

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**MILIMANI COMMERCIAL COURT**

**E.L.R.C. CAUSE NO 296 OF 2019**

**HANNAH NYAMBURA MAINA.....CLAIMANT**

**VERSUS**

**CREDIT**

**BANK**

**LIMITED.....RESPONDENT**

**CORAM**

**Before Lady Justice J.W. Keli**

**C/A Otieno**

**JUDGMENT**

1. The claimant filed suit against the respondent(ex-employer) seeking for the following orders-

a) Compensation of Ksh. 12,038,400 being the award by the Department of Health and safety for work injury.

b) General damages for unfair dismissal computed at the rate of Ksh. 6,108,000 being 12 times of her monthly salary.

c) General damages for breach of constitutional rights and freedoms.

- d) A declaration that the claimant should pay the outstanding loan at the preferential staff interest rates of 7%
- e) Costs of the suit.
- f) Interest on (a) and (b) above.
- g) Any other relief that the honorable court may deem fit.
2. The claimant in support of the claim filed her witness statement and bundle of documents.
3. The respondent entered appearance through the law firm of Kimondo Mubea & company Advocates and filed statement of response dated 25<sup>th</sup> July 2019 in opposition to the claim together with a witness statement of Wainaina Francis Ngaruiya dated 10<sup>th</sup> March 2020 and documents under list of even date together with the bundle.

#### **Hearing and evidence**

4. The claimant's case was heard on the 18<sup>th</sup> November 2024 and on the 27<sup>th</sup> March 2025, where she testified on oath virtually from the United States of America, adopted as evidence in chief her witness statement dated 26<sup>th</sup> March 2019, and produced her bundle of documents filed with the claim at pages 1-118 of the annexure to the claim. The claimant was cross-examined by counsel for the respondent. Kimondo Mubea and re-examined by her counsel.
5. The respondent's case was heard on the 3<sup>rd</sup> July 2025 with Wainaina Francis Ngaruiya as RW1, a witness of fact. He adopted as his evidence in chief his witness statement dated 10<sup>th</sup>

March 2020 and produced their documents under list of documents dated 10<sup>th</sup> March 2020 as R-exhibits 1-23. He was cross-examined by counsel for the claimant, Ms Matoke and re-examined by his counsel.

6. The court at the interim stage issued mandatory injunction order on the 20<sup>th</sup> September 2021 against DOSH for production of its report of medical review of the claimant dated 5<sup>th</sup> November 2018 and the report was admitted as evidence in the case.

#### **Claimant's case**

7. The claimant was employed at Respondent Bank on 8th June 2015, as a senior bank manager and was attached to the Westland so Branch of the respondent. She was later promoted to the position of Head of branches after demonstrating leadership and character while serving as a branch manager (**Annexure 1** of the claimants bundle of documents are the various employment and salary review letters).
8. The claimant during here employment with the respondent was material in the expansion of the bank geographically as she was involved in onboarding and increasing shareholder value. She also successfully facilitated opening of three branches of the bank such as Meru, Ngong road and Mombasa Nkuruma Branch.
9. On 19th October 2016, as the claimant was travelling back from Mombasa, from supervising the upcoming new branch (Nkrumah road branch), she suffered a spinal injury while at JKIA) causing her to be immediately hospitalized and subsequently undergo a spinal surgery

on 4th November 2016 at The Nairobi Hospital where she was hospitalized until 16th November 2016 and was put on sick leave until 11th January 2017.

10. After her hospitalization, the claimant had a challenge with the settlement of the medical bill totaling Ksh.2,350,000 since the respondent's insurer, First Assurance Company declined to settle the full medical bill sighting that the claimant had a pre-existing condition therefore only paid a bill of Ksh. 750,000.
11. When the claimant resumed work she engaged the Head of HR, who categorically told her that she needed to find a means of settling the bill causing the claimant to seek audience with the insurer, as evidenced by the emails attached as **Annexure 2** in *the Claimant's bundle of documents*) but the insurer refused to give such audience causing the claimant to seek the intervention of the Insurance Regulatory Authority (IRA), as there was no justification for the insurance to fail to settle the bill.
12. Notwithstanding this being the responsibility of the respondent being the insured, the respondent did not assist in the process but only moved to settle the outstanding hospital bill after the Insurance regulatory Authority directed that the entire claim was compensable and that there was no evidence that the claimant had a pre-existing medical condition. This is as evidenced by the correspondences attached the claimants bank statements. (*Annexed and marked as **Annexure No. 3** in the Claimant's List of documents*).

13. The spinal accident having occurred in cause of employment, the claimant took up the matter with the respondent as per the various correspondences attached but the respondent refused and or neglected to respond to the same instead instructing M/s Fidelity insurance (its primary insurer of WIBA), to state that my claim was not payable, sighting that the claimant had a pre-existing condition as previously sighted by First Assurance. The claimant wrote a letter questioning why M/s Fidelity insurance was again revisiting an issue that was clearly ruled out by IRA and notified to the respondent. This fact was also confirmed by the Respondent's head of human resource Mrs. Azmina Mulji in an email addressed to Mr. Naresh Shah of Acropolis Insurance Brokers (the letters and emails are *Attached and marked as Annexure No. 4 in the Claimant's List of documents*).
14. Following this exchange and further through the unrelenting efforts of the claimant the respondent's insurer M/s Fidelity Insurance In early February 2018, wrote a letter (*Attached and marked as Annexure No.5 in the Claimant's List of documents*) asking the claimant to go to Menelik hospital for an independent review by Dr. Gakuu.
15. Upon examination, by the doctor appointed by M/S Fidelity Insurance reported that the claimant had suffered a 30% permanent disability. This necessitated the treating doctor, after a year of follow-up and therapy, to complete the DOSH form as required and in his final assessment, clearly indicated that the claimant had suffered a 35% permanent disability. The completed form was submitted to my employer for finalization of the matter. (*Annexed and marked as Annexure No. 6 in the Claimant's List of documents are copies of the said reports*)

16. That despite the findings by the two doctors one representing the insurer, the respondent acting on a report from fidelity insurance and with full knowledge of both the report by the Insurance regulatory Authority declined to approve compensation and instead insisted that the claimant had a pre-existing condition and was therefore not entitled to compensation under WIBA.
17. Based on the strength of the report by the two doctors On the 29TH of June 2018, the claimant was called from DOSH office to pick her compensation letter Ref:MLSS/DOSHI/AFA/10/34/VOL.IV/30 in which the Ministry of labour-DOSH office had made an award of Kshs. 12,038,400.00 based on the evaluation and degree of disability as allowed by the Work injury benefits Act. The Claimant immediately submitted the said letter of award to the Respondent's Head of HR on the same day personally. The claimant contends that this award has never been revoked by the DOSH department and remains valid and payable as per the Act. *(Annexed and marked as Annexure No.7(a)in the Claimant's List of documents is a copy of the said award).*
18. To the claimant's surprise, expecting that the employer would allow compensation in the spirit of the value the claimant added to the respondent as the head of branches the pain and suffering she had endured, she received a call from DOSH office asking her to go for a meeting for further examination on grounds that the respondent had filed an objection. The claimant contends that the letter was never availed to her but was only obtained through

internal lobbying from the HR department. (Attached hereto and marked **Annexure No.7(b)** in the Claimant's List and Bundle of Documents is a copy of the said letter).

19. The claimant contends that the said letter of objection did not meet the threshold of the requirements of the WIBA statute as it was not in the prescribed form and did not contain a concise statement its grounds as required by section 51(2) of the Act. The respondent contends that the Director did not respond to the objection or otherwise vary the award but instead coerced the claimant to undergo a second intrusive and illegal examination against the clear provisions of section 52(1) of the WIBA statute.
20. Following the directive and coercion by the respondent, on 30th July 2018 the claimant availed herself for the review by the three doctors as appointed by DOSH namely, Dr. Musa Nyandusi, Dr. Kowino J.O and Dr. Kimani W. To her surprise instead of there being an appointed panel of doctors, she was reviewed by one doctor, Dr. Nyandusi. Notwithstanding the anomaly of being examined by one doctor, she received the final copy of the 'doctors report' dated 31st July 2017 Ref: ML/DOSH/MED/OSH/VOL.1X/(149) on 27th August 2018 assessing disability at 5 % and purporting to be signed by all three doctors two of whom she had never met and had not been present during the review.(Annexed and marked as **Annexure No. 8** in the Claimant's List of documents are copies of the said report).
21. The claimant immediately sought clarification on basis upon which the Doctor, Dr. Nyandusi, gave the opinion that she had a pre-existing degenerative disease, complaining that the doctor had purported to make the report on the 1st of July 2018 whereas the records of the claimants prior medical history had only been requested for on the 31st day of July

2018 vide Ref: ML/DOSH/MED/OSH/VOL.1X/(149) and had been delivered on the 2nd day and 17th day of August 2018. (*Annexed and marked as **Annexure No.9** in the Claimant's List of documents is a copy of the said letter*).

22. The claimant contends that after making her complaints, the DOSH office acknowledged the anomaly and arranged for another albeit illegal and unprocedural examination to be conducted this time allowing the claimant's doctor to be in attendance. The said examination took place on the 5th day of November 2018 whose outcome still remains unknown despite numerous letters addressed to the directorate both by the claimant and her Advocates. The claimant contends that as far as the award by the Director of health and safety under ref *MLSS/DOSHI/AFA/10/34/VOL.IV/30* the same has not been varied or waived and as such the respondent is under obligation to pay as per section 36 of the WIB Act. (*Annexed and marked as **Annexure No. 10** in the Claimant's List of documents is are copies of the said correspondences*).
23. Aggrieved by the claimant's pursuit of her rights under the WIB Act, the respondent began to frustrate the claimant through leaving her out of important correspondence and assignment of work culminating in the events of the 25th October 2018, where the claimant was at Strathmore College, for approved studies as documented via email dated 18th October 2018 addressed to Mr Eric Nyachae. (*Annexed and marked as **Annexure No.11** in the Claimant's List of documents*) when a circular was issued to all staff (*Annexed and marked as **annexure No.12** in the Claimant's List of documents*), stating that my position of

Head of Branches had been re-assigned to another employee, Mr Charles Kibaara. Effective 1st December 2018.

24. The claimant contends that she was never consulted on the changes nor was she given any opportunity to be heard as is expected of any adverse administrative action. On the other hand, the claimant contends that the arbitrary decision of allocating her position to another employee without her consultation breached the terms of her employment and caused her great ridicule and embarrassment amongst her peers and juniors.
25. The claimant contends that the said circular affected a number of positions at the Respondent bank and all affected persons were consulted and allocated alternatives at the bank but the claimant was isolated and treated discriminately as she was neither consulted nor allocated an alternative position affectively declaring her unwanted within the respondent bank. The claimant contends that this conduct was both discriminative and an unfair labour practice and caused her great psychological suffering and anguish.
26. The claimant contends that the circular subjected her to immediate insubordination as demonstrated through the email by Mr. Timothy Biwott (who was her direct junior) dated 30th October 2018 who immediately wrote to the Branch Managers-the claimants other direct juniors whom she had direct supervision over) asking them to be sending their reports to him with a copy to the "incoming Head of Branches", a communication where the claimant was completely left out on, despite the fact that she was still the rightful Head of branches until 30<sup>th</sup> November 2018.

27. Following this events, the claimant could not continue working in such an environment, where her personal rights were abused, denied and rejected, and where she was subjected to humiliation across the bank, all on account of her medical condition, despite the respondent's full knowledge of the personal struggles she had suffered following her injury and continue to suffer to date.
28. Despite the many attempts to seek clarification and request the respondent to offer back her job or otherwise alleviate the suffering and embarrassment that stripping her off her responsibilities caused her, the respondent did not offer any explanation for its actions and consequently the claimant felt betrayed, disrespected and victimized for her work injury and was left with no other alternative but to resign on 27<sup>th</sup> November 2018. (*Annexed and marked as **Document No. 13** in the Claimant's List and Bundle of Documents is a true copy of the resignation letter*).
29. Though the claimants letter of resignation did not disclose her frustrations under the hands of the respondent, during her exit interview, the claimant expounded on her reasons for resignation from the respondent bank. Further to the foregoing, the respondent was advised on the unfair working conditions it had created for the claimant through the claimants advocates on record letter dated the 11<sup>th</sup> of February 2019 but he same was not responded to. The respondent has been afforded numerous opportunities to remedy this breach of the claimants right but it has neglected and /or refused to take up this opportunity further necessitating these proceedings. (Attached hereto and marked **Annexure No. 14** in the

*Claimant's List and Bundle of Documents are copies of the exit interview and letter from the claimants advocates).*

30. During her employment with the respondent, the claimant had been granted a secured loan facility of Ksh. 6,000,000 and an unsecured loan of Ksh. 650,000, which was to be recovered from her salary by the respondent. Following her resignation by way of constructive dismissal, she was left with no income; yet she had to shoulder high medical expenses to manage her injuries arising from her employment with the respondent and consequently she is not in a position to meet the steep monthly loan installments.
31. The claimant contends that she had all along been willing to continue working for the respondent and pay off all the outstanding loan premiums but the respondent made the circumstances of her employment so unbearable that she had no recourse but to resign. The claimant contends that her current financial challenges are wholly attributed to the respondent's unfair administrative actions and consequently it would be unfair for the respondent to continue demanding payment of the staff loan whereas the separation between the claimant and the respondent was unfair and calculated by the respondent.
32. The claimant avers that due to the nature of her employment, the respondent has made it impossible for her to secure employment on account of reclassifying the interest rate from the preferential staff rates consequently causing her default and therefore failing all background checks by potential employers in the industry due to her credit reference score.

(Attached hereto and marked **Annexure No. 15** in the Claimant's List and Bundle of Documents are copies of the loan statement and CRB status report).

33. The claimant avers that her separation with the respondent was unfair and therefore the respondent is unjustified to review the interest rates from the prevailing staff loan rates the respondent charges it employees.

### **Respondent's case**

34. The Claimant was employed by he Bank on 8th June, 2015 as a Senior Branch Manager at its Westlands Branch vide a letter dated May 13, 2015. A copy of the said letter of offer appears at **page 1 to 4** of the Respondent's List and Bundle of Documents. ["R.L.O.D."].Subsequently, the Claimant was promoted to a position of Head of Branches a position she held until on **27th November, 2018** when she voluntarily resigned from employment vide her letter of even date and which resignation was accepted by the Bank vide its letter of **November 28, 2018**. Copies of the said letters appears at **page 5 and 6** of the R.L.O.D.
35. One of the terms and conditions of the Claimant's employment with the bank was that either party could terminate the employment by giving to the other three months' notice in writing or payment of one month's salary in lieu of notice but the Claimant did not give any notice but instead requested the bank to waive her notice period. Accordingly, the bank accepted the Claimant's request for waiver of notice but subject to her accrued annual leave days being off-set against the notice period and the balance thereof was to be waived.

36. On **19th October, 2016**, the Claimant was admitted at Mater Hospital after complaining of having a severe back pain as she was bending to pick her bag at Jomo Kenyatta International Airport [JKIA] upon landing from Mombasa. She was later transferred to Nairobi Hospital where she underwent an operation and remained there until 25.10.2016 when she was discharged. The Bank had in place a staff medical insurance cover from First Assurance [FA] vide which the Bank's employees are covered for injuries sustained while in the course of the Bank's employment. A copy of the said Medical Cover is from **page 7 to 23** of the R.L.O.D. The Claimant's medical bill at Nairobi Hospital was Kshs.1,985,382/- and out of which the Bank's Insurer [FA] agreed to pay Kshs.600,000/-only on the ground that the Claimant's injuries were out of pre-existing/chronic condition and that was the limit in such circumstances. Since the Bank's insurer refused to pay the Claimant's full medical bill, the Bank requested its Insurance Brokers, M/s AON, through whom the Bank had obtained the insurance cover to facilitate the Claimant's discharge from hospital on the Bank's undertaking to settle a sum of Kshs.1,385,982.00 being the amount over and above the Kshs.600,000/- which was to be paid by the insurance company. Copies of the email correspondence between the Bank and its insurance Brokers to that effect appear from **page 24 to 71** of the R.L.O.D. On 22nd March, 2017, the Bank paid the balance of the Claimant's medical Bill of Kshs.1,385,982.00 to its brokers as per its undertaking aforesaid. In the meantime, and without the knowledge of the Bank, the Claimant had taken up the matter of the refusal by the Bank's insurer to pay her full medical a bill with the Insurance Regulatory Authority["IRA"]. Subsequently, the Claimant refunded to the Bank the said sum of Kshs.1,385,982.00 which it had paid towards her medical bill after recovering the same from

the Insurer in two tranches of Kshs.1,125,982 and Kshs.260,000/-on 16th June and 17th August, 2017 respectively through the intervention of IRA where the Claimant had lodged her said complaint as stated herein before. As regards the recovery of the said sum of Kshs.1,385,982.00 by the Claimant from the Bank's insurers [FA], neither the bank nor the Head of Human Resources Department [HR] was privy to the deliberations between the Claimant, FA and IRA and the Head of HR relied on the information given to her by the Claimant that FA was made to pay the same on the ground that her claim was found not to be a pre-existing condition and consequently, the matter was closed.

37. Following the injury sustained by the Claimant, on 27th October, 2016, the Bank's Agent M/s My Friend Insurance Agency, duly notified the Broker M/s Acropolis Insurance Agency, through whom the Bank had obtained a WIBA Solution Policy [Incorporating 24 hours cover and employer's liability] from **Fidelity Insurance** of the accident for purposes of WIBA claim. A copy of the policy appears from **page 72 to 84** of the R.L.O.D. On **30th January, 2017**, the Bank filled in part 1 DOSH Form [Directorate of Occupational Safety and Health Services] being notice by Employer of an occupational Accident disease of an employee as required under the **Work Injury Benefits Act ["WIBA"]**. However, the Claimant's doctor who was required to fill in part 2 of the Form did not indicate the percentage of permanent incapacity and the form was sent back to the doctor on 3rd May,2017 wherein he specified that the final assessment of her permanent disability would be done after one year. A copy of the Form appears from **page 85 to 87** of the R.L.O.D. In support of the WIBA Claim, the Claimant on 13th January, 2017 recorded a statement explaining how she sustained the injuries on 19th October, 2016at JKIA. A copy of the statement is at **page 88** of the R.L.O.D.After the Bank lodged the Claimant's claim with

WIBA, the Claimant was kept duly informed of the position via the email correspondence exchanged over the matter. Copies of the emails appear from **page 89 to 104** of the R.L.O.D. The Claimant's claim under WIBA was declined by the **insurers [M/s Fidelity Insurances]** and the Bank's Agents [M/s Acropoliss Insurance Brokers]informed the Claimant of the same vide a letter of 13th April, 2018 and whereof the Claimant took up the matter directly with IRA without involving the Bank at all on the issue. A copy of the said letter is at **page 105** of the R.L.O.D.

38. The Claimant's claim under WIBA was declined by Fidelity Insurance on the ground that she had a pre-existing and chronic condition and that the proximate cause of her injury was not the lifting of the bag as claimed by her and the insurance said decision was informed by the claimant's previous two medical reports, one by the Claimant's Doctor, Dr. Patrick Akuku Okoth dated 26th April, 2017 and the other by Dr. Kamau D.M. dated 30th January, 2018. Copies of the said two medical reports appear from **page 106 to 107 and 108 to 109** respectively of the R.L.O.D. The Claimant's said medical report dated 26th April 2017 by Dr. Patrick Akuku Okoth stated, inter alia, that:

- [i] an MRI scan of the Lumbar spine confirmed that the claimant had a disc prolapse with a narrowing of neutral exist foramen on the right side and;
- [ii] The Claimant's past medical history revealed that she had a history of low back pain on and off during pregnancy and that she gave a history of having slipped and fell on her buttocks some years earlier.

39. Similarly, the medical report by Dr. Kamau D.M. of 30th January, 2018 also stated that the claimant had a history of low back pain which was on and off during pregnancy after having slipped and fell on her buttocks some years earlier and it was is on the basis of these two medical reports that her WIBA claim was declined as it was found to be a chronic and pre-existing condition and which the Claimant never revealed to the bank when it was taking insurance cover for her. On 29<sup>th</sup> June, 2018, the Claimant personally delivered a letter dated 27<sup>th</sup> June, 2018 to the Bank's Human Resource Manager from the Director of Occupational Safety and Health Services [DOSHS] informing her on the assessment of the compensation to the Claimant of Kshs.12,038,400/- as computed vide DOS Form I dated 26th June, 2016 and which was attached thereto. A copy of the said letter and DOSH Form 1 aforesaid are at **page 110 to 111 and page 112** respectively of the R.L.O.D. As the Bank was not involved and/or consulted on the said assessment, it vide a letter dated **July 11, 2018**, to the Ag Director of Ministry of Labour and Social Protection, the Bank objected to the said award of compensation to the Claimant under the provisions of Section 51 [1] of WIBA on the following grounds;

- (i) Under Section 13[a] of the said Act, the employee did not disclose that she had a pre-existing condition and history of low back pain having slipped and fell some years earlier which aggravated the injury for which the Claimant was seeking compensation for. A copy of her doctor's report dated 30th January, 2018 as availed by the Insurers Fidelity Insurance confirming the pre-existing condition was attached. Also attached a copy of the letter dated 13th April, 2018 from the insurers on the matter who had similarly raised an objection with the Insurer's regulator, the Insurance Regulatory Authority in the matter.

(ii) The award of 30% of permanent disability as assessed by the claimant's doctor was contested and sought the medical board to be convened so as to consider and rightly conclude on the issue of liability, if any.

A copy of the said letter and the annexures thereto appear from **page 113** to 116 of the R.L.O.D.

40. Since the bank lodged its said objection to the award, it did not hear from the Directorate of Occupational Safety and Health Services [DOSHS] until it received a copy of a letter dated 5th September, 2018 from DOSHS to the Claimant with a copy to the Bank and the Cabinet Secretary, Ministry of Labour and Social Protection. A copy of the said letter appears from **page 117 to 119** of the R.L.O.D. As per the said letter of 5th September, 2018 from DOSHS to the Claimant, the Claimant's claim of permanent disability was re-assessed at 5% from the previous assessment of 30% but the Claimant declined to accept the same and consequent to which she was advised by DOSHS to lodge her claim before this Court. While reviewing the claimant's assessment of permanent disability, DOSHS made observation that the claimant's attending doctor's report gave a history of low back injury way back in 2010 and that her role in the employment of the bank did not involve any heavy lifting, repetitive manual work or awkward position and this informed the said re-assessment of 5%. Prior to the earlier award of Kshs.12,038,400/- to the Claimant by DOSHS, the Claimant had vide a letter dated 3rd May, 2018 to the Chief Executive Officer of Insurance Regulatory Authority sought for the Authority's intervention and this is a clear testimony that the Claimant was trying to employ undue influence in the matter to the detriment of the Bank. A copy of the Claimant's said letter appear from **page 120 to 121** of the R.L.O.D. The

fact that the Claimant was using the Insurance Regulatory Authority to exert pressure both on the bank and its insurer is also evident by the fact that First Assurance Company Limited agreed to pay in full the medical bills incurred by the Claimant at Nairobi Hospital in spite of its finding that her claim arose from a pre-existing/chronic condition and which finding was not reviewed. This fact is also borne out by the Claimant's letter dated 1st February, 2017 to the Chief Executive Officer of IRA seeking for his intervention in the matter. A copy of the said letter appear from **page 122 to 123** of the R.L.O.D. As the finding of First Assurance [FA] that the Claimant's claim was from a pre-existing/chronic condition was not reviewed, its subsequent payment in full of the claimant's medical claim was definitely on ex-gratia basis and the claimant cannot use the same to argue otherwise. This fact is borne out by a letter dated 14th February, 2017 from First Assurance to IRA in which it restated its said position while casting aspersions on the second medical report by Dr. Akuku whereof he stated that the claimant's back pain was sudden contrary to his earlier report. A copy of the said letter is at page 124 of the R.L.O.D. As correctly observed by DOSH in its letter of 5th September, 2018, [see **page 117 to 119 of the R.L.O.D.**], to the Claimant, the Claimant's employment with the Bank did not involve any lifting of any objects and/or manual work and in the circumstances, the injury she sustained while bending to pick her bag did not arise from in the course of her employment and the Bank cannot therefore be held liable. Further, as the Claimant knew that she had a pre-existing/chronic condition of low back problem, she had an obligation to herself to ensure that she does not lift heavy objects and having failed to do so, she can only blame herself for the injuries she suffered as the same had no link to and/or connection with the work she was employed for by the bank. In the circumstances, I

urge the Court to dismiss her claim for general damages of Kshs.12,038,400/- as compensation of the said injuries was previously awarded to her by DOSH.

41. The Bank also contends that the Claimant's claim of the said sum of Kshs.12,038,400/- for compensation is totally misconceived and have no merits whatsoever in that the same is founded on the earlier award by the Department of Health and Safety [DOSH] for work injury whereas the same was recanted and/or vacated by the Department itself vide its said letter of 5th September, 2018 whereof her assessment of permanent disability was re-assessed downward from 30% to 5%. It is also important to point out that after the Claimant resumed work on 11th January, 2017 after being discharged from Nairobi Hospital where she underwent an operation, she continued with her official duties normally without any problem and even travelled overseas on two occasion as evidenced by the Bank's letter of March 6, 2017 and June 29, 2018 respectively to South African Embassy of Kenya and Italy Visa Application Centre which were written by the Bank to assist the Claimant obtain the requisite travel visa to enable her travel. Copies of the said letters are at **page 125 to 126** respectively of the R.L.O.D. The fact that the Claimant was able to work normally without any problem upon being discharged from hospital and also to undertake an overseas trip to South Africa almost immediately is a clear evidence that her earlier assessment of permanent disability at 30% was not only excessive but the same was grossly exaggerated and it is therefore not surprising that the same was reviewed downward to 5% although the Bank, as I have stated hereinbefore is not liable as the injury did not arise in the course of her employment so as to entitle her to compensation under WIBA. Further, the Claimant was guilty of having failed to disclose to the bank that she had a pre-existing/chronic condition

of lower back pain so as to enable the bank make a full disclosure of the same to the insurers as required under the policy and her failure contributed towards the refusal by the insurance to pay her WIBA claim.

42. The Complaint by the Claimant that the Circular of 25th October, 2018 by the Bank's Chief Executive Officer to all staff providing for organizational changes in pursuant to the Bank's 5 and 10 year strategy had re-assigned her position to another employee, a Mr. Charles Kibera, is completely untrue because what the circular did was to create a new position of Chief Manager Operations and Branches and her position was left intact. A copy of the said Circular of 25t October, 2018 [see page 103 to 104] appear at page 127 to 128 of the R.L.O.D. The said new position of Chief Manager Operations and Branches was intended to consolidate the reporting role of the operations department/units and those of the Branches in order to simplify the Bank's model by realigning business divisions, streamline overlap and reduce complexity of structures to foster a better performance framework in pursuit of the Bank's strategy. The Claimant's position of Head of Branches was not affected by the said Circular as the changes contained in the circular were intended to only realign the structure of operations units that previously reported to the CEO and those of the Branches who reported to the Executive Officer [i,e the Deputy to the CEO] by creating the said position of the Chief Manager Operations and Branches as the overall head of the two. In the circumstances, the Claimant could not have been consulted as her position was not being affected and her complaint that she was not consulted is without any merits whatsoever.

43. Further, the said re-organization of the Bank's business vide the said circular was a Board's decision and as the Claimant was not a director, she could not be consulted over the same. It was also not within the Claimant's position that whenever the bank wanted to create a new position and/or promote another member of staff, she had to be consulted. In view of what the circular was intended for as stated hereinabove, the Claimant's contention that she was not given an opportunity to be heard and that the said realignment/reorganization of the bank's business caused her great ridicule and embarrassment amongst her peers and juniors is not only farfetched and a blatant falsehood but the same has no merits whatsoever. Further, the claimant's complaint that the said reorganization and realignment of the Bank's business vide that circular breached her terms of employment is a mere fabrication so as to hoodwink this Honourable Court in that she never raised any issue with the Bank and/or sought for any clarification if she felt offended and/or aggrieved. It is therefore the Bank's contention that the Claimant's resignation from employment had no bearing whatsoever to the said circular and her allegation that she was forced to resign because of the same has no merits at all. The allegation by the Claimant that the said circular subjected her to insubordination is also a mere fabrication without any basis whatsoever as the Claimant never at any time before her resignation lodge and/or report any case of insubordination. A case of insubordination constitutes a grave disciplinary matter the handling of which is provided for in the Bank's policies and procedures. That none of the Claimant's rights were abused nor was she mistreated and the bank came to hear of those allegations when it was served with the Claimant's claim herein.. In the circumstances, it is the Bank's position that the Claimant's claim for general damages allegedly for unfair dismissal is not only an afterthought perhaps to unfairly enrich herself but it also amounts to a grave abuse of the

Court process, a fact of which is evident in her letter of resignation dated 27th November, 2018 appearing at **page 5** of the R.L.O.D.

44. At the time the Claimant resigned from her employment, she was indebted to the bank in the sum of Kshs.6,122,205,30 in Account No.0023301000201 and Kshs.444,056.80 in Account No.0023303000686 in respect of secured and unsecured loans respectively. Copies of the Claimant's bank statement for the aforesaid accounts appear at **page 129 and 131** respectively of the R.L.O.D. Interest on the Claimant's said loans is charged at Fringe Benefit Rate currently at 7% as per clause 1.4 of the staff loan policy, a fact of which she is aware of and therefore her plea for a declaration that the same be paid at 7% is also an abuse of the Court process. A copy of the Bank's Staff loan policy is from **page 132 to 151** of the R.L.O.D.

#### **DETERMINATION**

45. The parties filed written submissions after the hearing as directed by Court .

#### **Issues for determination**

46. The claimant outlined the following issues for determination in the suit-

- 1) Whether the Claimant is entitled to compensation for constructive dismissal
- 2) Whether Claimant is entitled to WIBA compensation as awarded by the Department of Health and safety.
- 3) Whether the Claimant suffered permanent disability to a degree of 30%
- 4) Whether the Claimant should clear the outstanding loan balance

47. Conversely the respondent outlined the following issues for determination in the suit-

- i. Whether the Claimant is entitled to the award of Kshs.12,028,400/- awarded by DOSH on 29th June 2018
- ii. Whether the Claimant's resignation amounted to constructive dismissal
- iii. If answer in [ii is in the affirmative the Claimant is entitled to compensation for constructive dismissal
- iv. Whether the Claimant is indebted to pay her outstanding loan amounts
- v. Who bears the costs of the suit.

48. The court found consensus of the parties on the issues before the court for determination to be-

- 1) Whether the Claimant's resignation amounted to constructive dismissal
- 2) Whether Claimant is entitled to WIBA compensation as awarded by the Department of Health and safety of Kshs.12,028,400/- .
- 3) Whether the claimant is entitled to relief sought.

Whether the Claimant's resignation amounted to constructive dismissal

Claimant's submissions

49. The matter revolves around the concept known in employment law as "constructive dismissal." It is defined in most employment statutes in other jurisdictions but unfortunately, has not been defined in our employment and labour statutes. However, it is adequately defined in common law to be an occurrence where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is

entitled to terminate it without notice, by reason of the employer's conduct. This definition was adopted by the Court Of Appeal in Orthodox Development Savings and Credit Limited v Harriet K. Muteshi [2018] KECA 775 (KLR) where the court relied on a common law case as follows; The authoritative meaning of constructive dismissal was articulated by Lord Denning MR in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give 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 (emphasis ours)." The concept of constructive dismissal although not expressly provided for in the Employment Act, has received sufficient attention in our courts as reflected in the rich jurisprudence in decided cases, setting out what can fairly be considered as general guidelines on what would constitute the subject. The Court of Appeal held as follows in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR: 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, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are:- a. The employer must be in breach of the contract of employment; b. The breach must be fundamental as to be

considered a repudiatory breach; c. The employee must resign in response to that breach; and d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived. That a constructive dismissal, occurs when there is a breach of the employment contract and an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge. This is essentially what happened to the Claimant herein, her employment by the Respondent was frustrated when her job was given to someone else essentially forcing her out of the Respondent's institution. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed. In *Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani* [2018] KECA 308 (KLR) the Court of Appeal re-affirmed the key issue in an allegation of constructive dismissal was the employer's conduct. The Court observed thus; "However, it is worth remembering that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee - unless waiver, estoppel or acquiescence is in issue. In other words, an employer is required not to behave in a way that amounts to a repudiatory breach of contract, Constructive dismissal as

recognized under common law similarly finds anchor under Article 41(1) of the Constitution which stipulates that: 'Every person has the right to fair labour practices'.

50. To determine whether the Claimant's case meets the criteria for constructive dismissal as has been highlighted above, it is essential to examine the relevant legal principles against the facts of the case. Significant breaches of contractual terms have to occur in order to meet the threshold required, the Respondent's conduct including offering the Claimant's position to another employee without notice constituted a significant breach of the Claimant's employment terms and effectively forced the Claimant to leave. The employee also needs to prove a causal link between the employer's conduct and his departure, for a constructive dismissal to be construed, there must be resignation. Resignation is viewed as communication of the intolerability of the employer's conduct. The employee who is constructively dismissed has no time to give notice of termination, such an employee is usually a frustrated person who simply quits and vanishes from his place of work; Indeed, the concept demands that the employee initiates the termination and does so within a reasonable time after the trigger. The Respondent created a hostile environment through its actions causing the Claimant to leave involuntarily by tendering her resignation on 30th of November 2018 weeks after her position was given to someone else and yet she was not offered any other position. For constructive dismissal to hold, the burden of proof lies with the employee to demonstrate a significant breach of essential terms of the employment contract. This has been adequately proved in the Claimant's case as essential parts of the Claimant's employment included adherence to due process in employment matters including termination, the manner in which the Claimant was forced out of her position constitutes a

significant breach in the employment terms that were in place between the Claimant and Respondent.

### **The Respondent's submissions**

51. Vide the statement of claim, the Claimant contends that the Respondent was aggrieved by her pursuit of her rights at WIBA and begun frustrating her culminating in the circular of 25th October, 2018 allegedly reassigning her position to another employee in effect constructively dismissing her. She further contends that the said circular allegedly reassigning her duties caused her great ridicule and led to insubordination aimed at her by her juniors leading to her resignation from employment allegedly claiming she had been constructively dismissed. My Lady, the Black's Law Dictionary, 8th Edition refers to constructive dismissal as constructive discharge and defines it as "a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave. Further, the Court of Appeal in Coca Cola East and Central Africa Limited versus Maria Kayai Liyaya (2025) eKLR set out the legal principle for determining constructive dismissal as follows; a. What are the fundamental or essential terms of the contract of employment? b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? C. 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. 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 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. (See paragraph 30 on page 8 of the decision) [Our page 33] As can be discerned from the principles above, the burden to prove constructive dismissal rests with the Claimant and as I shall demonstrate below, the Claimant has not discharged her burden of proof in proving that the conduct of the Respondent amounted to constructive dismissal. Further, it is important to point out that the Claimant voluntarily resigned and was not constructively dismissed from her employment as claimed by the Claimant. It was the contention of the Claimant that arising from her pursuit of her dues at DOSH, her job was given to somebody else without being consulted, causing her great ridicule amongst her peers and juniors. It was however the evidence of the Respondent that the Claimant's roles, duties and salaries were not in any way affected by the said circular. Further, that it was in the context of the Bank's strategy to simplify its overall business and reporting lines that the circular complained of was issued with the overall hierarchical organogram to be finalized as was stated in the circular complained of by the Claimant. To this end, it was the evidence of the Respondent that the Claimant's position was not affected but a new position was created as the overall head of 2 units i.e the operations unit that previously reported to the Bank's CEO and those Branches who previously reported to the Bank's Executive Officer (Deputy CEO) in order to simplify their reporting lines. In the circumstances, I humbly submit that the conduct of the Respondent in

reorganizing its business strategy and reporting lines which did not in any way affect the position, roles and responsibilities of the Claimant cannot be construed as a significant breach of the Claimant's contract of employment by the Respondent. The Claimant also alleged insubordination by a junior colleague but which allegation was never substantiated and/or reported to the Respondent prior to her resignation. 68. Further, as previously submitted on at length, the Respondent did not in any way frustrate the Claimant's Claim at DOSH being well within its rights to appeal against an assessment by the Director which it felt was erroneous on account of the Claimant's prior undisclosed medical condition. In the circumstances, it is my humble submission that the Claimant's resignation from employment does not meet the criteria set out for constructive dismissal in the Coca-Cola case (supra) i.e the Respondent's conduct in creating a new role to simplify its business operations and the appeal against an erroneous valuation of permanent disability does not constitute a repudiatory breach and I humbly urge you to so find.

52. Equally, by a letter dated 27th November, 2018, the Claimant voluntarily resigned from employment requesting she be allowed to pursue other interests and thanking the bank for supporting her in her roles which resignation was accepted by the Bank. (See REXHB 2 and 3 on pages 5 and 6 respectively of the Respondent List and Bundle of Documents.) That the contents of the letter of resignation do not in any way make reference to the alleged reasons claimed for the constructive dismissal instead requesting that the notice period be waived to enable the Claimant pursue other interests. The said resignation letter does not express any frustration and/or mistreatment as a result of the proceedings at DOSH or the reorganization of the Respondent's business model. It is therefore my humble submission that the Claimant's resignation from employment does not meet the threshold of a constructive

dismissal as expounded by the Court of Appeal in the Coca Cola case supra.- i.e the Claimant otherwise accepted, waived, acquiesced or conducted herself in a manner estopping herself from asserting the alleged repudiatory breach. In support of my submission to this point, I wish to place reliance on the case of Eric Ouma Aringo vs Co-operative Bank of Kenya Limited 2019 (KEELRC 2021) wherein the Court considered the wording of the resignation letter and the conduct of a Claimant in holding that constructive dismissal did not take place expressing itself thus: The claimant's letter of resignation does not mention any frustration. In fact, he gave notice with assurance to the respondent that he will continue performing his responsibilities and clear with the bank as he served the notice period up to 26th March 2014. In the last paragraph of his letter, he thanks the bank for the cordial relationship with management and for giving him an opportunity to work with the bank. This is in stark contrast with his allegations of mistreatment and frustration making it impossible for him to work with the bank to warrant his resignation. (See page 7 of the decision) [Our page 44] I wish to place further reliance on the case of, Milton M. Isanya vs Aga Khan Hospital Kisumu [2017] KEELRC 671 (KLR) wherein the Court equally considered the tone of a Claimant's resignation letter in dismissing a claim for constructive dismissal expressing itself thus; I do not find the Claimant's resignation to constitute constructive dismissal. In his letter of resignation he thanked the Respondent and the entire senior management team and even allowed the Respondent to use his certificate for a month. That is not the tone of an employee who has been forced out of work due to frustration by his employer's conduct. (See page 6 of the decision) [Our page 52]

## **Decision**

53. Constructive dismissal is a common law doctrine and one not provided for in our statutes. The Kenyan courts have adopted the doctrine to apply in our jurisdiction. The conditions of the application of the doctrine was outlined in landmark case relied on by both parties In Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR), where the Court of Appeal stated that; *'The authoritative meaning of constructive dismissal was articulated by Lord Denning MR in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give 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 (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1)."'* The Court of Appeal further outlined the legal principles relevant to determining constructive dismissal to include the following: a. What are the fundamental or essential terms of the contract of employment? b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? c. 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. 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 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. ' The court will adopt the foregoing decision in determination of whether a case of constructive dismissal was proved on a balance of probabilities.*

54. The claimant resigned from employment with the respondent vide letter dated 27th November, 2018 and stated as follows-

*'Hannah Nyambura Maina, P.O Box: 342 00200 Nairobi.*

*The Head of Human Resource Credit Bank Plc.*

*Through, The Executive Officer.*

*REF: RESIGNATION*

*I hereby submit notice of my resignation from Credit Bank, in the position of Head of Branches, with effect from 27th November 2018; to pursue other interests.*

*I take this opportunity to thank the Bank for allowing me to serve in the above capacity, and for the support accorded during my three and a half year tenure.*

*I am available to ensure a seamless transition and handover process.*

*I kindly request for a consideration to waive my notice period and allow me leave the bank by Friday 30th November 2018.*

*I wish Credit Bank, and the entire fraternity, God's blessings in all endeavours.*

*Yours sincerely,*

*Hannah Nyambura Maina*

*PF No. 446''*

55. On the face of the resignation letter there is no iota of frustration by the employer or claim of conduct by the employer amounting to repudiation of contract. The claimant in the claim justified the case for constructive dismissal claim as follows paragraphs 19-25 of the claim - 'Paragraph 19. Aggrieved by the claimants pursuit of her rights under the WIB Act, the correspondent began to frustrate the claimant through leaving her out of important correspondence and assignment of work culminating in the events of the 25th October 2018, where the claimant was at Strathmore College, for approved studies as documented via email dated 18th October 2018 addressed to Mr Eric Nyachae. (*Annexed and marked as **Annexure No.11** in the Claimant's List of documents*) when a circular was issued to all staff (*Annexed and marked as **annexure No.12** in the Claimant's List of documents*), stating that my position of Head of Branches had been re-assigned to another employee, Mr Charles Kibaara. Effective 1st December 2018. 20.The claimant contends that she was never consulted on the changes nor was she given any opportunity to be heard as is expected of any adverse administrative action. On the other hand, the claimant contends that the

arbitrary decision of allocating her position to another employee without her consultation breached the terms of her employment and caused her great ridicule and embarrassment amongst her peers and juniors.<sup>21</sup>The claimant contends that the said circular affected a number of positions at the Respondent bank and all affected persons were consulted and allocated alternatives at the bank but the claimant was isolated and treated discriminately as she was neither consulted nor allocated an alternative position affectively declaring her unwanted within the respondent bank. The claimant contends that this conduct was both discriminative and an unfair labour practice and caused her great psychological suffering and anguish.<sup>22</sup>The claimant contends that the circular subjected her to immediate insubordination as demonstrated through the email by Mr Timothy Biwott (who was her direct junior) dated 30th October 2018 who immediately wrote to the Branch Managers-the claimants other direct juniors whom she had direct supervision over) asking them to be sending their reports to him with a copy to the "incoming Head of Branches", a communication where the claimant was completely left out on, despite the fact that she was still the rightful Head of branches until 30<sup>th</sup> November 2018.<sup>23</sup>Following this events, the claimant could not continue working in such an environment, where her personal rights were abused, denied and rejected, and where she was subjected to humiliation across the bank, all on account of her medical condition, despite the respondent's full knowledge of the personal struggles she had suffered following her injury and continue to suffer to date.<sup>24</sup>Despite the many attempts to seek clarification and request the respondent to offer back her job or otherwise alleviate the suffering and embarrassment that stripping her off her responsibilities caused her, the respondent did not offer any explanation for its actions and consequently the claimant felt betrayed, disrespected and victimized for her work injury and was left with no

other alternative but to resign on 27th November 2018. (*Annexed and marked as **Document No. 13** in the Claimant's List and Bundle of Documents is a true copy of the resignation letter*).<sup>25</sup> Though the claimant's letter of resignation did not disclose her frustrations under the hands of the respondent, during her exit interview, the claimant expounded on her reasons for resignation from the respondent bank. Further to the foregoing, the respondent was advised on the unfair working conditions it had created for the claimant through the claimant's advocates on record letter dated the 11th of February 2019 but he same was not responded to. The respondent has been afforded numerous opportunities to remedy this breach of the claimant's right but it has neglected and /or refused to take up this opportunity further necessitating these proceedings. (Attached hereto and marked **Annexure No. 14** in the Claimant's List and Bundle of Documents are copies of the exit interview and letter from the claimant's advocates)''

56. The response to the foregoing was as follows- '37. The Complaint by the Claimant that the Circular of 25th October, 2018 by the Bank's Chief Executive Officer to all staff providing for organizational changes in pursuant to the Bank's 5 and 10 year strategy had re-assigned her position to another employee, a Mr. Charles Kibera, is completely untrue because what the circular did was to create a new position of Chief Manager Operations and Branches and her position was left intact. A copy of the said Circular of 25th October, 2018 [**see page 103 to 104**] appear at **page 127 to 128** of the R.L.O.D.<sup>38</sup>. The said new position of Chief Manager Operations and Branches was intended to consolidate the reporting role of the operations department/units and those of the Branches in order to simplify the Bank's model by realigning business divisions, streamline overlap and reduce complexity of structures to

foster a better performance framework in pursuit of the Bank's strategy.<sup>39</sup> The Claimant's position of Head of Branches was not affected by the said Circular as the changes contained in the circular were intended to only realign the structure of operations units that previously reported to the CEO and those of the Branches who reported to the Executive Officer [i.e the Deputy to the CEO] by creating the said position of the Chief Manager Operations and Branches as the overall head of the two. In the circumstances, the Claimant could not have been consulted as her position was not being affected and her complaint that she was not consulted is without any merits whatsoever.<sup>40</sup> Further, the said re-organization of the Bank's business vide the said circular was a Board's decision and as the Claimant was not a director, she could not be consulted over the same. It was also not within the Claimant's position that whenever the bank wanted to create a new position and/or promote another member of staff, she had to be consulted.<sup>41</sup> In view of what the circular was intended for as stated hereinabove, the Claimant's contention that she was not given an opportunity to be heard and that the said realignment/reorganization of the bank's business caused her great ridicule and embarrassment amongst her peers and juniors is not only farfetched and a blatant falsehood but the same has no merits whatsoever.<sup>42</sup> Further, the claimant's complaint that the said reorganization and realignment of the Bank's business vide that circular breached her terms of employment is a mere fabrication so as to hoodwink this Honourable Court in that she never raised any issue with the Bank and/or sought for any clarification if she felt offended and/or aggrieved. It is therefore the Bank's contention that the Claimant's resignation from employment had no bearing whatsoever to the said circular and her allegation that she was forced to resign because of the same has no merits at all.<sup>43</sup>

The allegation by the Claimant that the said circular subjected her to insubordination is also

a mere fabrication without any basis whatsoever as the Claimant never at any time before her resignation lodge and/or report any case of insubordination. A case of insubordination constitutes a grave disciplinary matter the handling of which is provided for in the Bank's policies and procedures. 44. I also wish to state that none of the Claimant's rights were abused nor was she mistreated and the bank came to hear of those allegations when it was served with the Claimant's claim herein.”(Paragraphs 37- 44 of witness statement of RW1).

57. During cross-examination, the claimant confirmed to the court that she was employed as senior branch manager vide letter of 13th May 2015. The claimant confirmed to the court on resignation she thanked the bank for service and indicated the reason for resignation was to pursue other interests. She confirmed the accident was on 19<sup>th</sup> October 2016 and she continued working up to 27th November 2018. She confirmed that after the injury, she continued to work, and the bank had no issues with her travels abroad. She said that as per the circular she was not going to be the head of branches but she had no documents to that effect. She agreed that, under the circular, one Kibara, who she was at par with as head of audit, was to be the head of operations and branches. After the circular the claimant could not confirm who she was to report to. She confirmed there was no memo for her to hand over to Kibara. She agreed he was not her junior prior to the memo. The claimant in the claim had stated that she was meant to report to her juniors. She confirmed that was not true. In her exit interview, the claimant stated the reason for her exit was further studies and dissatisfaction with remuneration. She confirmed she had not complained on the circular and failed to get a response from the respondent. The court noted that the exit interview was post the resignation. For purposes of proving constructive dismissal, the only relevant

documents would be correspondence during the employment and the letter of resignation, as those are the immediate and relevant reasons for the termination of employment. The court did not find any iota of indication of frustration with the employer or any conduct of the employer which was material and fundamentally repudiated the root of the employment relations. All what the court saw was a satisfied employee who thanked the employer and said she was resigning to pursue other interests. We are a free country and the employee is at liberty to leave subject to notice terms. The court found that the threshold for the doctrine of constructive dismissal in the Coca-Cola case was not met, and in particular *‘Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? c. 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. 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 employee terminating the contract i.e. causation must be proved’*. The claim of constructive was based on unfounded allegations without any documentary support. The claimant never bothered to confirm from employer the impact of the circular on her position. She never got any communication as would indicate her position was affected. The employer has the prerogative to reorganise their business for their own interest. The claimant’s case was based on presumptions. The claimant had the burden of proof of the existence of constructive dismissal, and the court held she failed on a balance of probabilities to prove the same. It was her burden to prove the constructive dismissal. She failed.

Whether Claimant is entitled to WIBA compensation as awarded by the Department of Health and safety of Kshs.12,028,400/- .

58. The claimant, upon assessment of injury sustained during employment, was assessed at 30% incapacity on the 26<sup>th</sup> June 2018 and awarded Kshs. 12,038,400 by DOSH under WIBA (page 97 of the claimant's documents). The award was communicated to the respondent on the 27<sup>th</sup> June 2018. The respondent objected and to the award vide letter dated 11<sup>th</sup> July 2018 under section 51(1) of WIBA (page 98 of the claimant's documents). DOSH convened a clinic and released a report dated 1st August 2018 in which they reduced the permanent disability to 5%. (page 100 of the claim). The claimant appealed to DOSH on the decision of 5<sup>th</sup> September 2018 and asked for re-assessment by a panel of doctors of her choice and suggested Akuku, Atinga, and Mulira, and the insurance doctor Kamau. The court on perusal of the record found a Court Order compelling DOSH to avail report of the medical review of 5<sup>th</sup> November 2018. The report was admitted as evidence. The report was dated 8<sup>th</sup> November 2018. It indicated that the claimant was evaluated by 4 doctors Prof Akuku, Dr Nyandusi DR Kowino and DR. Kimani. The report confirmed 5% disability. The claimant submitted that the award under reference MLSS/DOSH /AFA/10/34/VOL.IV/30 has not been varied and remains valid. The court finds that the process of objection under WIBA was complied with, and the objection was considered, and the incapacity was reduced from 30% to 5%. There was no appeal lodged to the court on the variation. The jurisdiction on matters of work injury is strictly under DOSH. The impugned award was based on the 30% incapacity. The court is bound by the 5% incapacity assessment by DOSH as the assessment has not been set aside. The DOSH ought to issue a fresh assessment under the 5% assessment.

**Whether the claimant is entitled to relief sought.**

59. I have already held that the claimant failed to prove constructive dismissal on a balance of probabilities, and consequently, all claims related to the termination are disallowed.

60. On the WIBA, I found that the DOSH on valid objection re-assessed the permanent incapacity to 5% from 30%. It is the opinion of the court that the respondent cannot bear the consequence of failure by DOSH to issue an amended assessment for settlement after the re-assessment. The court then finds that following the re-assessment of the permanent incapacity at 5% . the award of Khs. 12,038,400 based on 30% cannot stand. The valid award would have to be based on 5%. The issue is returned to DOSH to issue amended assessment injury award for the claimant to the respondent for settlement.

61. The remaining issue then is that as concerns the outstanding loan repayment.

**The claimant's submissions**

62. The Claimant seeks a declaration that she should not be liable to repay a staff loan issued to her by the Respondent financial institution during her period of employment. That this loan was granted as part of her employment benefits and, importantly, was fully insured against risks such as permanent disability. Following the issuance of the loan, the Claimant unfortunately suffered a serious injury that resulted in permanent disability. As a consequence, she struggled in carrying on her duties. Despite this, the Respondent forced her out of the institution when they reassigned her job to another person, effectively ending her working relationship with the institution and forcing her to resign. Despite the permanent

disability and the existence of the insurance cover, the Respondent proceeded to demand that the Claimant repay the outstanding loan balance. Worse still, the institution went ahead to list her adversely with the Credit Reference Bureau (CRB), which has had a profound negative impact on her ability to secure alternative employment or access credit. The Claimant has not been able to secure gainful employment since her resignation, a situation made even more difficult due to her adverse credit listing. In *Chris Kisire Chepkoi v National Bank of Kenya Limited* [2017] eKLR a similar case where the Claimant was unfairly terminated and the Respondent institution rescheduled interest rates of the Claimant's loans and listed him on the Credit Reference Bureau, the court held thus: On the CRB listing, with the orders above, it is only fair and just that the respondent do remove the claimant from the CRB by writing to them about the ruling herein and to enable the claimant access other facilities to remove his liabilities with the respondent. justice demands that where the claimant has since made effort to clear his loan over the car loan, such effort should be seen in good stead and thus by seeking to be removed from the CRB listing he is willing to give effort to repay the loans due from him. Further the court ordered; all other subsequent and due instalments shall be repaid based on the respondent's Staff Loan Policy and at 3% per annum until further orders of the court; Similarly, the court in *Esther Mbinya Musau v National Bank of Kenya Limited* eKLR [2019] KEELRC 914 (KLR) held thus: An injunction hereby granted restraining the Respondent and any other party from changing in any form the terms and conditions of the various loan facilities obtained by the Claimant from the Respondent during her employment with them and the Claimant shall continue to repay such loan facilities at the same terms and conditions as enjoyed while in employment with the respondent. Your Ladyship, it is our respectful submission that the Claimant ought

not to be held personally liable for the repayment of the loan. The purpose of the insurance cover on the loan was to protect both the lender and borrower in the event of unforeseeable hardships such as permanent disability. By failing to trigger the insurance claim process and shifting the repayment burden to a permanently disabled former employee, the Respondent acted in bad faith. It is unconscionable and unfair to expect a person who has lost the ability to work as they used to due to disability to meet loan obligations that were expressly insured for such a risk. Furthermore, the Respondent's actions reflect a disregard for its duty of care, especially in the face of the Claimant's vulnerability. Rather than assist her in navigating the insurance claims process or offer any form of support, the institution chose to penalize her further through the CRB listing. This decision has had devastating consequences. The Claimant's inability to access employment and financial services due to the negative listing has effectively locked her out of economic participation and aggravated her suffering. The CRB listing was not only premature and unjustified but was also punitive, considering the Claimant's circumstances. Given that the loan was insured, the Respondent should have exhausted the insurance claim option before resorting to blacklisting her credit status. The listing has become an unjust barrier to her rehabilitation and reintegration into the workforce, despite her willingness to rebuild her life after the onset of her condition. In addition to demanding full repayment, the Respondent further aggravated the situation by converting the staff loan into a normal commercial loan, thereby subjecting the Claimant to higher interest rates. This change in loan terms disregarded the fact that the Claimant's employment and thus her eligibility for staff loan rates was terminated not out of misconduct, but due to medical incapacity. The decision to impose commercial interest rates on a former staff member who had become permanently disabled lacked compassion, and

failed to consider the extenuating circumstances surrounding her exit from employment. In light of the above, we respectfully urge the Honourable Court to find that the Claimant should not be held liable for repayment of the staff loan and that the Respondent should be directed to withdraw the CRB listing. Additionally, the Claimant should be granted appropriate relief, including general damages for the emotional distress and financial exclusion she has endured. The facts speak for themselves. The Claimant was a hardworking employee who suffered an unfortunate and permanent health setback. The Respondent, instead of acting in a just and compassionate manner, opted to pursue repayment of a fully insured loan from someone no longer able to earn an income and then subjected her to a credit blacklisting that has worsened her plight. Justice demands that the Claimant be discharged from this financial obligation and given an opportunity to rebuild her life without the continued burden of an unjust debt. Your Ladyship, the Claimant therefore prays for an order compelling the Respondent to pay the full award by the Department of Health and Safety together with interest at court rates from the date of the award, general damages for constructive dismissal and for breach of her fundamental rights and freedoms, a declaration that the Claimant should not pay the outstanding loan as it was fully insured, an order compelling the Respondents to delist the Claimant from the Credit Reference Bureau and costs of these proceedings.

### **Respondent's submissions**

63. The issue of her outstanding loan balance. It is not in dispute that at the time of her resignation from employment, the Claimant was indebted to the bank in the sum of Kshs.6,122,205.30 and Kshs.444,056.80 on account of secured and unsecured loans

respectively as is evident on her bank statements.(See REXHB 22 appearing on page 129-131 of the Respondents List and Bundle of Documents) The express provisions of clause 1.4 of the Staff Loans Policy(REXHB 23) appearing at page 132 -151 of the Respondent's List and Bundle of Documents provide that interest on the Claimant's loan was to revert to commercial rates upon leaving employment save for the fact that the fringe benefit tax rate would apply in cases of retrenchment or completion of 2 years of service with the bank. (See page 137 of the Respondent's List and Bundle of Documents) It was the evidence of the Respondent that the Claimant's loan was charged interest at the fringe Benefit Rate of 7% and as a result, her prayer seeking a declaration that the same be paid at 7% was an abuse of the court process. It was however the submission of the Claimant that she should not be held liable for the repayment of the loan as the same was insured against risks such as permanent disability which she allegedly suffered as a result of the back injury she sustained while bending to pick her bag while on transit for a work assignment from Mombasa. It is our humble submission that although the Claimant's loan facilities were insured, the same could not pay for the loan amount due because as per the policy, the same would only crystalize in the event of death, total permanent disability, critical illness and retrenchment of the insured but which was not the case in the instant case, a fact which the Claimant admitted in cross-examination. For the said insurance policy to apply on account of permanent and total disability, the insured/ borrower had to be permanently and totally disabled during the term of the policy and is thus unable to engage in her normal occupation. However, this was not the case for the Claimant as her permanent disability was assessed at 5% thus her allegation of total and permanent disability is untrue and untenable. As a result of the foregoing, the Bank's insurance policy aforesaid cannot be invoked to settle her indebtedness to the Bank.

82. In response to this submission, I wish to place reliance on the decision of this court in Jacob Kelly Omondi Onyango v National Bank of Kenya [2017] KEELRC 888 (KLR) wherein this court reiterated that fact that Banks operate in a strictly regulated environment and financial facilities issued to employees must be paid promptly expressing itself thus at paragraph 19-20 on page 4 of the decision (our page 56-57) "... I must agree. Banks operate in a strictly regulated environment and every borrower whether an insider or the man from the street must meet their financial obligations to their bank. 20. The reasons for this are not hard to find; first, banks operate with customers' funds which must be available on call; second, non- performing loans interfere negatively with the macroeconomic stability of the country; third, to allow borrowers to go into perpetual default in loan repayments is to hand them a rope 83. -19- for financial suicide. Overall, it is never in the public interest to allow non-performing loans. I wish to place reliance on the decision of the Court of Appeal in Gisemba vs Tausi Assurance (Civil Appeal 405 of 2018) [2022] KECA 380 (KLR) wherein the court of appeal while reiterating that the superiority of loan agreements taken during employment relationships expressed itself thus at paragraph 24 on page 6 of the decision our page 63. It was the appellant's evidence that upon termination he received a letter dated 18th March, 2015 from the respondent informing him that he had defaulted in his loan repayment and, therefore, from the month of March 2015, the loan would attract an increased interest rate. In the letter of offer dated 11th December, 2012 addressed by the respondent to the appellant in regard to mortgage facility application for Ksh. 7,200,000 there was a clause on interest rate which reads as follows:- "Interest will be charged at the fringe benefit circulated from time to time by the Central bank of Kenya to minimum limit of 10% per annum. In the event that employment contract is terminated by either the company or yourself before the

loan is fully repaid, interest on the outstanding balance shall be charged at the prevailing market commercial rate." (Emphasis ours)The appellant cannot feign ignorance on this clause yet he had accepted the offer and had even topped up further loan. Therefore, by virtue of his termination from employment the interest rate would revert to commercial rate. In conclusion to this issue, it is therefore my submission that the Claimant is indebted to the Respondent for the loans she took over the course of her employment. In the circumstances, her prayer seeking a declaration that she should pay the said loans at the preferential staff interest rate of 7% which at any rate is the fringe Benefit Rate her loan interest is subjected to is an abuse of the of the Court process.

### **Decision**

64. The prayer sought is d) A declaration that the claimant should pay the outstanding loan at the preferential staff interest rates of 7%. This was not in dispute and the respondent witness stated the loans by the claimant were subject of fridge benefit rate of 7% as per the staff policy. The prayer was thus superfluous.

### **CONCLUSION**

65. The court found the claim to lack merit for lack of proof of constructive dismissal. The court, in the interest of justice, Orders DOSH to issue an amended demand to the respondent under FORM DOSH/WIBA4, being an amended award on re-assessment for 5% permanent disability as per its report vide letter of 8th November 2018, within 30 days of this judgment.

66. On costs, the court considered the totality of the case and found that DOSH was to blame for the non-settlement of the WIBA claim, having failed to issue a fresh demand on finding 5% permanent disability after objection and appeal. In the circumstances, the court exercised its discretion to make no order as to costs, the consequence being that each party bears its own costs in the claim.

67. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup>  
DAY OF NOVEMBER, 2025.**

**J.W. KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Appellant – Ms Gichuru h/b Ms Matoke

Respondent – Ms. Mwangi h/b Mubea