All that the Respondent would say in response to the Claimant's demands was that it was not able to provide a concrete payment plan because this depended on when its customers were going to settle their outstanding bills. It took the threat of adverse legal action for it (the Respondent) to share the payment plan.
  67. The Claimant gave evidence of the emotional distress he suffered as a result of the delay in payment of his salary. He stated that he could not satisfy his family's financial obligations as and when they fell due. He further stated that he began receiving incessant pressure from auctioneers who wanted him to settle the financial obligations he had. Yet, the Respondent expected him to continue reporting to work as if all was well.
  68. Nothing can be more intolerable than this kind of situation. Nothing can be more intolerable than an employer who has not paid your salary pushing you to report on duty when he knows he has not put you in funds to even cater for your travel to and from the office. Nothing can be more intolerable than an employer who has not paid your salary pushing you to be at work despite having been informed that auctioneers are threatening to levy distress against you and your family for nonpayment of rent.
  69. In the court's view, the aforesaid circumstances generated an intolerable work environment for the Claimant. As such, he had every reason to throw in the towel by resigning and pleading constructive dismissal from employment.
  70. In addition to the foregoing, the Claimant also asserts that the Respondent tasked him to work for PAGG without remuneration. On its part, the Respondent does not deny that it tasked the Claimant to take on some assignments for the benefit of PAGG. However, it contends that the activities which he was tasked to undertake on behalf of the company fell in his sphere.
  71. The Respondent further asserts that the Claimant was in any event not engaged as an employee of PAGG. It avers that he was only tasked to undertake limited activities in relation to the company's launch.
  72. A perusal of the letter of engagement between the parties dated 1<sup>st</sup> June 2020 shows that they were in agreement that the Claimant's services were to be rendered to the Respondent in the position of Director of Communications. Nothing in the letter suggests that the Claimant was required to serve any other entity including the Respondent's parent company (PAGG).
  73. If the Respondent desired to change this arrangement in order to engage the Claimant's services elsewhere, it should have amended his letter of engagement to stipulate this. As the record shows, this was not done.



74. Having regard to the foresaid, there is legitimacy in the Claimant's complaint that the Respondent asked him to render services to PAGG without pay despite the fact that this was not a requirement in the contract between them. Such action by the Respondent amounted to unfair labour practice against the Claimant. As such, the Claimant was entitled to rely on it to contend that the Respondent had made the work environment intolerable by requiring him to render additional services to a third party outside the contract between the two without additional remuneration.
75. The Claimant has also accused the Respondent of demoting him after he insisted on payment of his salary arrears. On the other hand, the Respondent contends that the reason why it proposed to demote the Claimant was because of his unsatisfactory performance.
76. Although the Respondent alleges that the Claimant was guilty of unsatisfactory performance, it is evident that the parties did not have agreed Key Performance Indicators before 18<sup>th</sup> November 2022 against which the Claimant's performance was to be measured. It appears that the manner of determining the Claimant's performance was haphazard and depended on the whims of the Respondent's Chief Executive Officer.
77. The only time that the Respondent formulated Key Performance Indicators for the Claimant was after 18<sup>th</sup> November 2022 when the parties had a disagreement regarding payment of the Claimant's salary arrears and after the Respondent raised a number of grievances against him. The record shows that on the aforesaid date, the Respondent wrote to the Claimant listing a series of grievances including failure to prepare the industry yearbook, failure to organize a press release for a VIP event involving the French Embassy and failure to submit a database for journalists. The Respondent then informed the Claimant that he had been deployed to a new position of Junior PR Assistant with the stated Key Performance Indicators to meet.
78. The Respondent's decision to demote the Claimant from the position of Director of Communications with a salary of Ksh. 556,000.00 to Junior PR Assistant with a salary of Ksh. 60,000.00 startled the Claimant. In his evidence to court, he said that the decision left him in a state of shock.
79. What is confounding is that the Respondent accused the Claimant of underperformance without providing evidence that: the parties had preset performance targets; that they had a preexisting performance evaluation matrix in place on the basis of which the Claimant's performance was to be evaluated; that the Claimant's performance was in fact evaluated in accordance with the preexisting matrix; that the Claimant's performance was found to be wanting after objective evaluation; that the Claimant was placed on a performance improvement plan; and that he failed to deliver despite such intervention (see *Jane Samba Mukala v Ol Tukai Lodge Limited* [2013] KEELRC 794 (KLR) & *National Bank of Kenya v Samuel Nguru Mutonya* [2019] KECA 404 (KLR)). To say the least, the Respondent's decision in this respect was arbitrary.
80. The Respondent contends that it withdrew the decision to demote the Claimant after he protested. As such, it contends that the threatened demotion cannot have provided a justification for his decision to resign and plead constructive dismissal.
81. I do not agree. In my view, what is critical is not whether the decision to demote the Claimant was withdrawn. Rather, it is the negative impact the threatened demotion had on the work environment.
82. As the Claimant contends, the threat to demote him left him shaken and frustrated. It sent him a message that the Respondent did not consider him as a valuable asset.
83. This must have left the Claimant feeling confused and frustrated. The decision spoke to the job insecurity the Respondent was exposing the Claimant to. Undoubtedly, the Respondent's conduct



- made worse an already intolerable work environment thus giving the Claimant added impetus to throw in the towel.
84. Having regard to the foregoing, the court is satisfied that the Respondent's conduct rendered the Claimant's work environment intolerable. As such, it finds that the Claimant was entitled to resign as he did and plead constructive dismissal from employment.
  85. The next issue for determination is whether the Claimant is entitled to the reliefs which he seeks through this action. The court has already found that the Respondent unfairly terminated the Claimant's employment through constructive dismissal. It is so declared.
  86. The next relief which the Claimant seeks relates to compensation for unfair termination of his contract of employment. The court notes that despite the fact that the Respondent was aware that it owed the Claimant salary arrears, it treated his claim for payment with a measure of inconsiderateness every time he sought to have the matter addressed.
  87. The record suggests that the Respondent did not think that the Claimant's pleas for payment deserved urgent attention. It (the Respondent) appears to have been fixated with the mindset that because its finances were allegedly unstable, the Claimant was bound, like any other employee, to live with that reality and wait until funds became available to resolve his demands. The Respondent's management even had the mind to tell him that he was free to tender his resignation if he desired so that it could be processed to enable his release from employment.
  88. The Respondent's mindset, considered against an employer's legal obligation to pay an employee's salary once it becomes due, was to say the least, less than desirable. Taking this into account, the court finds that the Claimant is deserving of compensation for unfair termination of his contract of service. Accordingly, it awards him compensation which is equivalent to his net salary for six (6) months, that is to say, Ksh. 396,315.65 x 6 = Ksh. 2,377,893.90.
  89. The Claimant has also prayed for salary for the work he did for PAGG. However, the record shows that he did not implead PAGG in the suit. As such, the court is not able to grant this relief. Consequently, it is declined.
  90. The Claimant has prayed for accrued leave days for the two years that he worked for the Respondent. He contends that he did not take leave for this period.
  91. The Respondent did not present cogent evidence to rebut this claim. Other than making a general denial of the claim, it did not present data to demonstrate that the Claimant utilized his annual leave days for the two years.
  92. Under sections 10(6) and 74 of the *Employment Act*, the employer is saddled with the obligation of keeping all employment records including for annual leave. Section 10(7) of the Act places the burden on the employer to prove or disprove fulfilment of any term of employment which is supposed to have been included in a written contract of service but which was not.
  93. A perusal of the contract of service dated 1<sup>st</sup> June 2020 between the parties does not show that it speaks to the issue of annual leave. As such and in terms of section 10(7) of the *Employment Act*, the burden falls on the Respondent to demonstrate to the court that the Claimant took his annual leave for the two years in question (see also Jackson Muiruri Wathigo ta Murtown Supermarket v Lilian Mutune [2021] eKLR).
  94. Importantly, section 112 of the *Evidence Act* places the burden of proof of a disputed fact on the person who has special knowledge of the fact. In matters, employment, because the employer has the statutory duty to keep employment records, he is presumed to have special knowledge of the matters contained in



- the records, including whether an employee applied for and took his annual leave. As such, the burden of proof rests on the employer (in this case, the Respondent) to provide evidence on the issue.
95. Despite the aforesaid legal position, the Respondent did not tender evidence to demonstrate that the Claimant took his annual leave days. As such, the court is bound to find that he did not. Consequently, he is granted the prayer for accrued annual leave days.
  96. Under section 28 of the *Employment Act*, the Claimant was entitled to 21 days annual leave for every year worked. These are exclusive of weekends. As such, including weekends, the Claimant was entitled to be away from duty with full pay for approximately one month every year.
  97. Having not utilized his annual leave days, the Claimant is granted leave commutation for two months which works out to Ksh.396, 315.65 x 2 = Ksh. 792,631.30. Accordingly, judgment is entered for him for Ksh. 792,631.30 being commutation of accrued leave days.
  98. The Claimant has further prayed that the Respondent be ordered to remit taxes and other statutory deductions to the Kenya Revenue Authority, the National Social Security Fund and the National Health Insurance Fund. However, he did not present cogent evidence to demonstrate that the Respondent did not remit the dues in question to the aforesaid agencies.
  99. In any case, these agencies have legal capacity to pursue the aforesaid payments directly from the Respondent without the Claimant's intervention. In the premises, the plea for payment of statutory dues and taxes that are allegedly outstanding is declined.
  100. The amount awarded to the Claimant is computed based on his net salary. As such, it has already been subjected to the applicable statutory deductions. Thus it is the net that is payable to the Claimant.
  101. The Claimant is awarded interest on the amount awarded at court rates from the date of this decision.
  102. The Respondent is ordered to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
  103. The Respondent has claimed for pay in lieu of notice to resign. However, it is noted that the Claimant's resignation was not voluntary. It was forced in response to the intolerable work environment that was exerted by the Respondent. In effect, it is the Respondent and not the Claimant who terminated the employment relationship.
  104. Section 35 of the *Employment Act* imposes the duty to issue notice to terminate a contract of service on the party who terminates the contract. This does not contemplate a scenario of constructive dismissal where although it is the employee who resigns from employment, the law perceives the employer to be the party who has terminated the contract.
  105. This reality has been addressed by implication in case law. For instance, in the Court of Appeal case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (supra), the court observed that an employee who resigns in response to an intolerable work environment may do so without giving notice.
  106. As such, the Respondent's contention that the Claimant ought to have issued it with notice of termination of their contract is misplaced. Accordingly, the claim for pay in lieu of notice fails.
  107. Consequently, the Counter Claim is dismissed.
  108. Costs of the claim and counter claim are granted to the Claimant.



## Summary of Decision

- a. The court finds that the Respondent irregularly terminated the Claimant's contract of service through constructive dismissal from employment.
- b. The court grants the Claimant compensation for unfair termination of his contract in the sum of Ksh. 2,377,893.90.
- c. The court declines the Claimant's prayer for salary against PAGG.
- d. The court enters judgment for the Claimant for Ksh. 792,631.30 being commutation of accrued leave days.
- e. The court declines to order the Respondent to pay to the Kenya Revenue Authority, the National Social Security Fund and the National Health Insurance Funds dues allegedly owing from it to them.
- f. The amount awarded to the Claimant is computed based on his net salary. As such, it has already been subjected to the applicable statutory deductions. Thus it is the net that is payable to the Claimant.
- g. The court awards the Claimant interest on the amount awarded at court rates from the date of this decision.
- h. The court orders the Respondent to issue the Claimant with a Certificate of Service in terms of section 51 of the *Employment Act*.
- i. The Counter Claim is dismissed.
- j. Costs of the claim and counter claim are granted to the Claimant.

**DATED, SIGNED AND DELIVERED ON THE 28<sup>TH</sup> DAY OF NOVEMBER, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

