

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC CAUSE NO E154 OF 2023**

**JACOBEL NJERU**

**BAU.....CLAIMANT**

**VERSUS**

**IMPRIMATUR COMPANY**

**LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The dispute between the parties is centered on whether the Claimant lost her employment through constructive dismissal or voluntary resignation. Whilst the Claimant asserts that she was a victim of constructive dismissal, the Respondent denies this contention.

**Claimant's Case**

2. The Claimant avers that she begun working for the Respondent in the position of Data Analyst in October 2019. She contends that she was later deployed to the position of Commercial Lead Trainee with effect from June 2022.
3. The Claimant contends that she served the Respondent with diligence and dedication throughout her term of service. She avers that this fact is fortified by the Respondent's decision to deploy her from the position of Data Analyst to Commercial Lead Trainee.
4. The Claimant contends that on 10<sup>th</sup> October 2022, the Respondent issued her with a notice to show cause letter

which required her to explain why disciplinary action should not be taken against her for alleged failure to remit funds which she had received on the Respondent's behalf in a case of embezzlement which she had been investigating. She avers that the Respondent gave her 48 hours to give her response.

5. The Claimant avers that by the same letter, the Respondent suspended her from work with effect from 11<sup>th</sup> October 2022. She asserts that she was directed to report to the office on 12<sup>th</sup> October 2022 for further directions.
6. The Claimant avers that the 48 hours which the Respondent gave her to respond to the show cause letter were inadequate to prepare a comprehensive response. As such, she contends that she wrote to the Respondent to request for an appointment with its Managing Director to give an oral account of the matters under inquiry.
7. The Claimant contends that following her request, the Respondent invited her to three meetings which were held on 12<sup>th</sup> October 2022, 9<sup>th</sup> November 2022 and 24<sup>th</sup> November 2022 to discuss the matter. She contends that during the first meeting, she questioned why the Respondent had taken too long to raise the matter. She avers that the show cause letter was issued to her approximately six months after the occurrence of the incident which allegedly gave rise to the accusation against her. She further asserts that the Respondent's Managing Director was notified of recovery of some of the funds in question long before she was issued with the show cause letter.

8. The Claimant asserts that she expressed her concern that the Respondent's decision to issue her with the show cause letter was an attempt to re-open a closed matter in order to use it as a justification for adverse action against her. She contends that the Respondent had just lost a major client at the time and was intending to restructure in reaction to the loss. She contends that the accusations against her were meant to justify termination of her employment as part of the impending restructuring process.
9. The Claimant avers that after the parties deliberated on the matter in the aforesaid meetings, the Respondent cleared her of the accusations and lifted her suspension. She avers that the Respondent subsequently asked her to resume duty.
10. The Claimant avers that she asked the Respondent to expunge the allegations of embezzlement from her personal employment file before she could resume work. She contends that leaving the impugned record on her file had the potential of ruining her career.
11. The Claimant avers that although the Respondent's Managing Director promised to consult on the request and revert to her, he did not. As such, she contends that it became apparent that the Respondent was unwilling to sanitize her personal record.
12. The Claimant avers that she did not find it tenable to resume work if the Respondent was not ready to expunge the impugned record from her file. She contends that maintaining the contested data in her file gave the

Respondent the opportunity to unjustifiably revive the charges against her at a later date. As such, she asserts that the Respondent's conduct demonstrated that it was keen to terminate her services through constructive dismissal from employment.

13. The Claimant further asserts that the Respondent's decision to keep the impugned allegations in her file resulted in other members of staff ridiculing her. She contends that holding onto the contested data in her personal file was meant to humiliate and intimidate her. As such, she contends that she could not continue working in such an environment.
14. The Claimant further accuses the Respondent of treating her unfairly by placing her on suspension without pay even before it had conducted an inquiry into the allegations against her. She asserts that the fact that the Respondent continued to remit statutory deductions on her behalf even after withholding her salary for the two months is testimony of the fact that it (the Respondent) was aware that its conduct was unjustified.
15. The Claimant avers that owing to this state of affairs, she was forced to tender her resignation from employment. She avers that the Respondent's actions rendered the work environment hostile. As such, she pleads constructive dismissal from employment.

### **Respondent's Case**

16. The Respondent states that although the Claimant was engaged as a Data Analyst, her role was later changed to Commercial Lead Trainee. It asserts that during the term of

the Claimant's service, she was involved in acts of misconduct involving theft and loss of customer funds. It alleges that the Claimant and her colleagues collected money from its customers without disclosure to it. It asserts that this fact is confirmed by the Claimant's own admission that whilst she was conducting investigation against a member of staff who had embezzled funds from a customer, she was given part of the cash which she banked in her M-Shwari account without disclosure to the Respondent.

17. The Respondent avers that when the malpractice was flagged, it issued the Claimant with a notice to show cause letter. It contends that it gave the Claimant 48 hours to respond to the letter because she was already seized of the facts of the matter under inquiry. As such, it contends that the time given to her to respond to the show cause was adequate.
18. The Respondent avers that it granted the Claimant's request for meetings to discuss the matter more than once. As such, it contends that she was granted adequate opportunity to address the matter.
19. The Respondent contends that the Claimant was part of a conspiracy to embezzle funds from it and its customers. It contends that it was entitled to re-open investigations into the malpractice after the Claimant had conducted her investigations against one of the employees who were involved in the syndicate. It asserts that this was necessary in order to stamp out the malpractice.

20. The Respondent avers that despite the Claimant's wrongdoing, it lifted the suspension against her and allowed her to resume duty. It contends that it had the option of dismissing her from employment but opted to exercise mercy upon her in good faith. It contends that the decision to pardon the Claimant was meant to give her a second chance.
21. The Respondent asserts that the decision whether to expunge the impugned record from the Claimant's personal file was a matter for its discretion as the employer. It avers that the Claimant had no right to insist on it.
22. The Respondent contends that the Claimant's assertion that the impugned record could be used against her in future was far-fetched. It avers that this could not justify her decision to resign from employment and plead constructive dismissal.
23. The Respondent maintains that if the Claimant faced ridicule from her workmates, this was because of her involvement in the impugned embezzlement of funds. It contends that she cannot blame it for this state of affairs because it (the state of affairs) was directly attributable to her maleficence.
24. The Respondent denies that it constructively dismissed the Claimant from employment. It contends that the events which led to her resignation from employment were triggered by her own misconduct for which she was trying to shift blame.
25. The Respondent avers that it opted to close the Claimant's case not because she was without blemish but because it wanted to focus on recovering the clients it had lost as a

result of her misconduct. As such, it contends that the Claimant cannot claim that she was cleared of the accusations against her and demand for her records to be sanitized.

### **Issues for Determination**

26. After evaluating the pleadings, evidence and submissions on record, the following issues present for resolution:-
- a) Whether the Claimant lost her employment through constructive dismissal.
  - b) Whether the Claimant is entitled to the reliefs which she seek in the action.

### **Analysis**

27. The evidence on record shows that the Respondent issued the Claimant with a notice to show cause letter dated 10<sup>th</sup> October 2022 asking her to account for alleged financial malpractice. From the letter, it is apparent that the Respondent accused the Claimant of having received money from one of its employees (being part of the funds which the said employee had allegedly embezzled from the Respondent's client) but failed to account for the money. The Respondent contended that instead of the Claimant accounting for the cash, she retained it. As such, it (the Respondent) gave the Claimant 48 hours to explain why disciplinary action should not be taken against her for the alleged malpractice.
28. The record shows that the Claimant did not do a written response to the show cause letter. Instead, she emailed the

Respondent on 12<sup>th</sup> October 2022 asking for an appointment to discuss the issue. This request triggered an exchange of email correspondence between the parties which led to the scheduling of a meeting on the same day at 1PM.

29. The Claimant now asserts that the time the Respondent gave her to respond to the show cause was inadequate. However, it is noteworthy that she did not raise this concern in her email correspondence with the Respondent.
30. As a matter of fact, the emails do not suggest that the Claimant asked for more time to proffer her explanation to the matters under inquiry. Instead, she asked for scheduling of a meeting to discuss the issue.
31. It is true that an employee who is facing disciplinary action at the workplace is entitled to sufficient time to respond to the accusations against him. However, what constitutes sufficient time is not fixed in law. It depends on the peculiar circumstances of each case.
32. In the instant case, the Respondent gave the Claimant 48 hours to respond to the charges against her. In the Respondent's view, this was sufficient time owing to the fact that the Claimant was allegedly aware of the issues under inquiry.
33. If the Claimant held a contrary view, she would have requested for extension of the time to proffer her response. However, the record does not suggest that she did that. Instead, she asked for an appointment to discuss the matter.
34. The Claimant's conduct does not suggest that she considered the time which she was given to react to the

accusations to have been inadequate. If she did, she would have said so in the email exchanges with the Respondent. Instead, she left it to the Respondent to schedule a meeting at its convenience to discuss the matter. Consequently, the court gets the impression that her contention in these proceedings that the 48 hours she was granted were inadequate is an afterthought intended to bolster her case.

35. Whilst addressing a similar issue in the case of ***Elizer Musambi Nyongesa versus Subaru Kenya Limited [2021] KEELRC 1909 (KLR)***, Radido J observed as follows:-

*“Adequate time to prepare for a hearing depends on the circumstances of each case. The Claimant was a senior employee of the Respondent. He did not seek for more time upon the receipt of the show-cause. He equally did not ask the disciplinary committee to adjourn the hearing to enable him bring along a colleague or prepare adequately for the hearing.”*

36. The minutes of the first meeting of 12<sup>th</sup> October 2022 show that the issue under inquiry related to the alleged loss of a sum of Ksh. 90,000.00. They (the minutes) show that whilst the Claimant was investigating the loss, the employee who was accused of embezzling the funds offered to refund Ksh. 60,000.00 to close the matter. The record shows that the employee gave the Claimant the money. However, she (the Claimant) did not remit the funds to the Respondent.
37. When the Claimant was asked why she withheld the funds, she stated that she did so in trust and intended to remit the money to the Respondent at the close of the year if there

were no instructions to the contrary. Alternately, she contended that she was to apply the funds towards staff bonus if the Respondent was going to agree.

38. The record shows that the Claimant appended her signature on the aforesaid minutes to affirm that they were a true account of what transpired at the meeting. It is therefore clear to the court (if the said minutes are anything to go by) that the Claimant conceded that she received Ksh. 60,000.00 from the employee who had embezzled the funds under investigation but had neither disclosed this fact to the Respondent nor forwarded the cash to the Respondent several months after she was given the money.
39. In his final submissions to court, the Claimant's lawyer contends that the Respondent did not establish its interest in the disputed funds. As such, he contends that the Claimant should not have been victimized on account of the alleged embezzlement.
40. However and with respect to counsel, the court does not think that this contention has probative value. Although during trial of the case, the Respondent's witness appeared to have been ambivalent about ownership of the embezzled funds, the court does not think that it was necessary to address the issue in the first place. This is because the Claimant had already acknowledged the Respondent's interest in the funds both in her pleadings and during the meeting of 12<sup>th</sup> October 2022.
41. At paragraph 8 of the Memorandum of Claim, the Claimant asserted, in part as follows:-

*“At the hearing of the 12<sup>th</sup> October 2022, the Claimant took issue with the duration it had taken to raise the allegation against her given that the investigation conducted on virtual outlets that led to release to her of the funds by the staff member that had defrauded the Respondent occurred 6 months earlier.”*

42. At bullet five (5) in the minutes of the meeting of 12<sup>th</sup> October 2022 between the Claimant and the Respondent’s management, she confirmed the accuracy of the following averment at the meeting by appending her signature on the minutes:-

*“From calculations the officer had defrauded the business about Ksh. 90,000.00 using the virtual outlets. The lady under investigation offered to refund back at least Ksh. 60,000.00 back to the business instead of being reported to the authorities. The money was given to Bau who said she had been holding it in trust in M-Shwari.”*

43. These averments demonstrate that the Claimant acknowledged the Respondent’s interest in the embezzled funds. As such, the question of the Respondent’s interest in the funds, whether legal or equitable, was no longer open for contestation.
44. The Claimant asserted that she intended to hand over the money which was given to her to the Respondent at the close of the year or to apply it to settle staff bonus. Her decision to hold onto the funds for whatever reasons without first seeking the Respondent’s concurrence was, to say the

- least, not appropriate. As such, the Respondent was justified to come to the conclusion that her conduct was suspect.
45. The Claimant's conduct entitled the Respondent to terminate her services for gross misconduct under section 44 of *the Employment Act*. The Respondent was entitled to conclude that she had committed or was reasonably suspected to have committed a criminal offence against or to the substantial detriment of her employer or her employer's property.
  46. Despite this reality, the court record shows that the parties opted to hold further deliberations on the matter. As such, they held a meeting on 9<sup>th</sup> November 2022.
  47. According to the minutes of the aforesaid meeting, the Respondent intimated that the client whose funds had been embezzled was not willing to make a formal complaint about the matter. As such, the Respondent's management lifted the Claimant's suspension.
  48. The Claimant then expressed her concern regarding the work environment within the Respondent's establishment. She stated that she did not feel comfortable to resume work unless the term "embezzlement" was removed from her file.
  49. The minutes show that the Respondent's management informed her that they were not in a position to decide on her request immediately. They asked for time to consult on the matter.
  50. The evidence on record shows that the parties held yet another meeting on 24<sup>th</sup> November 2022. By this time, the Claimant had already authored her letter of resignation from

employment dated 11<sup>th</sup> November 2022 (see document no. 4 in Respondent's bundle of exhibits).

51. Despite the Claimant having drawn her aforesaid letter, she appears to have drawn yet another letter of resignation dated 25<sup>th</sup> November 2025. It is unclear why she did this. However, once she issued the first letter, the resignation crystallized. As such, the second letter was, for all purposes and intents, superfluous.
52. The law entitles an employer to take disciplinary action against an employee for misconduct at the workplace. This entitlement falls within the employer's prerogative to manage the workplace (***Alfred Nyungu Kimungui v Bomas of Kenya [2013] KEELRC 235 (KLR)***).
53. Whilst executing this mandate, the employer is entitled to suspend the employee from the workplace. This is usually to give room for investigations and to bar the employee from interfering with the disciplinary process (***Mutwol v Moi University [2022] KECA 537 (KLR)***).
54. Therefore, the Respondent's decision to suspend the Claimant from the workplace as it took disciplinary action against her was within the law. The Respondent was entitled to suspend the Claimant whilst it investigated and undertook disciplinary action against her on account of the suspected financial improprieties.
55. The law entitles an employer to maintain a record of acts of misconduct by an employee. Section 74 (1) (I) of *the Employment Act* which deals with the matter provides thus, "an employer shall keep a written record of all employees

employed by him, with whom he has entered into a contract under this Act which shall contain the particulars of a record of warning letters or other evidence of misconduct of an employee''.

56. As such, the Claimant's demand that the Respondent expunges the impugned record from her record lacked basis in law. Having regard to the fact that there was evidence that she had misconducted herself, it was not within her right to demand that her records be amended to show that she was without blemish. On the contrary, the Respondent was entitled and indeed obligated by law to maintain a record of her misconduct.
57. The evidence on record shows that the Claimant resigned because the Respondent was unwilling to expunge evidence of her misconduct from her file. She contends that this rendered the work environment hostile and intolerable. Yet and as has been demonstrated above, the law entitled and indeed obligated the Respondent to maintain the record.
58. The fact that the Respondent opted to discharge this legal obligation by keeping the impugned data cannot be said to have resulted in the Respondent making the work environment intolerable. It (the Respondent) was simply discharging a statutory obligation under section 74 of *the Employment Act*.
59. The law on constructive dismissal from employment is now settled. For an employee to successfully plead constructive dismissal, he must demonstrate that the employer's conduct repudiated the contract between the parties. The employer

must have conducted himself in a manner which suggests that he was no longer willing to be bound by the terms of the contract of service between the parties (***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)***).

60. In the instant case, there is no evidence to suggest that the Respondent's actions implied an intention to repudiate the contract between the parties. On the contrary, there is evidence that the Respondent lifted the Claimant's suspension and asked her to resume duty. How can this be construed as exhibiting an intention by the Respondent to repudiate the contract between the parties? How can the Respondent's directive be construed to imply that it (the Respondent) was no longer willing to be bound by the terms of the contract between the parties?
61. As shown earlier, section 74(1) (l) of *the Employment Act* obligated the Respondent to keep a record of the Claimant's impugned conduct. How can the Respondent's decision to abide by this requirement of law be said to have generated an uncondusive work environment?
62. The Claimant asserts that the other reason she opted to resign and plead constructive dismissal from employment is that the Respondent delayed to remit her salary for October and November 2022. However, this assertion is not entirely accurate.
63. The record shows that the Claimant was suspended from duty on 10<sup>th</sup> October 2022. However, the suspension was

- lifted on 9<sup>th</sup> November 2022 when the Respondent asked her to resume work.
64. The record shows that the Claimant declined to resume duty insisting that her record be sanitized first. The minutes of the meeting of 9<sup>th</sup> November 2022 show that the Respondent asked for time to consult on the request. However, before a decision was taken on the matter, the Claimant resigned on 11<sup>th</sup> November 2022.
65. It is therefore apparent that at the time the Claimant resigned from employment on 11<sup>th</sup> November 2022, her salary for that month had not become due since the month had just begun. The only salary which was overdue at the time was for October 2022.
66. The court agrees with the Claimant that failure by an employer to pay an employee's salary once it becomes due amounts to breach of the contract between the parties which entitles the court to infer an intention by the employer not to be bound by the terms of the contract. However, before drawing this inference, the court must evaluate the peculiar circumstances of each case.
67. In the instant case, the court notes that when the Claimant's October salary was withheld, she was facing disciplinary action relating to misappropriation of funds. From the evidence on record, the matter was still undergoing investigations at the time.
68. Sections 17 and 18 of *the Employment Act* protect an employee's right to salary. An employer is obligated to release an employee's salary once it becomes due.

69. However, section 19(1) (b) & (d) of the Act entitles an employer to recover funds which an employee may have lost through deductions from the employee's salary. This includes money which may have been misappropriated by the employee.
70. In his witness statement, the Respondent's witness states that the Respondent withheld the Claimant's October salary because she was suspected to have misappropriated funds that belonged to it and or its clients. The witness states that the Claimant was aware that she was holding money which belonged to it and or its clients.
71. Taking the foregoing into consideration, the court finds that the Respondent's decision to withhold the Claimant's October salary was founded on the employer's right of lien over an employee's salary under section 19 of *the Employment Act*. It is noteworthy that by the time the Claimant's October salary became due at the close of that month, the parties had already held their first meeting on 12<sup>th</sup> October 2022 during which the Claimant conceded that she was holding some funds which she was yet to release to the Respondent. Therefore, the Respondent's right of lien over her salary under section 19 of *the Employment Act* to enforce recovery of the impugned funds had already crystalized. As such, the court rejects the Claimant's contention that the Respondent's failure to release her salary for that month was in breach of its obligation to pay the salary.

72. The foregoing demonstrates that the Claimant's suit against the Respondent is not merited. It is founded on a misunderstanding of the principles that undergird the concept of constructive dismissal from employment. As such, it is bound to fail.
73. Notwithstanding the circumstances which surround termination of an employee's contract of service, an employer should pay an employee his/her terminal dues once the contract between them comes to a close (see section 18(4) of *the Employment Act*). This is of course subject to the employer's right of set off and counter-claim. As such, despite the circumstances under which the Claimant lost her employment, she is entitled to be paid the dues which had accrued to her at the point of her exit from employment.
74. In the Statement of Claim, the Claimant prays for, inter alia, salary for October 2022 (Ksh.90,000.00) and accrued leave pay of Ksh. 47,117.49. In addition, she claims for pay in lieu of notice of Ksh. 90,000.00.
75. The court notes the Respondent was not averse to paying some of these claims. As a matter of fact, during the oral testimony of the defense witness, he stated that the Respondent had offered to pay the Claimant's terminal dues but she declined to collect the payment.
76. The court record shows that both parties tendered in evidence the schedule of computation of final dues which the Respondent was prepared to pay the Claimant. This appears as document number five (5) in the Respondent's

list and bundle of documents dated 20<sup>th</sup> October 2023 and document number twelve (12) in the Claimant's list and bundle of documents dated 24<sup>th</sup> February 2023.

77. According to the schedule, the Respondent was amenable to pay the Claimant the following exit benefits:-

a) Salary for October 2022	Ksh. 90,000.00.
b) Salary in lieu of notice	Ksh. 90,000.00.
c) Commuted leave days	Ksh. 47,177.49.
d) Two months compensation	<u>Ksh. 180,000.00</u>
<b>Total</b>	<b>Ksh. 407,177.49.</b>

Less statutory deductions.

78. Since the Respondent was ready to pay the aforesaid amount to the Claimant and in view of the court's earlier observations regarding the employer's obligation to settle an employee's terminal dues, I allow the following reliefs which the Claimant has specifically pleaded in the Statement of Claim:-

a) Commuted leave days	Ksh. 47,177.49.
b) Salary for October 2022	Ksh. 90,000.00.
c) Salary in lieu of notice	Ksh. 90,000.00.

79. The parties are in agreement that the Respondent lifted the Claimant's suspension on 9<sup>th</sup> November 2022 and directed her to resume duty. However, the evidence on record shows that she did not resume duty as directed. Instead, she tendered her resignation on 11<sup>th</sup> November 2022.

80. In effect, the Claimant remained in the Respondent's employment until 11<sup>th</sup> November 2022. However, she was

absent from duty between 10<sup>th</sup> and 11<sup>th</sup> November 2022 since she was expected to have resumed on 10<sup>th</sup> November 2022 or thereabouts.

81. Under section 17 of *the Employment Act*, the employer's obligation to remunerate an employee is conditional on the employee having worked (see also ***Renson Makheti Wanyonyi v Kenya Industrial Estates Limited [2018] eKLR***). As such, the Respondent was not bound to remunerate the Claimant for 10<sup>th</sup> and 11<sup>th</sup> November 2022 as she was absent from duty on those days.
82. However, the Claimant was entitled to be paid salary for the nine (9) days she was on suspension in November 2022. As such, the court awards her salary for the nine (9) days to wit Ksh. 27,000.00.

### **Determination**

83. The upshot is that the court finds that the Claimant's contract of service was not terminated through constructive dismissal from employment.
84. Rather, it (the contract) was terminated when she voluntarily resigned from the workplace after the Respondent declined to yield to her demands to expunge evidence of her misconduct from her employment records, a demand which was contrary to the obligation imposed on the Respondent by section 74(1) (l) of *the Employment Act*.
85. As such, save for the prayers for issuance of a Certificate of Service and payment of the terminal benefits set out in paragraphs 78 and 82 of this decision (with interest thereon

at court rates from the date of this decision) which are hereby granted, the rest of the claim is dismissed.

86. Each party shall bear own costs of the suit.

**Dated, signed and delivered on the 15<sup>th</sup> day of December, 2025**

**B. O. M. MANANI**  
**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

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

**B. O. M MANANI**