



REPUBLIC OF KENYA



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**Moindi v First Community Bank Limited (Cause E614 of 2022)
[2025] KEELRC 3674 (KLR) (17 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3674 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E614 OF 2022
B ONGAYA, J
DECEMBER 17, 2025**

BETWEEN

DOUGLAS MAGATI MOINDI CLAIMANT

AND

FIRST COMMUNITY BANK LIMITED RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 17th December, 2025)

JUDGMENT

1. The claimant filed the statement of claim dated 26.08.2022, filed on 02.09.2022, and through Munyao Muthama & Kashindi Advocates. The claimant prayed for judgment against the respondent for orders as follows:
 - a. A declaration that the claimant was constructively dismissed from employment.
 - b. Payment of the claimant's terminal dues and 12 months' salary compensation as set out in paragraph 27 herein above, totalling to Kshs. 1,470,840/=.
 - c. A declaration that the respondent breached the claimant's rights under Articles 29, 41 and 47 of *the Constitution*.
 - d. Damages for breach of the claimant's legitimate and reasonable expectations.
 - e. Damages for breach of the claimants' rights protected under Article 41 and 47 of *the Constitution*.
 - f. Damages for breach of the claimant's right to freedom from discrimination on account of religion.
 - g. Interests at court rates.



- h. Costs of the suit.
2. At paragraph 27 of the statement of claim the claimant alleged that he had been constructively dismissed from employment in an unlawful and unfair manner and further claimed as follows:
- a. 50% deducted and unremitted salaries for a period of 10 months from April 2020 to January 2021 (Kshs 43,260 X 10 months)Kshs. 432,600.
 - b. 12 months' salary compensation for unfair and unlawful termination (Kshs. 86,520 X 12)Kshs. 1,038,240. c) Certificate of service pursuant to section 51 of the Employment Act
3. The claimant alleged and pleaded as follows:
- a. The claimant was enlisted into the respondent's employment vide a letter of employment dated 20th May, 2014 as exhibited to serve the respondent as a Microfinance Officer at a monthly salary of Kshs. 86,520/= . The role was later changed to Business Officer with effect from 10th January, 2017 and per letter exhibited and dated 09.01.2017.
 - b. From or about 1st April, 2021, the respondent placed the claimant on a Performance Improvement Plan (PIP) with ill intentions to have his employment terminated and for reasons that were never disclosed to the Claimant. During the aforesaid PIP, the respondent threatened to terminate the claimant's employment indicating that a decision to have the claimant's employment terminated had been predetermined.
 - c. Prior to the PIP process, there was underperformance across the Bank network since almost half of the business team were issued with letters. This was because the claimant and the rest of the employees were working for two weeks a month with annual targets which were set before the change of working days. There was no issue on the claimant's personal individual performance to warrant a claim by the respondent that he was of poor performance. The claimant was never issued with any letter pointing out that he was of poor performance.
 - d. On or about 26th January, 2022, the claimant was invited to a performance discussion with the respondent's Senior Manager Retail Sales (Mr. Yahya Dahir) where performance figures for the period of 2021 were presented to the claimant and he was made to sign them without having had an opportunity to go through and verify the figures. The claimant was also not given an opportunity to compare the figures with the actual data in the respondent's performance review dashboard.
 - e. The variance was in terms of scores awarded, being leave day's management, financing book, customer service among others wherein the claimant was rated unsatisfactory and yet he had met the target in the subject parameters.
 - f. On or about 27th January, 2022, the claimant managed to review the performance figures and noted that they were incorrect and at variance with the actual figures and thereafter issued a dispute letter dated 27th January, 2022 as duly exhibited which was followed by a meeting held on 28th January, 2022. The claimant wrote and addressed the Senior Manager Retail Sales (Mr. Yahya Dahir) about his performance appraisal for the period 2021 as follows,

“The subject matter refers to the performance discussion that we had yesterday 28.01.2022 at First Community Bank Head Office, FCB MIHRAB whereby



performance figures for the period mentioned above were presented to me for signing without being given time to compare with actual data.

Further to this I hereby write to differ with what I signed yesterday, 26th January, 2022 upon going through my actual performance data that was shared by the Bank Business Analyst Manager for the above mentioned period.

With due respect, I request that you allow me to relook at the data that you presented against the actual data as presented by analytics office before I execute the document. Therefore I totally disagree with what I signed yesterday, 26th January, 2022.

Yours faithfully,

Signed

Douglas Masati Moindi

Cc: Branch Manager

Head of Human Resource Department”:

- g. At the meeting of 28th January, 2022, the claimant pointed out the variances but the figures presented on 26th January, 2022 were never changed despite the fact that there were clear variances with the actual data. This made the claimant believe that a decision had been made to have his employment terminated given that he was also issued with a pre-dated letter of termination dated 31st January, 2022, 3 days in advance. The letter duly exhibited was addressed to the claimant and signed by Mabel Kibore, Head of Human Resources. The letter referred to warning letters issued against the claimant dated March 2021 regarding his performance and consequently the PIP that was imposed from April 2021. The letter further stated that the PIP was extended for a period of 3 months from August 2021 to October 2021 to allow the claimant a chance to improve performance but after review and discussions with the line manager it was noted that there was still no improvement in the claimant’s performance as his performance was deemed unsatisfactory. The letter stated further as follows, thus,

“...It is for this reason we are terminating your contract of service with effect from 31st January 2022. Your last day of work will be taken as 31st January 2022. You will be paid one month salary in lieu of notice as per policy.

Your final dues will be worked out as follows:

1. Salary for 31 days of January 2022.
2. 5 days of 2021 Annual Leave earned but not taken.
3. 2.33 days of 2022 Annual Leave earned but not taken.
4. Telephone allowance for January 2022.
5. 1 month salary in lieu of notice.

These amounts shall be paid subject to tax and statutory deductions.

Provident Fund shall be paid per the rules of the Scheme.

You however have the following liability as at 31st January 2022.

1. Staff Facility (Kshs.474, 970.98)”



The letter further required the claimant to hand over and concluded thus, “Kindly sign the attached copy of this letter to signify your understanding and acceptance of the above mentioned dues and conditions.” The exhibited letter shows that the claimant did not sign the letter at all.

- h. The management of the claimant’s performance was not done in compliance with clause 22 of the claimant’s employment contract dated 20th May, 2014 as well as clause 13.0 of the Respondent’s Human Resource Policy and Procedure Manual as exhibited, in that the performance assessment was not based on the claimant’s individual performance targets and that the extension of the claimant’s PIP was done in contravention of clause 13.11.1 which provides that PIP must be for a maximum of 3 months.
 - i. The claimant pleaded that the respondent then asked the claimant to sign the pre-dated letter of termination to acknowledge receipt to which the claimant declined.
 - j. At the time the claimant was being issued with the pre-dated letter of termination, he had not been accorded a hearing and procedural fairness as would be required by the law and the principles of natural justice.
 - k. Despite the claimant’s faithfulness and honesty in serving the respondent, the respondent’s unlawful actions created an intolerable work environment and as a result of which, the Claimant was compelled to offer his resignation letter dated 28th January, 2022 contrary to his will and expressing his frustrations at the Respondent. The Claimant was thus constructively dismissed from his employment. The claimant’s resignation letter was dated 28.11.2022 addressed to Head of Human Resources of the respondent and stated as thus,

“In view of today’s meeting and upon presentation of data, I hereby tender my resignation effective today 28.01.2022.”
 - l. The respondent accepted the claimant’s resignation by the letter dated 28.01.2022 which stated in part, “We refer to your resignation letter received on 28.01.2022 in which you have expressed your wish to terminate your services with the Bank. Your resignation has been accepted. Your last working day will be taken as 31st January 2022. Management has accepted to pay you the one month salary in lieu of notice that you would have served.” The letter proceeded to repeat the terms of separation as had been set out in the termination letter that had been pre-dated 31.01.2022 and which the claimant had been required to sign. The respondent’s letter of acceptance required the claimant to sign in acknowledgment but the claimant declined to do so. Instead the claimant wrote the letter of 07.02.2022 referring to his letter of resignation dated 28.01.2022 and the bank’s acceptance letter of 28.01.2022 and further repeated the events leading to his involuntary resignation letter of 28.01.2022.
 - m. The claimant urged that he was forced into resigning from his position at the respondent institution due to the systematic, unsubstantiated and malicious claims of poor work performance, for which he claimed constructive dismissal and loss of employment.
 - n. It is the claimant’s case that by failing to address the issues raised in the claimant’s resignation letter and instead accepting the claimant’s resignation, the respondent’s



actions amounted to a direct replica of the contents of the pre-dated termination letter that the claimant had been initially issued with.

- o. Consequent to the claimant's resignation, he was paid Kshs. 1,207,259.34/= as January and February, 2022 salaries, accumulated pension and 7 days' leave compensation but no payment statement or payslip was provided.
- p. The claimant was thereafter asked to clear with the respondent which he did on 4th February, 2022.
- q. The claimant was never issued with the regulations governing the Scheme from which he was paid the aforesaid amount. Pursuant to provisions of Article 35 of *the Constitution*, the Claimant asked to be supplied with the aforesaid regulations of the Provident Fund for purposes of processing his dues and effecting his rights therefrom as an employee. The respondent has never supplied the claimant with the aforesaid regulations.
- r. Prior to the above, the respondent subjected the claimant to 50% pay cut for a period of 10 months from April, 2020 to January, 2021 while working for 15 days a month. The claimant was further subjected to a 20% deduction of salaries for a period of 4 months being from February to June, 2021 but which deductions were remitted in July and August, 2021.
- s. The claimant's 50% salary deductions of April to January, 2021 were never remitted back to him at the time of his constructive dismissal contrary to the agreement he had with the respondent. The claimant thus reserves the right to be paid all the deducted amount from his salaries for the aforesaid period.
- t. The respondent neglected and failed or ignored and refused to deduct and remit the claimant's lawful pension dues for the entire period the claimant was subjected to pay cuts, and in utter violation of the Pension Scheme Regulations and which reasons were never given or shared with the claimant.
- u. Further to the above, clause 5 of the claimant's employment contract entitled the claimant to annual salary increment and performance bonus upon successful completion of probation and confirmation into employment by the respondent. The claimant's salary was however never reviewed as compared to his colleagues' salaries which were annually reviewed and increased.
- v. The claimant was unlawfully subjected to discrimination on the ground of his religion since his colleague employees of Muslim faith enjoyed the benefit of salary increment or review and which discrimination was in contravention of section 5 of the *Employment Act* and Article 27 of *the Constitution* of Kenya.
- w. From the foregoing, the claimant pleaded that the respondent's actions and omissions amounted to a clear violation of the claimant's right to fair labour practice guaranteed by Article 41 of *the Constitution*. The respondent's actions and omissions further violated the claimant's right to fair administrative action as guaranteed by Article 47 of *the Constitution*. The respondent also breached the claimant's constitutional right to have his dignity respected as provided for under Article 28 as read with Article 29(d) and (f) of *the Constitution* of Kenya, 2010.



4. The respondent filed the memorandum of response dated 25.11.2022 through Busaidy Mwaura Ng'arua & Company Advocates. By notice of change of advocates dated 08.11.2023 the respondent changed its advocates to Busaidy Mwaura Ouma and Company Advocates LLP. The respondent urged the Court to find in its favour and to dismiss the claimant's suit against the respondent as extremely prejudicial.
5. The respondent further pleaded as follows:
 - a. The respondent pleaded it employed the claimant by the contract of 20.05.2014 as Microfinance Officer renamed Business Officer effective 10.01.2017.
 - b. The claimant's performance had been found wanting on numerous occasions during the period of his employment with the respondent.
 - c. The claimant's performance was found to be unsatisfactory from as far back as 2019. By way of a letter dated 13th February 2019, the respondent informed the claimant that his performance was found to be below acceptable levels, and the claimant was required to show cause why, at the material time, further disciplinary action should not be taken against him.
 - d. The Claimant was also informed vide the letter dated 13th February 2019, that continued non-performance may lead to the claimant being placed on Performance Improvement Plan ("PIP"), and that if the claimant did not meet the required targets within the set deadline, further disciplinary action as detailed in the respondent's Human Resource Policy would be taken against him.
 - e. By way of a letter dated 13th May 2019, the claimant was placed on PIP for a period of three (3) months from 1st May 2019 to 31st July 2019 as a result of his sustained poor performance. The claimant was afforded an opportunity to improve his performance, with the respondent going so far as to arrange coaching sessions for the claimant in order to assist the claimant improve his performance.
 - f. Subsequently, by way of a letter dated 19th April 2021, the respondent once more notified the claimant that his performance was found to be below acceptable levels. The claimant was again afforded an opportunity to improve his performance, and the Claimant was placed on a PIP for three months from 1st April 2021 to 30th June 2021, with the respondent going so far as to arrange coaching sessions for the claimant in order to assist the Claimant improve his performance.
 - g. In no way was the claimant threatened with termination as alleged or at all. The claimant was duly notified by way of the letter of 19th April 2021 that continued underperformance would lead to disciplinary action as detailed in the Respondent's Human Resource Policy and in the claimant's Employment Contract. The respondent shall rely on the letter dated 19th April 2021 for its full tenor, meaning and effect.
 - h. By way of a letter dated 13th September 2021, the respondent was notified that following the Mid-Year Appraisal and after completion of the claimant's PIP, the Claimant had achieved a rating score that was still below average and unsatisfactory. Consequently, the respondent, rather than take disciplinary action against the claimant, including termination of employment, saw fit to extend the claimant's PIP for a further three-month period with effect from 1st August 2021 in order to give the claimant another opportunity to improve his performance.



- i. The allegation that the claimant's termination was predetermined is vehemently denied. The respondent states that the claimant was performing poorly, was notified of this fact and given the opportunity to remedy his performance, which opportunity he failed, neglected and or refused to take.
- j. The respondent normally carried out annual performance reviews of all staff in the month of January in respect of staff performance during the preceding year. The respondent further states that the data used in conducting the performance reviews was available to all of the respondent's staff, in the respondent's internal performance review dashboard.
- k. That by way of an email dated 25th January 2022, the claimant's functional supervisor, Mr. Yahya Dahir, the respondent's Senior Manager - Retail Sales, informed the claimant that the final 2021 performance review meeting would be held on 26th January 2022. The claimant was required to prepare his data and be available for the session.
- l. During the 2021 performance review meeting held on 26th January 2022, the claimant was presented with his 2021 Personal (Balance) Score Card and requested to sign the same. The Claimant duly signed the said Score Card.
- m. The Claimant's allegations that he was not given an opportunity to review the figures prior to signing the Score Card, and that he was denied an opportunity to compare the actual figures with actual data in the respondent's performance review dashboard are whimsical and far-fetched at best. The said data was available to the claimant at any time, on the respondent's performance review dashboard, which was (and is) easily available to all of the respondent's staff, on its internal computer network.
- n. On 27th January 2022, the claimant wrote to his functional supervisor, whereby the claimant disputed the data presented to him vide his 2021 Personal (Balance) Score Card and requested a review.
- o. On the same 27th January 2022, the claimant's supervisor replied to the claimant inviting him to a meeting to be held on 28th January 2022 with the agenda of discussing the disputed performance figures. The Claimant was once more requested to have all his data ready for discussion.
- p. The following day, on 28th January 2022, a meeting was held between the claimant, his supervisor (Mr. Yayha Dahir), Sheikh Khaled Mohammed Aman (Shariah Audit Manager), Mr. Charles Mutuku (Senior Manager Analytics) and Mrs. Joan Odhiambo (Business Centre Manager, Westlands Business Centre).
- q. During this meeting, the claimant confirmed that the agenda for the meeting was a review or discussion of his Balance Score Card, which he had disputed.
- r. With regard to Financing Income Growth, the claimant confirmed that he had wrongly interpreted the information available on in the respondent's performance review dashboard and moreover, that the figures that he had input in the Balance Score Card were wrong.
- s. With regard to Funded Income, the Claimant confirmed that, during the period under review, he had disbursed a total of Kshs. 165,000,000.00 against a financing growth target of Kshs. 240,000,000.00. When asked if given a chance to input the same figures he had put in his Balance Score Card, the claimant informed the meeting that he had understood how it was done and he would put in different figures as done by his line manager.



- t. With regard to leave balances, the claimant confirmed that as per data shared by the respondent's Human Resources Department, he had not met his leave target.
- u. With regard to customer service, when asked if a complaint regarding his poor customer relationship management be shared with the meeting, he quickly asked for the same not to be shared and withdrew his objection.
- v. At the end of the meeting, the claimant was asked to redo the Basic Score Card with the correct figures since he had confirmed that he had input incorrect figures. The claimant responded by stating that he would not change the Balance Score Card and that the same should be taken the way he submitted it.
- w. In closing the meeting, the claimant was asked when he would be available to go through the minutes of the meeting and sign the same. He indicated that he would not be available.
- x. The claimant then proceeded to issue a hand-written letter of resignation dated 28th January 2022, in which he resigned without notice effective the same 28th January 2022.
- y. The respondent avers that the management of the claimant's employment was carried out in accordance with the provisions of the claimant's Contract of Employment, the respondent's Human Resources Policy Manual, and the applicable provisions of the [Employment Act](#) 2007.
- z. The respondent averred that Clause 22 of the claimant's Contract of Employment clearly sets out that "... Should your performance be found to be below the required standard at any one time, the Bank shall require you to remedy your performance within a specified reasonable time. Thereafter, should you fail to comply with the requirement, the Bank reserves the right to terminate your employment on account of poor performance."
- aa. The respondent averred that the claimant had severally been notified that persistent unsatisfactory performance would result in disciplinary action being taken against him, including but not limited to termination of employment.
- ab. The respondent further pleaded that the claimant's allegation of an "intolerable work environment" are a mere façade calculated at papering over the fact that the claimant had constantly poorly performed his duties, despite being afforded every opportunity to improve his performance. The claimant was engaging in a mud-slinging exercise to hide his own shortcomings in the performance of his duties.
- ac. The claimant indeed issued the respondent with a further letter of resignation dated 7th February 2022, after the respondent had already accepted his original resignation of employment dated 28th January 2022, and paid the claimant his terminal dues.
- ad. Notwithstanding the fact that the claimant had formally resigned on 28th January 2022, and the fact that the respondent had no obligation to respond to the said letter of 7th February 2022, the respondent nevertheless responded to the claimant's letter by way of a letter dated 17th February 2022, which letter the claimant refused to receive and or acknowledge receipt.
- ae. The claimant was neither forced to resign or at all by the respondent. The respondent avers that the claimant's performance was consistently found to be below par; the claimant failed to meet his performance targets during the course of his employment with the respondent; and moreover, failed to improve said performance despite being given several opportunities to do so. The allegation of constructive dismissal is particularly denied and the claimant put to strict proof.



- af. The respondent accepted the claimant's resignation by way of a letter dated 28th January 2022. The allegations of failure or avoiding to respond to the claimant's issues and frustrations are denied and the claimant put to strict proof thereof. In any event, the respondent avers that the claimant brought an end to the employer-employee relationship upon his resignation on 28th January 2022, and thus, any purported failure to respond to the resignation letter is irrelevant to the instant matter.
 - ag. The respondent averred that the claimant's resignation letter dated 28th January 2022 simply stated that the claimant resigned effective 28th January 2022. The same did not contain any "issues or frustrations" as alleged. The respondent shall rely on the resignation letter dated 28th January 2022 for its full tenor and effect.
 - ah. The claimant was duly paid his terminal dues in the sum of Kshs. 1,207,259.34. The averment for the claimant that no breakdown was provided is denied and the claimant put to strict proof thereof. The respondent averred in reply thereto that the breakdown of the said figure was duly provided to the claimant, who acknowledged receipt thereof on 17th February 2022.
 - ai. The respondent averred that the claimant completed the clearance process on 7th February 2022.
 - aj. The claimant did not at any material time or at all, request to be supplied with the Scheme Regulations. In any event, the respondent avers that the said Scheme Regulations were available at any time to all of the respondent's staff, including the claimant, on the respondent's internal computer network.
6. On the issues of pay cut, bonus and pay increase the respondent pleaded as follows:
- a. By way of a letter dated 8th April 2020 and an Addendum of 14th April 2020, the respondent notified the claimant that as a result of the coronavirus pandemic, the respondent's business had been greatly affected and impacted, necessitating a reorganization of the respondent's business approach to ensure continuity.
 - b. The claimant was further notified that following consultative discussions with staff, the respondent would implement a number of changes, including inter alia requiring the claimant (amongst other staff) to proceed on unpaid leave for nine (9) calendar days in April 2020 and fifteen (15) calendar days each month between May and June 2020, and that full payment would be made for days worked.
 - c. The claimant duly acknowledged that he received the letter of 8th April 2020 (and Addendum of 14th April 2020) and that he had understood its contents. The claimant did not raise any concern, issue or dispute any of the contents of the letter of 8th April 2020 (and the Addendum of 14th April 2020).
 - d. By way of a letter dated 1st July 2020, the respondent again notified the claimant that the coronavirus pandemic was still affecting business and as a result, the changes set out in the letter of 8th April 2020 would be extended for a further period of three (3) months from 13th July 2020. The claimant duly acknowledged receipt of this letter of 1st July 2020.
 - e. By way of a letter dated 8th October 2020, the respondent again notified the claimant that the coronavirus pandemic was still affecting business and as a result, the changes set out in the letter of 8th April 2020 would be extended for a further period of three (3) months from 14th



November 2020 to 30th November 2020. The claimant duly acknowledged receipt of this letter of 8th October 2020.

- f. By way of a letter dated 30th November 2020, the respondent again notified the claimant that the coronavirus pandemic was still affecting business and as a result, the changes set out in the letter of 8th April 2020 would be extended for a further period of one (1) month from 1st December 2020 to 31st December 2020. The claimant duly acknowledged receipt of this letter of 30th November 2020.
- g. By way of a letter dated 30th March 2021, the respondent again notified the claimant that the coronavirus pandemic was still affecting business and as a result, the changes set out in the letter of 8th April 2020 would be extended for a further period of three (3) months from 1st April 2021 to 30th June 2021. The claimant duly acknowledged receipt of this letter of 30th March 2021.
- h. By way of a letter dated 19th July 2021, the respondent again notified the claimant that the coronavirus pandemic was still affecting business and as a result, the changes set out in the letter of 8th April 2020 would be extended for a further period of three (3) months from 1st July 2021 to 30th September 2021. The claimant duly acknowledged receipt of this letter of 30th September 2021.
- i. By way of a letter dated 19th August 2021, the respondent then notified the claimant that its management had taken the decision to lift the measures imposed in April 2020 and further informed the claimant that staff were required to resume full time attendance with effect from 1st August 2021, and that staff salaries would resume at 100% with effect from 1st August 2021. The claimant duly acknowledged receipt of this letter of 19th August 2021.
- j. The pay cut measures was an understanding between the parties in view of the COVID-19 situation. The claimant duly accepted and received payment of his salary for the days worked during the period(s) set out hereinabove, and is thus estopped by conduct from claiming payment of the alleged deductions. The claimant duly acknowledged and accepted the changes in the terms of the Contract of Employment, due to the prevailing economic conditions affecting the parties. There was no agreement that the amounts in pay cuts would subsequently be paid.
- k. Clause 5 of the claimant's Contract of Employment clearly sets out that the claimant "may" be entitled to an annual salary increase and or performance bonus on the basis of the Bank's overall performance, divisional performance and individual performance, but nevertheless, the respondent reserved its right to amend or withdraw the same altogether. The respondent shall rely on the said Clause 5 for its full tenor and effect. Further, the respondent averred that the claimant consistently performed below expected levels throughout the period of his employment with the respondent and did not merit any increment on the basis, inter alia, of sub-par individual performance. Further, any salary increments awarded to the respondent's staff (including the claimant's colleagues) were awarded on the basis of the Bank's performance, divisional performance, and most importantly, individual performance. The claimant's performance during his tenure at the respondent did not merit the award of the incentives set out in Clause 5 of the Contract of Employment.
- l. The respondent averred that at no material time did it discriminate against the claimant on the basis of his religion or at all. The respondent categorically stated that any salary increments awarded to the respondent's staff were awarded based on the individual's performance, as established by the annual performance reviews carried out by the respondent.



7. On allegations of discrimination on religious grounds, the respondent pleaded that the claimant has failed to plead with any manner of particularity the alleged infringement and or violation of his constitutional rights, as is required in such matters as per the principles enunciated in the case of has been enshrined in the cases of Anarita Karimi Njeru vs. Republic (No. 1) (1979) 1 KLR 154 and Mumo Matemu vs Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012 [2013] eKLR.
8. The allegations of breach and violation of the claimant's right to fair labour practice fair administrative action and dignity have not been particularized in any manner or degree howsoever that would enable a more comprehensive response by the respondent.
9. The respondent further avers that the claimant is not entitled to any of the sums set out in the said paragraph 27 of the Statement of Claim, the claimant having been paid (and duly acknowledged receipt of) his terminal dues as pleaded for the respondent. The claimant was further duly issued with a Certificate of Service.
10. The claimant filed the reply to the statement of response dated 05.09.2024. It was urged and pleaded to the following effect:
 - a. The PIP was running from 13.05.2019 to 31.07.2019 and the claimant performed satisfactorily until unprocedural PIP of 2021,
 - b. The letter of 19.04.2021 was irregular in purporting to place the claimant on PIP whereas the PIP was expressed to have begun on an earlier date, 01.04.2021.
 - c. The letter of 13.09.2021 imposing PIP was irregular as it purported to effect the extension from 01.08.2021 which was a month and a half earlier from the date of the letter. It was imposed without consulting the claimant or outcome of the previously imposed PIP. Objectives of the PIP that was imposed retrospectively could not have been ben agreed upon.
 - d. The branch manager was employed in August 2021 and confirmed in appointment in November 2021 ostensibly upon good or satisfactory performance which was directly impacted upon by the claimant.
 - e. PIP could only be for 3 months per respondent's human resource policies. The three months ended on 31.10.2021. it was inconceivable that the respondent extended the PIP for three months to January 2022, a period of 10 moths in violation of policy.
 - f. Particulars of violation of Articles 29, 41, and 47 of *the Constitution* allegedly included unlawful pay cuts from April 2020 to January 2021; threatening termination of employment; unfair performance reviews; extending or imposing PIP beyond the policy periods; denial of annual salary increments while other employees were offered increments; denial of fair hearing and procedural fairness; and issuance of pre-dated termination letter on 28.01.2022 as dated 31.01.2022.
11. The claimant testified to support his claims. The respondent's witnesses included Aisha Mohammed Sheikh, Head of Human Resource (RW1); Yahya Farah Dahir, Head of Business and claimant's line manager (RW2) and, Joan Akoth Adhiambo (RW3). The Court has considered the material on record including the final submissions filed for the parties. The Court returns as follows.
12. To answer the 1st issue, there is no dispute that parties were in a contract of service as pleaded for the parties and the evidence was that parties were indeed in the employment relationship out of which the instant dispute about the claimant's alleged unsatisfactory performance emerged.



13. To answer the 2nd issue, the Court finds that the employment terminated upon the claimant's resignation letter dated 28.01.2028. That material fact is not in dispute per pleadings and the evidence.
14. To answer the 3rd issue for determination, the Court returns that the termination by way of resignation letter of 28.01.2028 amounted to unfair constructive termination. In particular the Court finds that the respondent fundamentally breached the minimum contractual terms when it failed to accord the claimant the due process prior to termination in accordance with provisions of section 41 of the *Employment Act*. The section prescribes that the employer must give the employee a notice and then a hearing in presence of a fellow employee or a union representative. In the instant case, instead of following that prescribed procedure, the respondent appears to have failed to amicably resolve the claimant's lamentations about the discrepancies in the data or figures of his performance scores. Whether the claimant raised the grievance and the respondent instead of proceeding to issue a show-cause notice towards a hearing as envisaged in section 41 of the Act, proceeded to require the claimant to sign on 28.01.2022 a pre-dated letter of termination of 31.01.2022. The Court finds that the claimant was entitled to infer that the respondent had opted and resolved to fundamentally breach the contract of service by imposing a predetermined termination without due process. By its design and wording, the letter of termination dated 31.01.2022 was to cunningly bring the claimant into a separation agreement while he was protected under section 41 of the Act to a notice and a hearing by the respondent in presence of a representative.
15. As submitted for the claimant, Black's Law Dictionary (9th Edition) defines constructive dismissal as, "A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave" Further, in the case of Joseph Aleper & another v Lodwar Water and Sanitation Company Limited [2015] eKLR, Marete J considered the issue and reviewed several decisions on the subject and held, "a distinction should be made of the two facets of the definition of constructive dismissal: i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee. ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working." Ndolo J in Benuel Mariera V Awand Enterprises Limited Mombasa Cause No 191 of 2013 defined constructive termination under both limbs and stated as follows: "It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer." The Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR set out 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.
16. The respondent relies on Black’s Law Dictionary, 12th Edition, which defines ‘constructive dismissal’ thus, “An employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”
 17. It was further submitted for the respondent that the concept of constructive dismissal was aptly articulated by Lord Denning MR in *Western Exeavating (ECC) Ltd v Shary* E978llCR221; (7978) 2 WLR 344 cited with approval in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR and the respondent relies on the key elements as were held by the Court of Appeal and reproduced above for the claimant.
 18. As submitted for the respondent the claimant must prove constructive termination. In the instant case the Court has found that the claimant has established that the respondent issued the pre-dated letter Of 31.01.2022 and by requiring the claimant to sign it to terminate the contract of service, the respondent thereby indicated that it was no longer interested to be bound by the contract of service as relates to due process per section 41. By that letter, the fundamental breach of section 41 was manifested while at the same time the respondent indicated it was no longer interested in continuing the employment relationship. The resignation letter expressly referred to the events at the meeting and data presented (which was disputed between the parties) and, it is on the same 28.01.2022 he had been required to sign the pre-dated letter of 31.01.2022. Accordingly, the submission for the respondent that the resignation was of free will and without reference to events of 28.01.2022 cannot hold. If it was about unsatisfactory performance, it is that the due disciplinary process was to issue but which option the respondent had indicated was not going to follow as prescribed in law. As testified for the claimant the PIP had been imposed initially for three months and then purportedly extended in breach of the policy and prior consultations which appears to the Court to have as well amounted to a fundamental breach. The Court’s primary finding is that the respondent while alleging unsatisfactory performance did not initiate disciplinary process per section 41 of the Act. That was a fundamental breach of the contract and then indicated separation intentions by the letter pre-dated 31.01.2022.
 19. The Court has considered the factors in section 49 on award of compensation for unfair. The mitigating factors in favour of the respondent are that the claimant’s service history was not clean. While the claimant laments about irregularity in the manner the PIP period was purportedly extended, there are warnings in 2019 and then the initial PIP as imposed in April 2021 was not in dispute that it was well founded. While a disciplinary processes would have shade light on validity of the unsatisfactory performance, the claimant does not dispute that PIP was imposed but his issue is whether he had not improved as at termination. his record of service is found not to have been clean. Then there was a significant contribution by the claimant to his predicament. In particular, he admits that on 26.01.2022 he signed the scores showing he had performed unsatisfactorily and that he had signed in error without due diligence. The aggravating factor against the respondent is that it acted in fundamental breach of due process per section 41 of the Act. The Court has as well considered the terminal dues already paid to the claimant including a month’s pay in lieu of notice. To balance justice



for parties the claimant is awarded 6-months' salaries less PAYE for unfair constructive termination making Kshs. 86, 520.00 x 6 thus Kshs.519, 120.00.

20. The 4th issue is on the residual reliefs as prayed for. The Court returns as follows:

- a. The claimant has failed to show violation of rights going beyond the denial of due process per section 41 of the Act and for which compensation has been awarded per section 49 of the Act. Accordingly, no further award can be made on account of alleged violation of Articles 29, 41 and 47 or freedom from discrimination purportedly in violation of Article 27. In particular the claimant failed to show discrimination on account of religion or denial of salary increment. The claimant testified that both Muslims and Christians left or were terminated from employment. He offered no credible evidence to show that his predicament was flowing from his religious convictions. As submitted for the respondent the claimant has not shown employees in similar circumstances like the claimant and for which comparison he was treated differently and adversely so. The respondent's case that annual salary increment and bonuses were based on performance has not been rebutted. Accordingly, the alleged breach of Bill of Rights will collapse as not established at all.
- b. Salary cuts of 50% for ten months from April 2020 to January 2021 Kshs.432, 600.00 is found unjustified. The respondent has shown that it was during the COVID-19 situation and to sustain the enterprise and to secure continued employment the understanding was that the employees had to work for only 2 – weeks in a month. It appears to the Court that the 50% pay cut was consistent with the work actually performed. Further, the respondent consistently informed the claimant in writing and the claimant acknowledged receipt of the communication as there was no grievance in that respect until after the separation. The claim appears to an unjustified pure afterthought in view that the claimant knew about the arrangement on pay cuts without any grievance in that respect. In any event, it would amount to unfair enrichment for the claimant to recover the 50% in circumstances that he worked only 2 months or half a month throughout the period of pay cuts. The claimant testified and confirmed that there was no agreement between him and the respondent bank for refund of the 50% pay cut in issue. The prayer is therefore declined.
- c. The claimant has significantly succeeded and is awarded costs of the suit.
- d. Parties made no submissions on the claim for certificate of service and is deemed abandoned as satisfied as in any event the certificate of service must issue per section 51 of the Act.

In conclusion judgment is hereby entered for the claimant against the respondent for orders:

1. The declaration that the claimant's resignation amounted to unfair constructive termination of the contract of service between the parties.
2. The respondent to pay the claimant Kshs.519, 120.00 less PAYE by 01.02.2026 failing interest at court rates be payable thereon from the date of this judgment until full payment.
3. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17TH DECEMBER, 2025.

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

