

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & MUCHELULE,

JJ.A.) CIVIL APPEAL NO E139 OF 2021

BETWEEN

LAKE BASIN DEVELOPMENT AUTHORITY.....APPELLANT

AND

CLIFFORD OTIENO OBIERO.....RESPONDENT

*(Being an appeal from the Judgment of the Employment
and Labour Relations Court at Kisumu (Radido, J.) dated
1st February 2021*

in

Petition No. 4 of 2020)

JUDGMENT OF THE

COURT

1. The events leading to this appeal begun with a constitutional Petition filed by Clifford Otieno Obiero (the respondent herein) who had been employed by Lake Basin Development Authority, (the appellant herein), as a Legal Officer II at a basic salary of Kshs.15,775/-with effect from 1st September 2014 and placed in job group F; house allowance of Kshs.15,000 and commuter allowance of Kshs.2500/- He was also entitled to 30 days annual leave.

2. Although the salary was later reviewed to Kshs.18,300/-, relying on a Circular No. MSPS2/6/4AVOL X/(2) dated 25th June 2012 from the office of the Prime Minister, the respondent asserted that he was being underpaid by a sum of Kshs.23,290/-; and as at the time of filing the petition, the total sum underpaid was Kshs.2,854,657/-, which also comprised commuter allowance. He also complained that he had accrued a cumulative number of 110 leave days and presented a copy of a leave application form dated 19th August 2019, which indicated that he had accumulated 80 days leave as of that date; and to which he computed to a sum of Kshs. 644,234/-. The respondent also complained that he was being paid a house allowance of Kshs15,000/-, which was way below the rates recommended by the Salaries and Remuneration Commission, and resulted in a deficit of Kshs.7000/-per month - for this, he relied on a Circular dated 10th December 2014, outlining various allowances for public officers.
3. In addition to this, was the situation where one Mr. Michael Okuk aged 50 years, then a legal assistant, being neither a lawyer by profession nor a graduate in any field was promoted to the position of Legal Manager, on account of

his age and moving to a higher job group than the respondent; and the

respondent complained that this was discrimination on account of age; that this discrimination also manifested itself on 20th December 2019, when all the staff except the respondent, were given shopping vouchers.

4. However, the legendary straw that eventually broke the camel's back was what the respondent described as his office being arbitrarily allocated to the personal assistant of the Authority's Managing Director, leaving him with no assigned new office space; and resulting in him operating from a hall with drivers and staff junior to him. In a quick move, the respondent was immediately transferred from head office in Kisumu, to the Nzoia Basin Region as Administrator through a letter dated 3rd December 2019; his attempts to access the headquarters were thwarted by the appellant's guards; and he was then issued with a show cause dated 19th December 2019, with allegations that he had absconded duty
5. He responded by a letter dated 2nd January, 2020 but on 9th January 2020, he was suspended. He then sent an email on 10th January 2020 alluding to mistreatment. When he made an attempt to access the offices on 21st January, 2020, the guards beat him up; leading to the filing of a report with the

Police; and realizing that the net effect of the conduct of
the

appellant and the guards was to make the work environment intolerable to him, the respondent on 22nd January 2020, tendered a resignation letter. He described these circumstances as discriminatory and resulted in constructive dismissal; and sought the following orders:

- (a) A declaration that the respondent's rights and fundamental freedom from discrimination, torture, cruel, inhuman or degrading treatment, right to human dignity, fair administration action as enshrined in Article 27,25,47.50 respectively were grossly violated by the appellant, servants, agents and employees.**
- (b) A declaration that the respondent's right to fair labour practice, fair remuneration, reasonable working condition and as enshrined in Article 41 of the Constitution of Kenya 2010 was grossly violated by the appellant, servants, agents, employees.**
- (c) Declaration that the respondent was entitled to payment and compensation for the violation and contravention of his fundamental right and freedom under the aforementioned provisions of the constitution.**
- (d) General Damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution of Kenya 2010.**
- (e) A declaration that the systematic gross conduct and motive of the appellant, servants and agents amounted to unfair constructive dismissal of the petitioner.**
- (f) One month salary in lieu of notice at Kshs.117,134**
- (g) Maximum (12) compensation for unfair constructive dismissal at Kshs.1,405,608.**
- (h) Basic Salary, House allowance and Commuter underpayment arrears at Kshs.2,**

(i) 854,657.
Leave pay of Kshs.644,237.

- (j) **Certificate of service.**
- (k) **Costs of the petition.**

6. The appellant however took the view that the claims about the assault were baseless as no one was ever charged; that the resignation was voluntary and was prompted by the desire to pre-empt the outcome of the pending disciplinary action against the respondent.
7. The evidence presented to the trial court was basically a repeat of what we have summarised above.
8. The learned trial Judge in making his decision found that the Appellant did not deny re-allocating the respondent's office, and not assigning him new office space; that respondent was also transferred with immediate effect from 3rd December 2019; and thereafter suspended on 9th January 2020. The learned judge noted that the suspension did not instruct the respondent not to visit the appellant's offices, quipping that:

“It was therefore intolerable for the Authority to deny him access to the head office. The denial of access to the head office and re-allocation of office without providing new office to operate from, in the view of the Court, was the apogee of the difficulties encountered by the Petitioner and was part of a pattern on the part of the authority to frustrate the Petitioner thus leading to a

hostile work environment. The Court is satisfied and finds that the petitioner has

proved that this was a case of constructive dismissal.”

9. With regard to the impugned remuneration the trial court considered the Circular dated 27th June 2011 from the office of the Prime Minister which he noted applied to civil servants employed through the Public Service Commission, and held that the respondent did not demonstrate that he was a civil servant as opposed to public officer or that the Circular applied to him to prove discrimination on remuneration. The learned judge remarked that:

“The Petitioner did also not disclose the particulars of senior managers who were purportedly earning. Kshs.160,000/- to Kshs.200,000/-. Not even the job profiles, qualifications of the Managers were placed before the Court.”

10. As regards the unfair labour practices, learned judge observed that the respondent was employed as a Legal Officer, and he had lamented that the letter transferring him designated the position of an Administrator, which amounted to change of employment particulars and as contemplated by section 10(5) of the Employment Act, 2007 he ought to have been consulted. The respondent argued that this was a violation of his right to fair-labour-practices. On the other hand, the appellant maintained that

it was part of the terms and conditions of

service that the respondent could be assigned new duties; and that the transfer was necessitated by the need to keep the respondent away in order to facilitate investigations which were on-going at the time, in which he had been implicated.

11. The trial court was unable to determine whether the designation of the respondent as Administrator from Legal Officer was in violation of section 10(5) of the Employment Act, 2007 so as to constitute an unfair since the job profiles/description for the position of Legal Officer and Administrator were not disclosed to the Court. Ultimately the learned judge found that the respondent succeeded only in respect of 2 heads of claims, namely: **constructive dismissal and breach of contract on account of leave (we underline for emphasis)**. The learned Judge declared as follows:

- (a) That the petitioner left employment on account of constructive dismissal.**
- (b) The Petitioner is awarded compensation of Kshs.200,000/-.**
- (c) That the petitioner is entitled to accrued leave at time of resignation.**
- (d) The respondent to compute and pay within 30 days the Petitioner's accrued leave.**
- (e) That the respondent to issue a certificate of service to the petitioner within 30 days. The**

petitioner needlessly invoked the Petition route and is therefore denied costs.

12. The appellant through its memorandum of appeal dated 16th June, 2021 outlined the following six grounds upon which the decision was faulted;

- (a) That the learned judge erred in law and in fact by interpreting the provisions of the constitution by finding that the respondent had been constructively dismissed without any evidence to support such claim.**
- (b) That the learned judge erred in law and fact in finding that there was breach of contract of employment when there was no evidence placed before the court to support such allegation at all.**
- (c) That the learned judge erred in law and in fact by failing to comprehend and acknowledge that the appellants had a duty to post and transfer staff and the same does not amount to breach of any contract or violation of any law or the constitution.**
- (d) That the learned judge erred in law in awarding the respondent compensation of Ksh.200,000/= when there was no evidence to support such an award.**
- (e) That the learned judge misdirected himself by finding that actions of the appellant amounted to any violation of the law or the constitution.**
- (f) That the learned judge failed to analyze the evidence and submissions before him and therefore arriving at a wrong decision as required in law.**

13. Through this, the appellant sought the following orders from the court;

- a) That this appeal be allowed.**
- b) That the judgment made on 1st February, 2021 be set aside and judgment be entered for the appellant dismissing the petition with costs to the appellant.**

c) That the appellant be awarded costs of the appeal and costs of the petition in the superior.

14. The appellant identified the following as the issues for determination:

a) Whether the-respondent herein proved the allegation of constructive dismissal and breach of contract of employment by the appellant.

b) Whether the award of Kshs.200,000/= as compensation to the respondent was merited.

c) Whether the appellant violated the constitution.

15. The respondent contested the appeal and filed a cross appeal wherein he prays that the Cross-Appeal be allowed in its entirety; and this Court sets aside or enhance the orders of the trial court to accord with the proved rights and entitlements of the Cross-Appellant ; award salary in lieu of notice in the sum of Kshs.117,134, in accordance with the contract and established judicial precedent; award maximum compensation for unfair constructive dismissal at twelve (12) months' salary, totalling Kshs.1,405,608, as justified by the aggravating circumstances; and direct issuance of a certificate of service to the respondent.

The respondent has identified the following issues for determination:

a) Whether the trial court erred in failing to

award salary in lieu of notice to the Cross-Appellant after a finding of constructive and unfair dismissal.

- b) Whether the trial court erred in awarding manifestly insufficient damages for unfair constructive dismissal, contrary to statutory parameters and judicial precedents.**
- c) Whether the learned judge contradicted himself by finding constructive dismissal but failing to find harassment/unfair labour practice and award commensurate remedies.**
- d) Whether the trial court erred in failing to appreciate and award cumulative underpayments, leave pay, and other pleaded dues, despite unopposed evidence. Whether the court failed to award general, exemplary, and aggravated damages under Article 23(3) of the Constitution in light of gross constitutional violations. Whether the appellant's own appeal and conduct amounts to an abuse of process, and if so, whether the Cross-Appellant is entitled to costs and interest.**

16. In our considered view, save for the issue on costs, these issues are subsumed in the ones already identified by the appellant, and we need not address them separately in relation to the issue constructive dismissal and breach of contract of employment.

Mr. Yogo learned counsel appearing for the appellant, submits that it is well established that constructive dismissal occurs when an employee resigns claiming that there was a fundamental breach of contract on the part of the employer and that this breach caused them to resign; that in this instance the respondent claimed being subjected to discriminatory treatment yet there was no

evidence to support

this. The appellant insisted that the respondent's transfer was solely intended to allow investigations into the department to ascertain how many documents had been lost by the respondent; and this would not, and does not amount to constructive dismissal. In support of this argument and to fortify the position that the respondent failed to substantiate his allegations, we were referred to the case of **Coca Cola East & Central Africa Limited vs. Maria Kagai Ligaga [2015] KECA 394(KLR).**

17. In reference to the respondent's grievance that the transfer and new designation amounted to change of employment particulars as contemplated under section 10(5) of the Employment Act, 2007 and the need for consultation before effecting the same, the appellant pointed out that being assigned new duties was part of the terms and conditions of service, which was rendered necessary and more significant so as to facilitate investigations which were ongoing at the time and the respondent was implicated. On this issue the trial court pointed out that without disclosing the job profiles/description for the two positions it could not render an informed finding.

18. This finding is faulted in arguing that the learned judge misdirected himself and applied a standard of proof that is unknown in law, lower than balance of probability. By holding that the respondent was denied access, it is argued that the suspension directed to the respondent never barred him from making visits to the head office at any time, and it was therefore unfair for the learned judge to state that, "**the suspension did not instruct him NOT to visit the Authority's offices.**" That the allegations of assault by the appellant's guards were investigated by police, and found to have no basis; and the respondent simply resigned to avoid facing a disciplinary action which was to follow after investigations.

19. To this, the appellant submits that the transfers were not arbitrary, without cause and or resulted in constructive demotion. As regards violation of the constitutional rights and the subsequent award, it is also the appellant's contention that the award of Kshs.200,000/- as compensation to the respondent was unmerited as the court had critically considered the evidence tendered by the respondent in relation to the infringements alleged to have been committed by the

appellant, ranging from allegations of underpayments for

house allowances, discrimination on age grounds, discrimination on remuneration, fair labour practices, unfair administrative action and lastly torture and inhuman and degrading treatment; and found that the respondent had failed to prove them. On account of this, the appellant contended that the trial court erred in finding that the respondent succeeded in respect of the claim of constructive dismissal and breach of contract on account of leave, and therefore the respondent's award of compensation had no basis, and was not merited.

20. The Mr. Obiero learned counsel appearing for himself as the respondent, is equally dissatisfied with this award, albeit for a different reason, and in his cross-appeal and submissions he argues that the transfer was immediate, without requisite procedural compliance or facilitation, in breach of the service terms; and the learned judge having acknowledged the string of indignities which included the transfers, denial of office, harassment amounting to constructive dismissal, lamentably, awarded only Kshs.200,000/- for unfair constructive dismissal without basis or formula known in law.

21. He contends that despite finding constructive and unfair dismissal, the judge refused to award salary in lieu of notice, and dismissed claims for general, exemplary, and aggravated damages under Article 23(3) without proper legal analysis. The respondent argues that he is entitled to the maximum compensation for unfair constructive dismissal (Kshs.1,405,608) per SRC guidelines, as well as cumulative underpayments (Kshs.2,854,657), leave pay (Kshs.644,237), and issuance of certificate of service. The respondent argued that section 35 (1) of the Employment Act, Section 35(1)(c), as interpreted by courts, makes it mandatory that an employee whose services are unlawfully or constructively terminated is entitled to salary in lieu of notice. The respondent cited **Gacheru vs. Kenyatta University [2022] KEELRC 1449 (KLR)**, where the court stated that:

“A claim for salary in lieu of notice flows as a matter of right from unfair or constructive dismissal; to deny the claimant this relief would amount to re-victimizing the aggrieved employee.”

He also cited the pronouncement by this Court (differently constituted) in **Duncan Murunyu Mungai vs. Slopes Media House Limited [2021] KEELRC 228 (KLR)** that:

“The employer’s failure to pay salary and refusal to let the employee work are repudiatory breaches

which entitle the employee to treat himself as constructively dismissed, and salary in lieu of notice is payable as a consequence.”

22. In addressing the complaint relating to the leave days, the learned judge noted that the leave form indicated that the respondent had accumulated 80 days leave as of that date; that he separated with the appellant in January 2020, so it was mathematically impossible that he could have accrued a further 30 days of leave from August 2019 to January 2020 as he was only entitled to 30 days of annual leave each leave year. The learned judge held that the respondent did not disclose the source of the formula he used to compute the commuted leave days and that in light of section 10(3) of the Employment Act, 2007, the appellant ***“should compute and pay to the Petitioner any accrued leave days of the date of separation.”***

23. The learned judge considered the issue relating to leave and the Circular dated 10th December 2014 outlining various allowances for public officers in different job groups and the applicable rates of house allowance, and noted that for staff in job group F and working in Kisumu the house allowance was Kshs.3,730/-, meaning that the Kshs.15,000/- that the

respondent was earning as house allowance was way above the recommended rate.

24. With respect to the allegations of discriminatory assignment of roles and remuneration, the respondent maintained that he was qualified and duly appointed; assigned weighty senior management responsibilities yet his remuneration was instead rerouted to a less qualified individual who was preferred simply on the basis of age rather than merit, revealing an invidious discriminatory pattern.

25. To this the respondent submitted that although the trial court recognized the existence of terms and appointments, it erroneously concluded it was “unable to determine” the differences in positions to assess violation a finding inconsistent with the documentary evidence tendered by him; and on the question of underpayment, discounted applicable salary circulars on a narrow technicality, thereby failing to appreciate.

26. In finding no evidence on discrimination on account of age, the learned judge pointed out that other than the assertions made by the respondent in the petition and the supporting affidavit, no evidence was tendered in relation to the age of the person who was appointed replace the

Legal Manager; and that there

was even no evidence that the respondent had completed a law degree or got admitted as an advocate of the High Court.

27. On the issue of discrimination regarding remuneration, the learned judge held as follows:

***“It is generally known that civil service comprise officers recruited by the Public Service Commission of Kenya and who are deployed to serve ministries. The Petitioner did not address expressly whether employees of authorities or parastatals such as the Authority herein would qualify or be entitled to benefits accruing to those in the civil service (such as those in the Circular relied on). The Court, regrettably finds that the Circular did not apply to the petitioner and/or employees of the Authority.*”**

28. The respondent contended that he led detailed, unchallenged evidence of deliberate mistreatment arbitrary transfers, denial of tools of work, humiliation, and even physical assault and urged us to be persuaded by the case of **Joseph Wanderi Kahiga vs. Nyoro Construction Company Limited [2017] KEELRC 709 (KLR)** where the Court stated that:

“Where an employee has served diligently and the termination is accompanied by humiliation or aggravating circumstances, an award of the maximum allowable compensation is justified.”

29. Finally on this aspect the respondent referred us to **Felix Mathenge vs. Kenya Power Company Limited [2008]**

eKLR, where the Court stated:

"Damages for breach of constitutional rights are not circumscribed by statute; where profound indignity, suffering, and abuse are proven, the court should fashion a remedy commensurate with the violation suffered."

30. As regards the legal Status: **Public Officers vs. Civil**

Servants the respondent submitted that the trial court's finding that the SRC circulars only applied to "civil servants" recruited by the Public Service Commission and not to the parastatal staff recruited by the respondent was erroneous both on fact and law; his reliance on "**common knowledge**" even worsened the analysis. While conceding that not all public officers are civil servants, the respondent argued that all enjoy the fundamental rights to equal pay for equal work, non-discrimination, and fair remuneration.

31. This being a first appeal, it is our duty, in addition to considering submissions by the parties, to analyze and re-assess the evidence on record; and reach our own conclusions in the matter. This approach was adopted by this Court in **Arthi Highway Developers Limited vs. West End Butchery Limited and 6 others [2015] eKLR** citing with approval the case of **Selle vs. Associated Motor Boat Co. [1968] EA p.123.**

In **Selle's case (supra)**, the Court held that:

“An appeal to this Court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions”

32. Having considered the record of appeal, the respective submissions, we are of the considered view that the appeal and cross appeal stands or falls on our findings on three main issues: Whether there was evidence supporting the allegation of constructive dismissal; whether there was proof of violation of the respondent’s constitutional rights; and whether the sum of Kshs.200,000/- awarded to the respondent as compensation was merited. Lest we lose focus, we hasten to point out that although the genesis of this matter stems from an employee-employer relationship, what was presented to the Employment and Labour Relations Court “the ELRC” was a constitutional petition not an employment dispute. Indeed, Article 23 of the Constitution grants that court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedoms in the Bill of Rights. The court has jurisdiction to grant appropriate relief including inter alia declaration of

rights, an injunction, a conservatory order and an order for compensation.

33. The grounds upon which the respondent challenged the administrative directive by the appellant dated 10th July 2019 and 3rd December 2019 were: unfair administrative action thereby violating Article 47 as the directives were unlawful and procedurally improper; exposed him to unreasonable working conditions; and discrimination on grounds of age and violating his right to human dignity torture and inhuman treatment; and unfair labour practice including violating his right to remuneration culminating in constructive dismissal. The learned judge agreed with him and awarded him compensation of Kshs.200,000/-.

34. Constructive dismissal arises when an employee resigns with or without notice due to an employer's fundamental breach of a contract or intolerable conduct, making continued employment impossible. What constitutes constructive dismissal was well set out by the learned judge in the judgment; and he duly evaluated the impugned conduct and environment, to draw the conclusion that the prevailing situation made it intolerable for the respondent to remain in the appellant's employ. Even at this stage, the appellant does not deny arbitrarily taking away the respondent's office space, assigning it to

a junior, then leaving him to find room in a

general area used by junior staff. Then there was the incident involving an altercation with the guards, even if the police did not charge anyone, the environment that had been created was enough to send the message that the appellant could not access the office and his presence was unwelcome. Indeed, if the intention was to keep him away so as to pave way for investigations, nothing could have been easier than to directly communicate that to the respondent instead of creating unnecessary hostilities. We find no error on the part of the learned judge, in the evaluation of the evidence in this regard, the analysis or the application of the law and legal principles.

35. With regard to violation of the respondent's constitutional rights *vis a vis* application of the law by the trial court, we take note that the respondent did not present to the trial court the job profiles/description for the positions he lamented about as to enable a determination on whether the designation of the respondent as Administrator from Legal Officer was in violation of section 10(5) of the Employment Act, 2007 so as to constitute an unfair practice. Instead, he has now adopted a comparative approach, asking us to give an expanded definition of who

is a Public Officer *vis a vis* who is a Civil Servant. We take cognisance of the fact that the learned trial

judge gave a breakdown of every limb or sphere which the respondent claimed had been exposed to discrimination, from age to remuneration, to general treatment, each duly analysed; and in the end what emerged was simply a litany of complaints and comparisons, based on self-assessment by the respondent. However, this failed to meet the threshold of clear discrimination. We are unable to fault the findings by the trial court on this aspect.

36. In citing the case of **Felix Mathenge vs. Kenya Power Company Limited [2008] eKLR**, to urge for aggravated damages and to peg the damages awarded to his annual earnings, the respondent is way off the mark. The sum of Kshs. 200,000/- was not awarded as compensation for violation of constitutional rights, but as an amelioration for the intolerable environment which made it difficult for the respondent to work. It is trite that the assessment of damages is a discretionary function of the trial court. This Court in **Butt vs. Khan [1977] 1 KLR**, held that an appellate court should not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate, or where the trial court acted on wrong principles or misapprehended the evidence.

Whereas the learned trial judge failed to indicate

what formula or considerations led to the sum awarded, we take into consideration the intolerable circumstances created; and find that the sum awarded at the court's discretion was not inordinately high or punitive, and we decline to interfere with it. Ultimately the appeal fails and is dismissed. As we have alluded to in other portions of this judgment, there is no reason whatsoever to interfere with the decision, and this means that the cross appeal also has no merit and is dismissed. Each party shall bear own costs of this appeal.

Dated and delivered at Kisumu this 13th day of February, 2026.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the*

original.

Signed

DEPUTY REGISTRAR