IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA (P), J. NGUGI, & ODUNGA,

JJ.A.) CIVIL APPEAL NO 381 0F 2019

BETWEEN

MICHAEL NJAI.....APPELLANT

AND

AMADEUS EAST AFRICA.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (M. Mbaru, J.) delivered on 20th April 2018

in

ELRC Cause No. 1927 of 2013)

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JUDGMENT OF THE COURT

1. In the judgment giving rise to this appeal, the Employment and Labour Relations Court (**ELRC**) at Nairobi (**M. Mbaru, J.**) dismissed the appellant's claim for constructive and wrongful dismissal and declined to make any award, save for what the respondent had offered the appellant in a letter dated 19th December 2013.
2. The background to this appeal is that the appellant and the respondent enjoyed an employee-employer relationship. As per

the appellant's memorandum of claim dated 2nd February 2013 and which was subsequently amended on 17th May 2017, he was employed by the respondent as the IT Manager on 26th September 2005 at a starting salary of Kshs. 100,000/= together with a medical cover. For context purposes, the respondent is a company engaged in the supply and distribution of innovative technology and in-depth expertise in the travel technology space. It offers a full range of technology solutions for the travel industry and has a global distribution system with a diverse range of customers, including travel agents, airlines, tour operators, hoteliers, car rental businesses and cruise.

3. The appellant contended that as the respondent grew fivefold, he received promotions and annual bonuses ranging between Kshs. 100,000/= and Kshs. 276,228.60, the latter having been awarded in April 2013 at a time when his salary had risen to Kshs 315,650/= and his medical cover having been extended to his family. On 10th August 2011 he was appointed Senior IT Manager and became responsible for leading and supervising IT managers across East Africa, supporting top-tier clients daily,

providing internal and external technical support, responding

to client needs and preparing weekly performance reports. In this regard, the appellant contended that the respondent served many clients and travel agencies across Nairobi, Mombasa, Eldoret, Kampala and Kigali, including HRG and FCM Travel, and that his performance had always been strong, with consistently above-average evaluations.

4. The appellant further contended that in August 2013, he detected weaknesses in the internet infrastructure supporting HRG and FCM Travel, observing that HRG operated on a 2- megabyte link while the respondent provided only a 1-megabyte capacity for air-ticketing services. This mismatch, he explained, meant that if HRG's primary link failed, the respondent's capacity would be inadequate to keep their operations running. On 15th August 2013, he notified the respondent's operations manager, Mr. Dennis Kabutha, as well as HRG, recommending immediate corrective action, and on 13th September 2013, he sent a follow-up reminder warning of the potential for service disruption. He claimed that despite these alerts, no action was taken and he received no response.

5. He averred that on 24th October 2013, the very disruption

he

had warned about occurred. He set out a chronology of the day’s

events stating that at about 9 a.m., he contacted HRG and was assured that their internet connectivity was stable. At around 10 a.m., he received a call from FCM Travel, a client whose volume of business with the respondent exceeded that of HRG, requesting technical support after their internet went down. He attempted to assist FCM Travel remotely without success and scheduled a physical visit for 2 p.m. Shortly before leaving for FCM Travel, HRG contacted him urgently reporting an equipment failure and seeking immediate assistance. He informed them that he would attend to their issue promptly after dealing with FCM Travel whose request had come first. After resolving FCM's problem, he proceeded to HRG at approximately 4 p.m., where the management expressed dissatisfaction with the delay and issued an ultimatum to the respondent that unless the appellant was withdrawn and replaced, they would terminate their business relationship with the company.

6. According to the appellant, the respondent yielded to this ultimatum and began steps to unlawfully and constructively dismiss him. He cited a series of actions beginning with an

accusation of misconduct on 30th October 2013, a suspension

on 7th November 2013 said to be for investigations, an extension of the suspension on 14th November 2013, a questionnaire administered on 17th November 2013, and on 29th November 2013 a demand that he resigns in exchange for 15 months' salary and a non-compete clause, failing which he would face disciplinary action. Later that same night, he was issued with a notice to show cause alleging misconduct. He asserted that these actions violated his constitutional rights, particularly dignity under Article 28, because the suspension that followed ignored his earlier recommendations regarding ICT upgrades at HRG, caused him loss and damage, and demonstrated that the respondent was intent on forcing him out through an unlawful constructive termination.

7. The appellant contended that on 2nd December 2013 he obtained interim orders stopping his termination. However, he stated that on 19th December 2013 the respondent's advocates secretly moved the file before another judge without notice to him, procured the discharge of the injunction, and immediately thereafter the respondent issued a termination letter dated the same day. He asserted that

the orders of 19th December 2013

were fraudulently obtained and were later set aside on 23rd

December 2013, thereby restoring the position as at 2nd December 2013, meaning that his employment was never lawfully terminated. He further pleaded that the respondent refused to cancel the termination letter, refused to pay him salary contrary to the court's orders, and denied him work, leaving him dependent on his parents and thereby violating his rights under Articles 28, 29, 41 and 47 of the Constitution.

8. The appellant sought a series of declaratory, injunctive and compensatory orders, beginning with declarations that his suspension on 5th November 2013 and the subsequent actions taken against him amounted to an attempted constructive and unlawful dismissal, and that the respondent's purported termination of his employment was and always had been unlawful, null and void. He further sought a declaration that he remained an employee entitled to continue working for the respondent until the mandatory retirement age of fifty-five, together with an order compelling the respondent to pay him all salaries, benefits and allowances from 1st January 2014 until the date of judgment, and to allocate him work. In the alternative, he

prayed for Kshs. 235,151,289.71 as damages for destruction of his career.

9. He also sought declarations that his constitutional rights to dignity, protection from cruel or degrading treatment, fair labour practices and fair administrative action under Articles 28, 29, 41 and 47 had been violated, and orders for general damages for those violations. In addition, he sought a declaration that the respondent's conduct contravened sections

45 and 46 of the Employment Act, an order of specific performance of his employment contract, injunctive orders restraining the respondent from interfering with or hindering the performance of his duties, and a permanent injunction prohibiting the respondent from terminating or victimizing him for filing the suit. He also prayed for general and exemplary damages for unlawful termination.

10. The respondent through its defence dated 3rd November 2015 and subsequently amended on 6th June 2017 denied all the allegations and asserted that the claim was an abuse of the court process. It admitted the employment relationship and the events of 24th October 2013 but asserted that the appellant had failed to follow mandatory internal processes despite being the Senior IT Manager responsible for

enforcing those processes.

The respondent emphasized that its business relied on prompt

and transparent handling of IT incidents, and that its internal procedures required all customer complaints to be logged through a shared system by email or ticket so that all members of the technical and operations team could act immediately.

11. The respondent contended that on 24th October 2013, the appellant received calls from both FCM Travel and HRG but failed to log any of them, with the result that no one within the organisation was aware of the HRG outage until its managing director made an irate escalation call to the General Manager complaining about poor service, system failure and a complete lack of communication. Seeking to set the record straight on the sequence of events that followed, the respondent contended that the appellant was issued with a warning letter on 30th October 2013, asked to provide an explanation on 4th November 2013, and thereafter became the subject of an internal investigation. A detailed questionnaire was issued to him on 14th November 2013, his responses were received on 19th November 2013, and the inquiry concluded that he had failed to follow the company's escalation procedures. A show-cause notice for gross

misconduct was then issued on 29th November 2013 and a

disciplinary meeting scheduled for 2nd December 2013. The

respondent stated that after the show-cause notice, the parties explored the possibility of an amicable separation but instead of pursuing that avenue, the appellant filed suit effectively eroding trust between them. As for the events of 9 to 19 December 2013, the respondent denied any fraud or concealment, asserting that the Duty Judge had directed that all matters with interim orders be placed before him on 19th December 2013, that the appellant failed to attend while the respondent did, and that once the interim orders were discharged, the respondent proceeded lawfully to terminate the appellant's employment the same day. The respondent rejected the allegations of constitutional violations and maintained that there was no contractual guarantee of employment until retirement. It also described the claim for over Kshs. 235 million together with the additional constitutional remedies as unfounded. On this basis it urged the trial court to dismiss the claim in its entirety.

12. At the hearing before the trial court, the appellant testified and called three witnesses. The appellant relied entirely on the amended claim as well as his witness statement dated 6th June

2017. During cross-examination, the appellant maintained that

he was constructively and unlawfully terminated and insisted that on 24th October 2013 he attended to FCM Travel and HRG in order of urgency but was unable to log incidents because he was in motion, using a phone, and that his hands were full.

13. **Dominic Mogaka**, the former Head of IT at HRG, testified as the second witness for the appellant. He testified that HRG had long-standing connectivity issues and that the appellant had previously recommended upgrades. He testified that he was not familiar with the respondent's internal procedures and did not know how complaints were supposed to be handled once reported. As to the breakdown that occurred on 24th October 2013, he stated that he notified the appellant and expected an immediate and expeditious response but he was unaware of what internal steps the respondent was required to take. He explained that although he had raised concerns about the need for an upgrade, he had never made a written request to the respondent and had only communicated this verbally to the appellant, who was his account manager. He recounted that on the day of the outage, he called the appellant as soon as HRG's system

went down expecting a quick response because the

issue required an almost immediate solution. However, no quick

solution was offered, and he recalled that the HRG Managing Director reacting angrily when he briefed her as no action had been taken despite his earlier call and request for assistance.

14. The third witness for the appellant was **Francis Kamau Gatehi**, a network specialist certified in Cisco Networks who had been engaged by the appellant to provide an expert assessment of the system at HRG. He explained that he was asked to give a professional opinion on whether the infrastructure had the capacity to support the necessary flow of information. His assessment confirmed that there had been a genuine system failure and that it took approximately three and a half hours to resolve the issue, although he could not say why it took so long or why the person responsible did not respond more quickly. He recalled that the loss of internet connectivity was first reported around 1 p.m., and by 1.30 p.m. the service provider had issued its own report on the outage. Beyond this, he stated that he had no knowledge of what the individual who initially received the information did with it or why the problem was not addressed more promptly.

15. The appellant’s father, **Prof. Daniel Njai Migwi,** testified as the

fourth and the last witness for the appellant. His testimony

revolved around the personal and family hardship caused by the job loss.

16. For the respondent, **Juan Torres**, its General Manager, testified that the appellant ignored clear internal procedures requiring all incidents to be logged by email or ticket; that the respondent only learned of the HRG outage when it was escalated by the client; that these procedures existed to ensure timely action by the full team; and that investigations confirmed prior similar lapses. He stated that after the show-cause notice, parties explored a mutual separation but the appellant filed suit, eroding trust and prompting termination on 19th December 2013 once the interim orders were lifted.

17. After the full hearing, the trial court delivered judgment on 20th April 2018. The court identified several issues: whether there was constructive unlawful dismissal from employment of the appellant; whether there was unfair termination; whether the appellant remained an employee of the respondent entitled to salary and work up to retirement; whether damages for destruction of career were payable; whether damages were due for rights violations; whether compensation was due for unfair

termination of employment; and whether the respondent should be restrained from further interference.

18. On the central question, the court held that the appellant admitted failing to log customer complaints on 24th October 2013 despite being fully conversant with the internal ticketing procedure he helped develop. This failure meant other support staff were unaware of the incident, leading to delayed service to a key client. His explanations that he was in motion or attending to another client were considered insufficient, especially since he had a phone, a colleague (Ms. Kirui) with him, and the option to call the office to trigger logging if he could not do it himself. The failure to follow internal procedures in a time-sensitive IT support environment amounted to careless performance of duty under section 44(4)(c) of the Employment Act, which constitutes gross misconduct. The court found the warning letter and the show-cause process justified and held that a reasonable employer could properly terminate his employment.

19. As regards the allegation relating to constructive dismissal, the trial court held that the evidence on record showed that

he acted on his own volition in failing to perform his duties with the

diligence and standard reasonably expected of him. By

neglecting to log the customer complaints into the system and disregarding the internal procedures that governed how such incidents were to be handled, he could not shift responsibility for the termination to the employer. The trial court observed that the respondent had established clear guidelines, processes and parameters for managing customer complaints, yet the appellant chose not to follow them. His lapses were self- initiated, and the resulting misconduct and dismissal could not be attributed to the employer under the doctrine of constructive dismissal.

20. On the question of whether he remained an employee, the court noted that the interim injunction of 2nd December 2013 was vacated on 19th December 2013 by the Duty Judge. The respondent issued a termination letter immediately thereafter, at a time when no restraining orders existed. Although the orders vacating the injunction were later set aside on 23rd December 2013, the court was of the view that by then the factual situation had changed, a termination letter having already been lawfully issued. The appellant, therefore, could not rely on the earlier orders to claim continuing employment or

unpaid salaries.

21. Given the finding that the termination was substantively justified, the trial court rejected the claims seeking various declaratory orders, general damages, exemplary damages, reinstatement, salary arrears and career-loss damages. The court observed that the respondent's offer in the letter dated 19th December 2013 regarding terminal dues was generous and would stand, but no additional remedies were available to him. In the end, the trial court dismissed the claim in its entirety and directed each party to bear its own costs.

22. Being aggrieved and dissatisfied with the decision of the trial court, the appellant lodged this appeal, contending that the learned judge erred in law and in fact by, *inter alia*: misunderstanding the case and misapplying the law, including Article 41(1) of the Constitution on fair labour relations, thereby failing to protect the appellant's rights; showing bias in evaluating the evidence favoring the employer and disregarding the appellant's performance and warnings; holding that the respondent was entitled to terminate the appellant's employment under section 44 (3) (c) of the Employment Act; failing to recognize that the appellant had predicted the internet

supply failure to HRG on 15th August 2013 and 13th September

2013, which materialized on 24th October 2013 due to the respondent's negligence; overlooking that the termination of the appellant's employment was effectively dictated by HRG, the customer, rather than the respondent independently; ignoring evidence that the respondent failed to act on the appellant's warnings, admitted negligence by enhancing internet capacity only after the failure occurred, and took steps to comply with HRG's ultimatum.

23. Other grounds of appeal include misinterpreting relevant case law, including **Judicial Service Commission v Gladys Boss Shollei & Anor, Civil Appeal No. 50 of 2014,** thereby suggesting that an employer can terminate an employee due to external pressure despite negligence on the employer's part; overlooking procedural irregularities including the ex-parte discharge of conservatory orders obtained through misleading statements by the respondent's counsel; erroneously accepting the respondent's claims of contractual limitations with HRG despite evidence showing that the failure and subsequent termination were avoidable; rendering a judgment that was against the weight of

evidence and established employment

jurisprudence, particularly regarding constructive dismissal and employer accountability.

24. At the hearing of this appeal, **Dr. Kamau Kuria, Senior Counsel** appeared for the appellant, while the respondent was represented by **Dr. Fred Ojiambo, Senior Counsel,** who appeared alongside learned counsel **Mr. Oyoo**. Both sides made brief oral highlights of their respective client's written submissions.

25. On behalf of the appellant, it was submitted that as a first appellate court, this Court is mandated to re-evaluate the evidence afresh, but bearing in mind that it had neither seen nor heard the witnesses. In this regard, the appellant relied on the decision of this Court in **Kenya Ports Authority v Kuston (Kenya) Ltd [2009] 2 EA 212.**

26. Regarding the internet challenges that occurred on 24th October 2013 and which set the stage for the appellant's termination of his employment, it was contended that the incident arose from the respondent's and HRG's own failure to implement remedial technical measures which the appellant had advised as early as 15th August 2013 and 16th

September 2013. According to the

appellant, he had predicted that failure to upgrade the

bandwidth would inevitably cause service disruption. It was maintained that when the problem eventually materialized, the appellant was already attending to FCM Travel, a client that generated more business for the respondent and had sought assistance earlier that day. The appellant asserted that he had informed HRG that he would attend to them immediately after resolving FCM's four-hour outage. In this regard, it was the contended that HRG's demand to jump the queue was unreasonable and that the respondent unfairly succumbed to HRG's alleged blackmail that the appellant be dismissed or HRG would withdraw its business.

27. As regards the procedure leading to his termination, the appellant contended that he was never accorded the procedural fairness mandated by section 41 of the Employment Act. He cited the decision of this Court in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR**, wherein this Court stated, *inter alia,* that section 41 prescribes minimum procedural standards of a fair procedure that an employer ought to comply with, which includes notification, explanation of reasons, an opportunity to be accompanied

by a representative, and a

genuine hearing. It was submitted that no such hearing

occurred. Instead, the appellant only responded to letters, questionnaires, and notices while the respondent had already as at 30th October 2013 already pre-determined that it would dismiss the appellant. The appellant relied on **Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR**, as cited by this Court in **Postal Corporation of Kenya v Andrew K. Tanui** (supra) to distinguish situations where written exchanges may suffice on the question of fairness of a hearing but emphasized that appellant's termination called for an oral hearing.

28. It was further contended that the respondent additionally breached substantive fairness requirements under section 45 of the Employment Act. Relying on **Pius Machafu Isindu v Lavington Security Guards Ltd [2017] eKLR**, the appellant submitted that the respondent bore the burden of proving valid and fair reasons for termination and demonstrating a fair process, obligations that were allegedly not met in the appellant's termination and as such, his

dismissal was unfair and unlawful. It was emphasized that even if the appellant's conduct was questionable, which allegation was denied, it did

not amount to a dismissible offence. Reliance was placed the

decision of this Court in **Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya) [2021] KECA 173** for the argument that not every lapse warrants dismissal. The appellant maintained that his actions were reasonable under the circumstances as he had to prioritize FCM Travel who raised their issue first and that HRG's dissatisfaction stemmed from earlier managerial failures unrelated to him.

29. Further reliance was placed on the Supreme Court decision in **Gichuru v Package Insurance Brokers Ltd [2021] KESC 12** wherein the Court held that the dismissal of an employee is unfair and unlawful for failing to accord the employee a fair hearing. In this regard, it was reiterated that the respondent's conduct violated the appellant's rights under the Employment Act and under Articles 41 and 50 of the Constitution by denying him fair labour practices and a fair hearing. The appellant also cited **Halsbury's Laws of England (4th Ed.,) Vol. 16(1) para. 642** in support of the position that an employer's decision must meet the standard of what a reasonable employer would do in the

circumstances, something the respondent allegedly failed in the circumstances leading to the appellant’s termination.

30. A separate contention was also made to the effect that the dismissal of the appellant was null and void for having been effected in contempt of an active court order. It was submitted that the respondent irregularly procured the discharge of conservatory orders on 19th December 2013 without notice to the appellant's counsel, obtained a termination letter thereafter, and then ignored the reinstatement of the orders by Justice Maureen Onyango on 23rd December 2013. In this regard, the appellant cited a five-judge decision of the High Court, to wit, **Petition No. 518 of 2013, Judicial Service Commission v Speaker of the National Assembly** which adopted the English authority of **Clarke & Others v Chadburn & Others [1985] 1 All ER 211** for the argument that any action taken in defiance of a court order is a nullity.

31. On constructive dismissal, it was submitted that the respondent's conduct of barring the appellant from the office from 28th October 2013, the imposition of successive suspensions, the exerting of pressure upon him to resign, and the disregarding of valid court orders amounted to repudiation of the employment contract. He relied on

Coca Cola East &

Central Africa Ltd v Maria Kagai Ligaga [2015] eKLR, where

this Court explained the unreasonable-conduct test and contractual-repudiation test for constructive dismissal. He also cited the Supreme Court of Canada decision in **David Farber v Royal Trust Co (1997) 1 SCR 846** which defines constructive dismissal as a unilateral and fundamental change to employment terms without providing reasonable notice of that change to the employee. It was contended that the respondent's conduct met the threshold for constructive dismissal.

32. As regards the issue whether the appellant was entitled to the remedies sought in the memorandum of claim, it was submitted that having demonstrated that his termination was unlawful and unfair, he was entitled to compensation under section 49 of the Employment Act. Relying on the Supreme Court decision of **Kenfreight (E.A.) Ltd v Benson K. Nguti [2019] eKLR**, the appellant submitted that in giving an award under section 49 of the Employment Act, a court is expected to exercise judicial discretion of what is fair in the circumstances. He also relied on **Kenya Broadcasting Corporation v Geoffrey Wakio [2019]**

eKLR and **Ol Pejeta Ranching Ltd v David Wanjau Muhoro [2017] eKLR** to argue that the remedies under section 49 are

aimed at restoring the employee to the position they would have

been in but for the unlawful dismissal. In this connection, it was submitted that the appellant's career in IT had been severely damaged, his employability diminished, and his family forced to rely on parental support, a situation likened to the diminished employability and stigma discussed in **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** wherein the court held that the claimant was entitled to be compensated Kshs. 20 million as coalesced damages for, *inter alia,* unfair and unlawful termination, diminished employability.

33. On costs, the appellant maintained that although costs in employment matters do not automatically follow the event as recognized by this Court in **Ol Pejeta Ranching Ltd v David Wanjau Muhoro** (supra), in this regard, it was contended that the respondent should bear the costs of the appeal because it was its failure to comply with section 41 of the Employment Act that precipitated litigation.

34. In sum, the appellant urged us to allow the appeal and set

aside the judgment of the trial court.

35. For the respondent, it was submitted that one of the key issues

in this appeal was whether the respondent lawfully terminated

the appellant's employment on grounds of mutual loss of trust and confidence. It was contended for the outset that the termination was both substantively and procedurally fair and fully compliant with the Employment Act and as such, the appellant was not entitled to the remedies sought in the memorandum of claim.

36. On the circumstances leading to the appellant's termination, the respondent asserted that on 24th October 2013, he failed to promptly address a key customer's complaint, did not log the incident, and consequently caused an escalation. According to the respondent and which fact is said to have been admitted by the appellant, logging the complaint would have allowed another officer to address HRG's issue sooner. The respondent submitted that an internal investigation was conducted and that the appellant, being fully conversant with internal procedures, had no justification for failing to adhere to them. It was emphasized that the disciplinary concern was not the technical failure of the network but the appellant's failure to act with diligence and in accordance with established policies.

37. It was further submitted that the appellant's responses to

the

show-cause letter were inadequate because he focused on the

technical cause of the failure rather than addressing the real issue, which was his failure to follow internal protocols. The respondent relied on **Anthony Mulaki v Addax Kenya Ltd IC 822 of 2012** to support the position that disciplinary action grounded on admitted misconduct is lawful where investigations reveal a breach of internal procedures. It was maintained that the appellant's suggestion that he was terminated at HRG's demand was unproven.

38. On the issue of negotiations, it was contended that separation discussions were initiated by the appellant, who expressly stated he was happy to leave the company on agreed terms. The respondent submitted that the negotiations were mutual and conducted in good faith. It was argued that the appellant used these discussions to create a foundation for injunctive relief while concealing the negotiations from the court. The trial court's finding that constructive dismissal did not arise was, therefore, said to be sound and correct.

39. It was also submitted that the relationship between the parties irretrievably broke down due to the appellant's dishonesty and manipulation of the negotiation process,

culminating in the

filing of proceedings before the trial court, while still engaging

in discussions. In this regard, it was contended that on 2nd December 2013 while awaiting the appellant's comments on the draft settlement agreement and while the appellant continued to engage with the respondent, the appellant was busy instituting proceedings before the trial court. The respondent relied on **Francis Nyongesa Kweya v Eldoret Water & Sanitation Co. Ltd [2017] eKLR** wherein the court cited the South African decisions in **Theewaterskloof Municipality v and South Africa Local Government Bargaining Council (Western Cape Division) v Arbitrator Adv C De Kock N.O** which also cited the decision of **Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (AD) at 26E-G** for the argument that employment relationships are grounded on mutual trust and confidence, and that conduct inconsistent with this duty justifies termination.

40. Regarding the discharge of the conservatory orders, it was submitted that the respondent did not deceive the court as

alleged. According to the respondent, the appellant's counsel failed to attend on 19th December 2013 when the matter was called out before the Duty Judge, leading to the lawful discharge

of interim orders. The respondent contended that it acted within

that lawful window to issue the termination letter. It was argued that subsequent reinstatement of injunctive orders on 23rd December 2013 did not operate retrospectively, a finding the trial court expressly affirmed.

41. The respondent maintained that it had valid reasons to terminate the appellant's employment contract and that it fully discharged its burden under sections 43 and 45 of the Employment Act. In this regard, it contended that the appellant's failure to provide reasons to justify his improper handling of the customer complaint and the mutual loss of trust and confidence were genuine and sufficient reasons which were subsisting at the time and warranted the termination of the employment relationship. It relied on **CFC Stanbic Bank Ltd v Danson Mwakuwona [2015] eKLR** for the argument that in adjudicating on the reasonableness of the employer's decision, courts should not substitute their own views for that of an employer but should consider whether a reasonable employer could have acted as the respondent did. It was contended that the trial court properly applied this test and arrived at a correct finding.

42. It was also submitted that procedural fairness was satisfied before the appellant's employment was terminated. In this regard, it was contended that the appellant was issued warnings, given a show-cause letter, and afforded an opportunity to respond but refused to complete the disciplinary process. The respondent relied on the decisions of **Sotik Highlands Tea Estates v KPAWU (Civil Appeal 23 of 2017)** and **Mathew Lucy Cherusa v Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre [2013] eKLR** in support of the argument that an employee who declines to participate in internal disciplinary mechanisms cannot later claim denial of a hearing. The respondent, therefore, contended that it fully complied with the provisions of sections 41 of the Employment and that the appellant's failure to follow the internal grievance handling procedure was unjustified and to his own detriment.

43. Regarding the applicable remedies, it was submitted that the appellant was not entitled to reinstatement, salary up to retirement age, or damages for destruction of career. It was

contended that reinstatement was unavailable, both legally (after three years) and factually. The respondent maintained

that no evidence was tendered to prove career destruction or inability to secure alternative employment. The respondent relied on **Richard J. Kashero v Kilifi Mariakani Water and Sewerage Company Limited (KIRIWASCO) [2017] eKLR** to emphasize the statutory cap of 12 months' compensation in cases of wrongful and unfair dismissal, and on **Mary Mutanu Mwendwa Ayuda v Ninos De Africa-Kenya (Anidan K) (2013) eKLR** for the principle that general damages are not awardable in employment contract disputes.

44. As regards the claims for breach of constitutional rights, it was submitted that they could not stand because the dispute fell squarely within the Employment Act which provides a complete remedial code.

45. On costs and interest, the respondent contended that the appellant did not plead any basis for interest, and that the prolonged delay in prosecuting the suit was deliberate and should not benefit him. In conclusion, the respondent urged this Court to uphold the trial court's judgment, asserting that it was based on sound legal principles and a proper

evaluation of the evidence.

46. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] EA 123,** thus:

> "**An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."**

47. We have reviewed the record, considered the submissions of counsel and examined the judgment of the trial court. In our view, the appeal turns on several key issues: **whether the learned judge erred in finding that the appellant's termination on 19th December 2013 was justified; whether the judge was wrong in concluding that the termination complied with the applicable legal**

requirements; whether the conservatory orders previously issued by the trial court

had any effect on the validity of the termination; whether the judge erred in holding that the doctrine of constructive dismissal did not apply; and finally, whether the appellant was entitled to the reliefs he sought in this appeal.

48. It is trite law that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification concerns the existence of a valid and demonstrable reason for the termination, while procedural fairness relates to the steps taken by the employer before reaching that decision. Indeed, section

41 of the Employment Act requires that before an employer terminates an employee on grounds of misconduct, poor performance or physical incapacity, the employee must be informed of the allegations in a language he understands and be given an opportunity to respond. In **Postal Corporation of Kenya v Andrew K. Tanui** (supra), this Court affirmed that compliance with section 41 is mandatory and that procedural fairness demands meaningful notification and a real

opportunity for the employee to defend himself. The Court in that case set out the essential components of a fair process: a

clear explanation of the grounds for the proposed termination

in a language the employee understands; disclosure of the reasons prompting the employer to consider termination; the employee's entitlement to be accompanied by a fellow employee of his choice at the disciplinary hearing; and the obligation on the employer to hear and consider any representations made by the employee and the person accompanying him.

49. Section 43 of the Employment Act on the other hand provides that an employer must demonstrate a valid and fair reason for termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. The Employment Act, therefore, sets out an elaborate procedure before an employee can be terminated or dismissed from employment. This Court in **Pius Machafu Isindu v Lavington Security Guards Limited** (supra) stated thus about the said procedure:

> **"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the**

reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before

termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee."

50. Having outlined the applicable legal principles on termination of employment, we now turn to the question whether the learned judge erred in finding that the appellant's dismissal on 19th December 2013 was justified. It is undisputed that the events giving rise to the termination occurred on 24th October 2013. The appellant's position was that he was dismissed for prioritizing assistance to one client, FCM Travel, over another, HRG, and that HRG subsequently issued an ultimatum to the respondent to remove him or risk losing its business. The respondent, however, maintained that the termination was grounded not on client pressure but on the appellant's failure to follow established internal procedures for handling customer complaints and his inability to manage client expectations in a manner consistent with maintaining key business relationships.

51. During cross-examination, the appellant admitted that he

had received outage reports from both FCM Travel and HRG. He

further acknowledged that he failed to log the HRG incident in the internal ticketing system despite being fully aware of the mandatory logging protocol and despite being one of the principal architects of that very system. He also conceded that logging complaints allowed other available technical officers to take up the matter immediately and address it promptly. In evaluating this evidence, the trial court found that the appellant clearly understood the internal rule requiring an employee who was unable to log a complaint personally to ensure that someone else in the office logged it. The court, therefore, rejected his explanation that he was in transit, attending to another client, or otherwise too occupied to log the complaint, holding that these reasons did not justify his complete failure to log or cause the complaint to be logged. The court concluded that nothing in the appellant’s movements on that day prevented him from contacting the office and instructing a colleague to log the incident and it noted that the appellant had admitted making calls to other clients on the same day, which demonstrated that he was not incapacitated from communicating with the office.

52. We fully uphold the trial court's finding on this issue. The appellant admitted in cross-examination that he received outage notifications from both FCM Travel and HRG but failed to log the HRG incident in the internal ticketing system despite knowing the mandatory protocol and having helped design the system himself. He also accepted that proper logging allowed other technical officers to intervene immediately, which reinforced the trial court's view that his omission was unjustified. The respondent's internal rules required any employee who could not log a complaint to ensure that a colleague in the office did so, yet no entry was made. As a result, the respondent only became aware of the problem when HRG escalated it to the General Manager. The appellant's claim that he was in transit, attending to another client or that he was overwhelmed, in our view, has no factual footing. In this regard, we note and, indeed, the appellant conceded that he made calls to other clients that same day and as such, nothing prevented him from contacting the office to have the incident logged. The trial court, therefore, concluded and rightly so, in our view, that the failure was avoidable and reflected a disregard

of

established procedure. The trial court’s finding that the

appellant was responsible for the lapse, and that the employer acted within its rights in treating it as a breach of protocol was well supported by the evidence on record and was consistent with the law. On this basis, therefore, the respondent had valid grounds to terminate his employment.

53. On the second issue, which is whether the termination complied with the applicable law, the trial court noted that after the events of 24th October 2013, the appellant received a warning letter on 30th October 2013 and responded to it by email on 4th November 2013. The respondent acknowledged that response and advised that investigations would follow. On 14th November 2013 the respondent wrote to the appellant as part of those investigations, and he replied on 19th November 2013. Once the investigations were completed, the appellant was given a copy of the report which concluded that he had failed to follow the established procedures for reporting IT problems. A detailed show-cause letter dated 29th November 2013 was then issued. It outlined the allegations, including careless performance of duties, failure to log incidents, poor client handling and the consequences arising from those lapses. The trial court

reviewed the appellant’s written responses and found that while

he offered lengthy technical explanations about bandwidth and Safaricom connectivity, he did not give a meaningful explanation for ignoring the internal logging and escalation procedures. The court held that his responses failed to confront the core allegations and showed an unwillingness to engage with the substance of the issues raised.

54. Indeed, after reviewing the record, we agree with the trial court's conclusion that the show-cause letter clearly outlined the allegations against the appellant, including careless performance of duties, failure to log incidents, poor customer handling, and the resulting consequences. The record shows that he was notified of the allegations against him from the outset, given an opportunity to respond in writing, issued both a warning and a show-cause letter and invited to participate further in the disciplinary process. However, the appellant voluntarily abandoned the process when he opted to focus on separation discussions and later instituted proceedings in court as the discussions were ongoing. There is no doubt that the appellant was aware of or that he understood the allegations against him and for which the respondent was considering

terminating his employment. In the circumstances, the

respondent satisfied the requirements under sections 41 and 43 of the Employment Act.

55. Section 44 of the Employment Act outlines the grounds for summary dismissal for gross misconduct. Section 44(4)(c) particularly permits dismissal where an employee willfully neglects assigned duties or performs them carelessly or improperly contrary to the requirements of the work. In this case, logging incidents was the respondent's key mechanism for ensuring timely resolution of customer issues and the appellant's failure to log the HRG complaint constituted willful neglect. Consequently, the respondent had a valid and fair reason to terminate his employment.

56. On whether the appellant's dismissal was null and void due to the subsistence of conservatory orders, the record shows that the orders issued by Marete, J. on 2nd December 2013 were discharged on 19th December 2013 by the duty judge. On the same day, following the discharge, the respondent served the appellant with the termination letter. The dismissal, therefore, occurred in the absence of any injunctive orders. Although the orders were subsequently reinstated on 23rd December 2013,

the relevant action had already been taken and the situation could not be undone as the horse had already bolted.

57. As regards the issue on constructive dismissal, this Court in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga** (supra) delineated the test to determine if constructive dismissal has taken place. It held thus:

> **"What is the key element and test to determine if constructive dismissal has taken place? 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. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that 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.” [Emphasis added]

58. In the circumstances herein, it was established that the appellant initiated negotiations for a mutual separation and expressed willingness to leave employment on agreed terms. The respondent prepared a draft settlement agreement for the appellant's consideration. However, while these discussions were ongoing, the appellant sought injunctive relief in court without disclosing that he was concurrently pursuing an amicable separation. The respondent's conduct, therefore cannot be characterized as a repudiatory breach of the employment contract. On the contrary, it was the appellant who acted inconsistently with the trust inherent in an employment relationship. Consequently, constructive dismissal was not established.

59. Finally, on the question of reliefs, we find no grounds to disturb the trial court's findings. Having determined that the appellant's termination was justified, it would have been unconscionable to grant the reliefs sought. Nonetheless, and as the trial court rightly observed, the respondent had extended a generous offer regarding terminal dues which should not be reduced or undermined.

60. In the end, we are not satisfied that the trial court erred in finding that the appellant committed misconduct, that the respondent had a valid reason for termination and that procedural fairness was observed. Accordingly, this appeal lacks merit and is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 28th day of November 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF

APPEAL JOEL

NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.