

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

ELRC CAUSE NO E825 OF 2023

VIOLA MONICA ATIENO ODHIAMBO...
.....**CLAIMANT**

VERSUS

STIMA INVESTMENT CO-OPERATIVE SOCIETY
LIMITED.....RESPONDE
NT

JUDGMENT

Introduction

1. This case seeks to determine whether the contract of service between the Claimant and Respondent was terminated through constructive dismissal of the Claimant from employment. Whilst the Claimant contends that she lost her employment through constructive dismissal, the Respondent avers that the contract between them was terminated through voluntary resignation by the Claimant.
2. Besides the foresaid, the case also seeks to determine whether the Respondent breached the contract between the parties by downgrading the Claimant's medical cover. Whilst the Claimant contends that the Respondent's decision to

alter the cover amounted to breach of the contract, the Respondent expresses a contrary view.

Claimant's Case

3. The Claimant avers that the Respondent first hired her services as a Legal Officer on a three year contract from 12th March 2018 up to 12th March 2021. She contends that the Respondent issued her with a letter of appointment which, inter alia, granted her a medical cover with an outpatient benefit of up to Ksh. 200,000.00 and inpatient benefit not exceeding Ksh. 5,000,000.00. She further states that the inpatient cover also covered maternity care up to a limit of Ksh. 200,000.00.
4. The Claimant contends that in 2020, the Respondent unilaterally reduced the inpatient cover from Ksh.5,000,000.00 to Ksh. 1,000,000.00. She avers that the reduction was in breach of the contract between the parties.
5. The Claimant avers that she was hospitalized between 7th and 18th December 2020 incurring a medical bill of Ksh. 1,506,372.00. She avers that out of this amount, the medical insurer paid Ksh. 1,000,000.00 whilst the Respondent paid

the difference of Ksh. 506,372.00. She contends that the Respondent later irregularly recovered the amount of Ksh. 506,372.00 from her.

6. The Claimant avers that she was re-admitted to hospital on 24th December 2020 whereupon she incurred another medical bill of Ksh. 140,000.00 which she paid directly. She contends that she is entitled to be reimbursed these amounts as per the terms of her letter of appointment dated 12th March 2018.
7. The Claimant contends that on 15th March 2021, the Respondent renewed her contract which had lapsed a few days earlier. She asserts that she learned of the renewal when she reported back to the office on 19th April 2021 after her maternity leave. She avers that the renewal was for three years with effect from 19th March 2021.
8. The Claimant avers that she was however not able to serve the full term under the renewed contract because of the unfavourable work environment which the Respondent allegedly subjected her to. As such, she contends that she was forced to resign from service with effect from 21st October 2022.

9. The Claimant accuses the Respondent of a plethora of transgressions which she says forced her to resign from employment. She alleges, inter alia, that the Respondent: removed her from sitting in its Board meetings for purposes of taking minutes without explanation; assigned her a demeaning role of key holder for the office despite the fact that she was a lactating mother at the time; arbitrarily surcharged her for a lost laptop; constantly harassed and subjected her to harsh and unreasonable treatment; allowed her assistant to attend meetings for Heads of Departments despite the fact that she was present at the office as head of the Legal Department; wrongly deducted various sums of money from her salary; unfairly accused her of insubordination; maliciously assessed her performance; and unfairly demanded for the refund of the sum of Ksh. 506,372.00 which it had paid towards her medical bills.
10. The Claimant contends that the totality of these acts confirmed that the Respondent wanted her out of office. She contends that the Respondent's actions were demeaning and left her with a feeling of demotion from her actual position as per her letter of appointment. As such, she

contends that she was forced to tender her resignation from work hence the plea of constructive dismissal from employment.

11. Consequently, she prays for the various reliefs as set out in the Statement of Claim including: compensation for unfair termination of her contract of service; salary for the unexpired term of her contract; a declaration that she was entitled to medical cover as per clause 8 of her contract with the Respondent dated 12th March 2018; an order for reimbursement of Ksh. 506,372.00 and Ksh. 140,001.00 which she incurred as a result of the alleged breach of the contract dated 12th March 2018; an order to pay her Ksh.134,000.00 which was allegedly improperly recovered from her salary as pay in lieu of notice; an order for reimbursement of Ksh. 51,514.00 allegedly deducted from her gratuity as tax but not remitted to the relevant tax agency; an order for payment of Ksh. 36,150.00 as accrued leave pay; an order for reimbursement of Ksh. 16,500.00 recovered from her as surcharge for the lost computer; an order that the Respondent remits Ksh. 2,000.00 to the National Social Security Fund to cover unpaid contributions

for June to October 2022; a Certificate of Service; interest on the amounts prayed for; and costs of the case.

Respondent's Case

12. The Respondent does not admit the claim. It contends that the Claimant was employed by it on 12th March 2018. It avers that in her position as its Legal Officer, she was entitled to medical cover with an inpatient and outpatient limit of Ksh. 5,000,000.00 and Ksh. 200,000.00 respectively.
13. The Respondent avers that it reduced the inpatient cover in 2019 from Ksh. 5,000,000.00 to Ksh. 1,000,000.00. It contends that it notified the Claimant of the changes and that she did not protest.
14. The Respondent contends that the Claimant incurred an inpatient medical bill of Ksh. 1,506,372.00 in 2020. It contends that the insurance company settled the bill up to the insured limit of Ksh. 1,000,000.00 leaving a balance of Ksh. 506,372.00 which was to be paid by the Claimant.
15. The Respondent avers that it paid the aforesaid amount on the Claimant's behalf in order to avoid keeping her in hospital. However, it contends that it was entitled to recover the payment from her.

16. The Respondent contends that the Claimant voluntarily resigned from employment after she resumed duty after her maternity leave. It avers that upon her resignation, she was paid all her terminal dues. As such, it contends that the instant suit is unmerited and should be dismissed with costs to it.

Issues for Determination

17. After evaluating the pleadings, evidence and submissions by the parties, the following issues emerge for determination in the suit:-

- a) Whether the Respondent breached the clause on medical cover in the first contract between the parties.
- b) Whether the Claimant's second contract of service with the Respondent was terminated through constructive dismissal from employment or through voluntary resignation by the Claimant.
- c) Whether the Claimant is entitled to the reliefs which she seeks through this action.

Analysis and Determination

18. The first issue for determination is whether the Respondent breached the first contract of service between the parties by

altering the clause on medical cover in the contract. This contract was founded on the Respondent's letter to the Claimant dated 12th March 2018. By this letter, the Respondent appointed the Claimant to the position of Legal Officer for a term of three (3) years.

19. In the preamble to the letter, the Respondent notified the Claimant that its (the Respondent's) Board of management had appointed her as a Legal Officer for a term of three (3) years based on the terms and conditions set out in the letter.
20. When the Claimant accepted the job offer based on the terms and conditions in the aforesaid letter, a contract was thereby created between the parties. One of the terms of the contract was on medical cover. Clause eight (8) of the letter notified the Claimant that the Respondent had a medical scheme for members of staff which catered for both inpatient and outpatient services up to a limit of Ksh. 5,000,000.00 and Ksh. 200,000.00 respectively.
21. The moment the contract between the parties crystalized, it was not open to the Respondent to unilaterally alter the terms and conditions therein, including the one on medical cover, without the concurrence of the Claimant. As such, the

Respondent's Board was not entitled to downgrade the Claimant's medical cover without her unequivocal concurrence.

22. The Respondent concedes that it downgraded the Claimant's inpatient medical cover from Ksh.5 000,000.00 to Ksh. 1,000,000.00. It asserts that this was prompted by the financial challenges it was facing at the time. It further contends that its Board of Directors endorsed the decision.
23. Although the Respondent asserts that the Claimant was notified of the changes to her medical benefits under the contract, it (the Respondent) did not present evidence to demonstrate that her consent to make the changes was sought and obtained. As such, the alterations were undertaken in breach of clause eight (8) of the letter of appointment.
24. Importantly, section 10 (5) of *the Employment Act* obligates an employer who wishes to alter a term in a contract of service for an employee to do so in consultation with the affected employee. In addition, this provision together with section 13 of the Act require the employer to notify the employee of the changes in writing.

25. If the employer effects changes to the contract without consulting the employee, the changes will not only be ineffective but also unlawful. Speaking to this in the case of ***Elizabeth Kwamboka Khaemba v Bog Cardinal Otunga High School Mosochi & 2 others [2014] eKLR***, the court expressed itself on the matter as follows:-

“The key position is that the employer cannot alter the employee’s employment contract without consulting the employee. The wording of the section is couched in mandatory terms, an indication that the employer cannot unilaterally revise the contract unless there is consultation.”

26. The evidence on record does not demonstrate that the Respondent complied with the above requirements whilst downgrading the Claimant’s medical benefit under her first contract of service with it. There is no evidence to suggest that the Respondent wrote to the Claimant individually to notify her that her medical cover was due to be downgraded based on earlier consultations between the parties, if at all.

27. The foregoing being the case, the court finds that the purported downgrading of the Claimant’s medical cover was

in breach of clause eight (8) of her letter of appointment dated 12th March 2018. As such, the Respondent is obligated to indemnify her for the loss she incurred as a result of the breach.

28. The Claimant presented evidence to establish two medical expenses she incurred under this head. She provided data relating to the medical bill of Ksh. 1,506,372.00 which was partially settled by the medical insurer leaving a balance of Ksh. 506,372.00 which the Respondent paid on her behalf before it recovered the money from her. She also provided proof of the maternity bill of Ksh. 140,000.00 which she settled directly.
29. The Claimant was forced to shoulder these medical bills because of the Respondent's unilateral and unlawful variation of clause eight (8) of her contract of service dated 12th March 2018. Accordingly, the Respondent is bound to reimburse her the sum of Ksh. 646,372.00 being the medical expenses she incurred directly as a result of the unlawful alteration of her medical cover.
30. The next issue for determination relates to whether the Claimant's second contract of service was terminated

through constructive dismissal from employment or through voluntary resignation. Constructive dismissal from employment arises when an employee resigns from employment in response to an intolerable work environment which has been created by the employer.

31. Although the closure of the employment relationship is occasioned by the employee's resignation, the law considers the employer to be responsible for the separation of the parties owing to his intolerable conduct towards the employee. As such, the employee's resignation is considered involuntary.
32. In order not to overstretch the concept, the Court of Appeal has suggested that constructive dismissal from employment will only be deemed to arise in situations where the employer's conduct constitutes a repudiatory breach of the contract between the parties (see ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)***). The court expressed itself on the matter in the following terms:-

“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.”

33. For one to successfully plead constructive dismissal, he must demonstrate that the impugned conduct by the employer fundamentally affected the foundation of the employment relationship between the parties. Speaking to this, Lord Denning, MR in the case of **Western Excavating (ECC) Ltd v. Sharp (1978) ICR 222** stated as follows:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essentials of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave instantly without giving any notice and say that he is leaving at the end of the

notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

34. Put differently, not every disagreeable conduct by an employer entitles an employee to resign and plead constructive dismissal from employment. The impugned conduct must be sufficiently grave to signify a repudiatory breach by the employer of the contract between the parties. The conduct must lead to the inescapable conclusion by a reasonable bystander that the employer is no longer keen to be bound by the contractual relation between the parties.
35. Conduct which implies breach of a contract of service by the employer to warrant resignation by an employee and a subsequent plea of constructive dismissal is broad. It includes: unilateral alteration of the terms of the contract; failure to pay an employee salary for no cogent reason; demotion of an employee; and failure to assign an employee tasks at work (see the commentary by George Ogembo at page 469 of his publication titled *"Employment Law Guide for Employers"* 2nd edition).
36. The burden of proof in constructive dismissal rests on the employee. The employee is required to tender persuasive

evidence to back his claim that the employer pushed him into resigning from employment (***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga*** (supra)).

37. In determining whether constructive dismissal has occurred, the court is supposed to objectively evaluate the circumstances which surround the employee's exit from employment in order to determine whether, on the whole, they point to repudiatory breach of the contract of service by the employer. In the court's view, the fact that the employee did not disclose the reason[s] for his departure in the letter of resignation is of little moment if the circumstances surrounding his exit point to repudiation of his contract by the employer.

38. Speaking to this, the Court of Appeal in the case of ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga*** (supra), stated as follows:-

"Involuntariness [of the resignation] can be deduced from the context and circumstances surrounding the case."

39. Indeed, the employee has no obligation to issue a formal notice of resignation. As was stated in the case of ***Coca Cola***

East & Central Africa Limited v Maria Kagai Ligaga

(supra), he may leave with or without notice. What is critical is that there should be a causal link between his exit and the intolerable work environment at the time.

40. In the instant case, the Claimant alleges that she was forced to resign from employment due to various transgressions by the Respondent which allegedly rendered the work environment intolerable. To establish the veracity of this claim, the court will examine only a few of the alleged acts by the Respondent to determine whether they constituted a repudiatory breach of the contract of service between the parties.
41. Whilst examining the alleged transgressions by Respondent, it is critical to keep in mind that the parties had two distinct contracts of service. The first one ran from 12th March 2018 to 12th March 2021. The second contract commenced on 19th March 2021.
42. The allegation of constructive dismissal relates to the second and not first contract. As such and as will be demonstrated later in the judgment, evidence on the subject which is founded on the first contract is of no probative value in

determining whether the second contract was constructively terminated.

43. At paragraph 11 of the Claimant's witness statement dated 11th October 2023, she stated as follows:-

"The CEO then hired a Legal Assistant to work under me. This was a welcome development to help with workload but the CEO used it to frustrate me. I sat on Heads of Departments Meetings in the Respondent. It was limited to officers in charge of the Departments in the Respondent but the CEO made a strange request that my assistant sits on the said Committee. It became apparent to everybody that I was being replaced."

44. At paragraph 9 of the Statement of Claim, the Claimant states that this and several other events happened between 16th May 2022 and 16th June 2022. In effect, she contends that the development occurred during the currency of the second contract which was entered into in March 2021.

45. In the witness statement by the Respondent's witness, he did not contest this particular grievance by the Claimant. Neither did he contest it during trial of the case.

46. During the trial, the Claimant stated that she did not have an issue with the Respondent hiring a legal assistant in her department. However, she averred that her problem with the arrangement was that the Respondent's CEO authorized the assistant to replace her in the meetings of Heads of Departments. In the Claimant's view, this was calculated to sabotage her work.
47. The Respondent does not deny that the Claimant was the head of the Legal Department and that as such, the legal assistant was to work under her (the Claimant's) directions. As a matter of fact, during the trial, the Claimant stated that she was the direct supervisor of the assistant and was charged with the responsibility of evaluating her performance. It is noteworthy that the Respondent did not controvert this evidence.
48. Given the foregoing, it was expected that if the legal assistant was to attend the Heads of Departments meetings, she was to do so on the instructions of the Claimant as her direct supervisor and not on the instructions of the Respondent's CEO. The CEO, not being the legal assistant's direct supervisor, was not expected to give her direct

instructions to execute duties which the Claimant was charged with.

49. The conduct of the CEO, viewed from this standpoint, was startling to the Claimant. The Claimant was entitled to construe this conduct as a direct assault on her mandate. She was legitimately entitled to construe the CEO's actions as an expression of lack of confidence in her ability to discharge some of her duties.
50. The impugned action by the CEO was a direct assault on the Claimant's contract. It amounted to an attempt by him to take away some of the Claimant's responsibilities without consulting and seeking her concurrence in that regard. As such, the Claimant was entitled to consider this as a violation of her contract and to therefore resign and plead constructive termination of the contract.
51. The Claimant also blames her resignation on the fact that the Respondent's CEO allocated her the role of keeping the office keys despite her protestation. She felt that this task was beneath her and that the Respondent did not consider the inconvenience which came with the task given that she was a lactating mother at the time.

52. In the Claimant's witness statement which she adopted as part of her evidence, she expressed herself on the matter as follows:-

"The CEO showed me open and persistent aggression and hostility. He would often criticize me for no reason whatsoever. I felt intimidated whenever we made contact. He began assigning me duties outside my contract and beneath my skill set. I found these assignments to be demeaning to me as a legal officer, designed to frustrate me and hinder the effective discharge of my functions under the terms of my employment.

He assigned me the duty of a key holder to open the office in the morning and close in the evening. The CEO knew that I was a lactating mother who could not come early to work or leave late from work. The CEO insisted that despite my state, I still open the doors to the office every morning and close them late in the evening. Vainly, I protested being assigned the role of a key holder and requested that another staff be assigned that role.

Having the key meant that I would have to be the first to arrive and the last to leave work. It meant that I would have to work before and beyond the hours agreed under my employment contract. This created difficulties for me being a lactating mother. I could not be reasonably required to be at work early in the morning to ensure the office was open for cleaning while at the same time tending to a child who needed my attention.

There were days when my colleagues had pressing assignments and needed to work late on their tasks. On Friday, 25th March 2022, my colleague Emmanuel Bruno was working late into the night. I left Bruno with the keys on the understanding that he would lock the office.

A week later, I was informed that a receptionist had reported a missing laptop.”

53. In response during trial of the case, the Respondent’s witness stated that the role that was assigned to the Claimant was not demeaning to her since it only required her to maintain the key movement register. The witness

contended that the role did not require her to keep the physical keys but only to monitor their movement through the key movement register.

54. It is noteworthy that although the defense witness presented this version of the story during his oral testimony in court, he had avoided to address the matter in the witness statement which he filed in court. Nevertheless, the court found the evidence to be unconvincing.
55. First, although the Respondent's witness asserted that the Claimant was not required to have physical possession of the office keys, the evidence on record suggests otherwise. For instance, the letter by the Respondent's CEO dated 11th May 2022 describes the Claimant as the custodian of the office keys denoting that contrary to the assertion by the Respondent's witness, the Claimant was expected to have physical possession of the office keys.
56. Second, if the Claimant had misapprehended the scope of her new role in respect of the office keys, why didn't the Respondent's CEO who was her immediate supervisor and who assigned her the task clarify it to her through issuance

- of a Job Description for the role? Why did he have to wait until after the theft incident for him to offer the clarification?
57. The court has also considered the import of the correspondence between the parties immediately after the loss of the laptop computer. In the CEO's letter to the Claimant dated 16th May 2022, he blamed her for failure to maintain a key movement register for the office keys which he alleged was the reason for the loss of the laptop. In the Claimant's response dated 23rd May 2022, she protested the CEO's contention and stated that the Respondent did not have a policy on management of office keys or a requirement for maintenance of a key movement register to support the CEO's finding that she was culpable for failure to maintain a key movement register.
58. It is noteworthy that the Respondent did not respond to the Claimant's contention in the aforesaid letter. As such, it (the Respondent) did not controvert her assertion on the matter.
59. These correspondence leave no doubt in the court's mind that the Respondent did not have specific guidelines on management of office keys which were known to staff and which required, inter alia, the maintenance of a key

movement register. As such and absent a Job Description issued to the Claimant stating what the task of securing the office keys entailed, how was she expected to know that she was required to maintain a key movement register? How was she expected to know that the new role on office keys did not require her to have physical custody of the office keys but to only maintain a register to track their movement?

60. The Claimant stated that despite her protestations against the new role in respect of the office keys, the Respondent's CEO forced her to take it up. During cross examination of the Respondent's witness, he stated that although the Claimant resisted the new role, she was cautioned that refusal to take it up would be tantamount to insubordination.
61. As mentioned earlier in the judgment, the Claimant served the Respondent under two distinct contracts of service. As the evidence demonstrates, the responsibility of holding the Respondent's office keys (or maintaining a key movement register as the case may be) was allocated to her when she resumed from her maternity leave in April 2021. At this time, her 2018 contract had already lapsed. As such, she was

serving under the second fixed term contract which commenced on 19th March 2021.

62. Clause three (3) of the new contract which appears at pages 5 to 8 of the Claimant's trial bundle sets out her duties and responsibilities under the contract. A perusal of the responsibilities does not suggest that one of the Claimant's duties was to keep the office key or maintain the key movement register.
63. Unlike the contract of 12th March 2018 which entitled the Respondent to assign the Claimant any other responsibilities, the contract dated 15th March 2021 did not have a similar clause. As such, it was not open to the Respondent to assign the Claimant additional roles such as keeping the office keys or maintaining the key movement register without seeking her concurrence in respect of the additional functions and amending her contract accordingly.
64. During cross examination, the Claimant was shown a clause in the contract of 12th March 2018 which entitled the Respondent to assign her additional responsibilities outside the ones which were expressly mentioned in the contract. However and as mentioned earlier, no similar clause was

included in the contract dated 15th March 2021 which is the subject of constructive termination.

65. The Respondent is not entitled to invoke the provisions in the earlier contract dated 12th March 2018 to assert that it was entitled to assign the Claimant additional roles outside the ones which were mentioned in her new contract. As such, the contention at the trial that the Claimant was obligated to take up the additional role of keeping the office keys or maintaining the key movement register is misplaced.
66. The foregoing being the case, the court finds that the decision by the Respondent to assign the Claimant the additional responsibility of keeping the office keys or maintaining the key movement register, in so far as it gave her additional responsibilities which were not captured in her new contract without first seeking her concurrence in terms of section 10 of *the Employment Act*, amounted to breach of the contract. As such, she was entitled to resign and plead constructive dismissal from employment.
67. Speaking to this matter in the case of ***Gatuma v Kenya Breweries Ltd & 3 others [2024] KESC 52 (KLR)***, the Supreme Court of Kenya observed as follows:-

“From the provisions of section 10(5) and section 13 of the Employment Act it is clear that any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and in case the same would lead to termination of employment the same may be deemed as constructive dismissal.”

68. Consequently, the court is satisfied that there is evidence to demonstrate that the Respondent’s conduct fundamentally and adversely affected the work environment for the Claimant as to amount to a repudiatory breach of her contract. As such, the court finds and declares that the Claimant did not voluntarily resign from employment but was forced to quit employment due to the intolerable work environment which was created by the Respondent with the consequence that she was a victim of constructive dismissal from employment.
69. In their written submissions, the Respondent’s lawyers urge the court to find that even if the Claimant was entitled to resign and plead constructive dismissal, this right was lost after she delayed to tender her resignation. They contend that whilst the Claimant resumed duty under the new

contract from 19th April 2021, she did not resign until 4th November 2022. They contend that all this while, she tolerated the allegedly intolerable work environment thereby waiving the right to resign and plead constructive dismissal from employment.

70. The lawyers rely on the case of ***Burendwa Secondary School v Ashikhoba [2023] KEELRC 1704 (KLR)*** to anchor their position on the matter. In that case, the trial court indicated that an employee who is faced with an intolerable work environment should resign without delay if he has to successfully plead constructive dismissal from employment.
71. Whilst the court in the aforesaid case stated that the resignation from employment should be tendered without undue delay in order for one to successfully plead constructive dismissal, it did not venture to determine what amounts to unreasonable delay in tendering the resignation. In this court's view, whether submission of the resignation is unreasonably delayed is relative and can only be determined based on the peculiar circumstances of each case.

72. Importantly, in the case of ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga*** (supra), the Court of Appeal observed that an employee is entitled to delay his resignation from employment until he gets an alternative job underscoring the reality that a plea for constructive dismissal will not necessarily be defeated because of delay in tendering one's resignation. The court observed on the subject as follows:-

"In the case of Jones -v- F. Sirl & son (Furnishers) Ltd. [1997] IRLR 493, it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go to."

73. The transgressions which the Claimant accuses the Respondent of are not said to have taken place on 19th April 2021 when she resumed duty under the new contract. Rather, they are said to have taken place over a span of time after she resumed duty. In the premises, the court does not agree with the Respondent's assertion that the Claimant unreasonably delayed her decision to resign from employment.

74. The last issue for determination is whether the Claimant is entitled to the reliefs which she seeks through this action. From the Statement of Claim, she has prayed for various reliefs to wit the following:-

- a) A declaration that her resignation from employment on 21st October 2022 amounted to constructive dismissal from employment.
- b) Compensation for unfair dismissal from employment.
- c) Payment of salary for the unexpired term of her contract.
- d) A declaration that the composition of the HR Committee which sat to review her request to vacate the decision to recover the sum of Ksh. 506,372.00 denied her the right to fair hearing.
- e) A declaration that the employment contract of 12th March 2018 entitled her to inpatient medical cover of Ksh. 5,000,000.00 and that she is therefore entitled to be reimbursed the medical expenses of Ksh. 506,372.00 and Ksh.140,000.00.

- f) A refund of Ksh. 134,000.00 deducted from her exit dues on account of pay in lieu of notice to terminate her contract.
 - g) Reimbursement of Ksh. 51,514.00 deducted from her gratuity as tax but which the Respondent allegedly did not remit to the Kenya Revenue Authority.
 - h) Payment of leave allowance of Ksh. 36,150.00.
 - i) Refund of Ksh. 16,500.00 deducted from her salary as surcharge for the lost computer.
 - j) Remittance of Ksh. 2,000.00 to the National Social Security Fund being unremitted contributions for the months of June to October 2022.
 - k) A Certificate of Service.
 - l) General damages for failure to issue her with the Certificate of Service in time.
 - m) Interest on the amounts to be awarded.
 - n) Costs of the case.
75. The court has already made a finding that the Claimant's decision to resign from employment was actuated by the intolerable work environment which the Respondent had subjected her to. Consequently, the court declares that the

Respondent unfairly terminated her contract of service through constructive dismissal from employment.

76. The Claimant's contract of service having been closed through constructive dismissal from employment, she is entitled to compensation for unfair termination of the contract. The court notes that at the time the contract was terminated, the Claimant had served the Respondent for more than three years albeit under two distinct contracts.
77. In the court's view and having regard to the totality of the term of the Claimant's contracts, the duration which she served the Respondent before she resigned was sufficiently long. As such and having regard for the factors to be taken into account whilst determining the quantum of compensation for unfair termination of a contract of service under section 49 as read with section 50 of *the Employment Act*, the court awards her compensation which is equivalent to her salary for five (5) months.
78. According to the Claimant's letter of appointment dated 15th March 2021, she was to be paid basic salary of Ksh. 120,500 plus house allowance of Ksh. 13,500 totaling Ksh. 134,000.00. As such, the compensation awarded to her

under this head amounts to Ksh. 134,000.00 x 5 = Ksh. 670,000.00.

79. The Claimant has prayed for salary for the unexpired term of her contract. However, this relief cannot be granted because the contract of service between the parties contained a clause which entitled either party to terminate the contract subject to issuance of a one month's notice of the intention to terminate it. As such, there is no guarantee that the Claimant would have served for the entire of the unexpired term (see ***Middle East Bank Kenya Limited v Waseka [2025] KECA 2113 (KLR)***).
80. The Claimant has claimed for reimbursement of Ksh. 646,372.00 being the amount which she incurred after the Respondent unilaterally varied her medical cover. As indicated earlier in the judgment, the Respondent's decision to downgrade the Claimant's medical cover was in breach of clause eight (8) of her letter of appointment dated 12th March 2018. As such, she is entitled to recover this amount. Accordingly, the court enters judgment in her favour for the aforesaid sum of Ksh. 646,372.00.

81. The Claimant has claimed for a refund of Ksh. 134,000 which the Respondent recovered from her terminal benefits on account of pay in lieu of notice to terminate her contract. As noted earlier, the contract between the parties was terminated by the Respondent through constructive dismissal of the Claimant from employment. In the circumstances, the Claimant was entitled to leave the workplace with or without notice (see ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga*** (supra)). As such, the Respondent was not entitled to demand for notice pay. Consequently, the Respondent is directed to reimburse her the amount of Ksh. 134,000.00 on this account.
82. The Claimant has prayed for reimbursement of Ksh. 51,514.00 which the Respondent allegedly deducted from her gratuity but did not remit to Kenya Revenue Authority. The court finds that as the Claimant's employer, the Respondent was obligated by law to collect taxes from her income and remit the same to Kenya Revenue Authority. As such, the Respondent will have abdicated this responsibility if it were to refund the Claimant the amounts which were allegedly debited from her benefits on this account. What

the Respondent ought to do in the circumstances is to remit the impugned amount to the Kenya Revenue Authority as required by law. As such, the court declines the plea for reimbursement of Ksh. 51,514.00.

83. The Claimant has prayed for payment of leave allowance of Ksh. 36,150.00. Although the Respondent contested the claim on the basis that the Claimant had not earned the leave days, its (the Respondent's) email at page fifty five (55) of the Claimant's trial bundle and the statement of final dues which it issued to the Claimant show that it acknowledged that she was entitled to leave of 15 days as at 10th August 2022 and 10 days as at October 2022 when she resigned. As such and based on the Respondent's own computations, the court finds that the Claimant is entitled to leave pay for ten (10) days.

84. The Claimant's salary was Ksh. 134,000.00. Consequently, her leave pay for the ten (10) days in terms of section 28 of *the Employment Act* would have amounted to Ksh. 44,667.00. This is because an employee is entitled to earn an amount which is equivalent to his salary during the leave period.

85. Despite the foresaid, the Claimant has claimed Ksh. 36,150.00 under this head. Accordingly, the court enters judgment for her for the sum of Ksh. 36,150.00 on account of accrued leave pay.
86. The Claimant has also claimed for a refund of Ksh. 16,500.00 which was deducted from her salary as surcharge for the lost computer. She contends that the Respondent's CEO arbitrarily ordered for the amount to be debited from her salary even when it was apparent that there was no basis for holding her culpable for the lost computer.
87. The Claimant contends that since the Respondent did not have a security policy for management of the office keys, it was unfair for the CEO to hold her responsible for the loss of the computer on the ground that she did not maintain a key movement register which would have assisted the Respondent to find the culprit in the theft.
88. The Claimant also contended in her letter to the CEO dated 23rd May 2022 that the office had not installed CCTV cameras to enhance security for its equipment. According to her, if this had been done, the culprit behind the theft of the computer would have easily been found.

89. The court has considered the contrasting positions expressed by the parties on the subject. The evidence on record shows that the Respondent did not have a policy which required maintenance of a key movement register. As such, it was unjust for its CEO to contend that the Claimant had breached a nonexistent policy which resulted in the impugned loss.
90. Further, the Respondent did not deny the Claimant's contention that it had not installed CCTV cameras which would have obviated the theft or assisted in identifying the culprit. As such, the loss of the laptop was occasioned by the weaknesses in the Respondent's security policy which the Claimant was not responsible for.
91. Importantly, the evidence on record demonstrates that at the time of the theft, the office keys were in the possession of one Emmanuel Bruno who had remained at the office to work late. It is therefore apparent that notwithstanding the absence of the key movement register, the available evidence suggested that Emmanuel Bruno was the individual who should have accounted for the movement of the keys after they were left in his custody. As such, it was unjust to

require the Claimant to account and pay for the stolen laptop in the circumstances.

92. The court notes that the Respondent indeed surcharged Emmanuel Bruno for the lost computer. This, in the court's view, was an acknowledgement by the Respondent that the individual who should have accounted for the loss was the said Emmanuel Bruno. It was therefore unreasonable for the Respondent to still have surcharged the Claimant for the loss allegedly for failure to maintain a key movement register in the absence of a policy requirement in this respect.
93. Having regard to the foregoing, the court finds that the Claimant's demand for reimbursement of Ksh. 16,500.00 is not unreasonable. As such, the court issues an order directing the Respondent to reimburse her Ksh. 16,500.00 on account of the amount that was unjustly surcharged from her.
94. The Claimant has also prayed for an order that the Respondent remits the amount of Ksh. 2000 to the National Social Security Fund (NSSF) to cover the period between June and October 2022 when she was in its employment. She has produced her NSSF statement for the period to

demonstrate that the Respondent did not remit her contributions for the period in question.

95. Under section 58 of *the National Social Security Fund Act*, Cap 258 Laws of Kenya, the NSSF is entitled to pursue this amount directly. As such, the court declines the Claimant's attempts to directly sue for the amount.
96. The Claimant has prayed for a Certificate of Service. On the other hand, the Respondent contends that the said certificate was not issued to her because she did not clear with it.
97. The evidence on record demonstrates that although the Claimant tried to clear with the Respondent, these attempts were frustrated by the Respondent's CEO. The officer was not able to accommodate her request to be cleared because of what he described as his busy schedule.
98. As such, the Respondent cannot blame the Claimant for the failure to clear with it. Accordingly, the court directs it (the Respondent) to facilitate the Claimant to undertake the clearance process within thirty (30) days of this decision and to issue her with the requisite Certificate of Service on or before the thirtieth (30th) day of this decision.

99. The Claimant has prayed for general damages for unfair labour practice on account of the failure by the Respondent to issue her with a Certificate of Service. However, the general position in law is that general damages are not recoverable for breach of a contract (***Nyamweya v Asakania [2025] KEHC 1702 (KLR)***). In the premises, the request for general damages is declined.
100. The Claimant is awarded interest on the amount that has been awarded at court rates from the date of this judgment.
101. The Claimant is awarded costs of the case.
102. The award to the Claimant is subject to the statutory deductions that were applicable at the time the contract between the parties was terminated.

**Dated, signed and delivered on the 29th day of January,
2026**

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

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th 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