

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: KIAGE, MUCHELULE & KORIR,**

**JJ.A) CIVIL APPEAL NO. 548 OF 2019**

**BETWEEN**

**PETER MUTARURA MWAURA.....APPELLANT**

**AND**

**CIC INSURANCE GROUP LTD.....RESPONDENT**

*(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (H. S. Wasilwa, J.) dated 8<sup>th</sup> July, 2019*

*in*

***ELRC Cause No. 2456 of 2016)***

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**\*\*\* JUDGMENT OF THE**

**COURT**

The appellant filed a Memorandum of Claim in the Employment and Labour Relations Court against the respondent for;

- a) A declaration that the claimant's 2-line resignation letter was procured by force, threat, coercion and intimidation.
- b) A declaration that the claimant wrongly and forcefully lost his employment.
- c) A declaration that the claimant is entitled to judgment on the amount of Ksh.29,687,830 claimed as well as judgment and

assessment of general damages for threat, intimidation and coercion.

- d) In the alternative reinstatement of the claimant to his previous position without any loss of benefits and payment of salary arrears for the entire period the claimant has been out of employment.
- e) Costs of the claim and interest.

The substance of the appellant's claim was that by a letter of appointment dated 12<sup>th</sup> February 1985, he was first employed by the respondent as an Assistant Accountant with effect from 3<sup>rd</sup> March 1985. By various letters from the respondent, the appellant grew in rank to the position of Managing Director/Principal Officer - CIC Asset Management Ltd, earning a monthly salary of Ksh.1,927,002, as at the time of termination of his employment. Following the placing of Imperial Bank (the Bank) under the management of the Kenya Deposit Insurance Corporation on 13<sup>th</sup> October 2015, for reasons of unsafe and unsound business conditions, the respondent's Group Chief Executive Officer (CEO) and the Board sought to know its exposure level from the appellant, who requested for that information from the respondent's Investment Manager

through an email dated 13<sup>th</sup> October 2015. On the same day,  
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Investment Manager, allegedly, misled the appellant that the exposure level was Ksh.334,160,821.91. On reliance of that information the appellant, ostensibly, unintentionally and excusably misled the respondent's Board and CEO that its exposure level was Ksh.334,160,821.91. In December 2015, while the appellant was on leave, the respondent received a request from the Capital Markets Authority (CMA) for confirmation of the amount of deposit that it held at Imperial Bank. That information was obtained from its systems and it established that the deposit at the bank amounted to Ksh.605,482,191.78, and not what the appellant had stated.

Vide an email dated 21<sup>st</sup> December 2015, the appellant sought an explanation from the Investment Manager concerning the variance in the amount and the response was that two other deposits of Ksh.200,000,000 and 83,000,000 had been omitted as the report had not been fully reconciled. Vide a letter dated 5<sup>th</sup> February 2016, the appellant was summoned to show cause on 12<sup>th</sup> February 2016, why he should not be dismissed and/or disciplinary action taken against him for having misled the

respondent's Board and CEO. The appellant was also required to submit a written explanation on the

issue by 8<sup>th</sup> February 2016 at 5.00pm. On that date, the appellant gave an account of how he had been misled by the Investment Manager, resulting in his misinforming the respondent's CEO and Board. The CEO then proceeded to the appellant's office where he asked for his office keys. He gave him 10 minutes to write a resignation letter and leave the premises. Owing to pressure, coercion, intimidation and threats, the appellant handed in a 2-line resignation letter and left the premises. By a letter dated 16<sup>th</sup> February 2016, the CEO accepted his resignation letter.

It was claimed that owing to the alleged coercion, intimidation and threatening of the appellant into tendering his resignation letter, he had lost his income, his dues in form of unpaid salaries and terminal benefits which were computed as follows;

- a. One year's pay for loss of employment -  $1,927,002 \times 12 = 23,124,024$ .
- b. Three months' notice before loss of employment -  $1,927,002 \times 3 = 5,781,006$
- c. Unpaid salary for February 2016 -  $1,927,002 \times 12 / 30 = 770,800$
- d. General damages for threats, intimidation and coercion.

Alternatively, the appellant prayed that he be reinstated to his previous position without any loss of benefits and payment of

all

salaries in arrears for the entire period that he had been out of employment.

The respondent filed a Statement of Response in which it asserted that it was entitled to terminate or summarily dismiss the appellant under **sections 35 and 44** of the **Employment Act, 2007** (the Act). It was averred that the appellant's duties and responsibilities as Managing Director/Principal Officer of CIC Asset Management Limited included directly managing and/or supervising the Investment Manager and Unit Trust Manager. The appellant was also enjoined to take all investment risks; solve complex issues and make strategic decisions within the subsidiary; make investment decisions in conjunction with the Investment Committee and be in charge of all subsidiary data. Further, it was an express term of the appellant's letter of appointment that either party was at liberty to terminate the employment upon issuing three (3) months' notice or payment of three (3) months' salary in lieu of notice. The respondent confirmed that on or about 13<sup>th</sup> October 2015, it asked the appellant for a summary of the deposits that its Funds had in the Bank and the appellant furnished it with

a schedule showing that the deposit

held at the Bank, at the material time, was Ksh.334,160,821.91, inclusive of accrued interest. On 10<sup>th</sup> December 2015, it received a request from the CMA to confirm the amount of deposits held by the Bank and upon carrying out computation from its system, it established that the deposit held in the Bank stood at Ksh.605,482,191.78. Upon that discovery, the respondent accused the appellant of failing and/or neglecting to scrutinize the summary that he furnished and as a result deposits amounting to Ksh.200,000,000 and Ksh.83,000,000, from the Money Market Fund and Wealth Management Fund were omitted.

The respondent averred that it was the appellant's duty to ensure that reconciliations for deposits placed in banks by the respondent's funds was done monthly. Moreover, the Investment Committee that was charged with overseeing the day to day investment activities was under the direct management or supervision of the appellant. It was claimed that deposit of the respondent's funds at the Bank had been limited to Ksh.485,000,000, at the material time. The appellant was blamed for authorising a deposit of Ksh.605,482,191.78 to be made in the

Bank, in excess of the agreed limit, without the approval of the respondent's Board. The respondent averred that in the appellant's response of 8<sup>th</sup> February 2016 to the Notice to Show Cause, he acknowledged that there was over exposure in the Bank; he was not vigilant and did not scrutinise the reports on investment thoroughly before presenting them to the Management and Board; and, the Investment Committee was not meeting regularly. Following the disciplinary hearing held on 12<sup>th</sup> February 2016, the Board, notwithstanding its recommendation to terminate the appellant's services, granted him an opportunity to resign from employment and he opted to resign with immediate effect. That resignation was accepted by the respondent and it accordingly waived the requirement for three (3) months' notice under clause 7 of the Contract, as amended on or about 25<sup>th</sup> November 2013. The respondent denied the damages particularised and sought by the appellant for the reason that he was neither dismissed nor his employment terminated. There was also no justification for an order of reinstatement. In the end the trial court was urged to dismiss the appellant's claim with costs to the respondent.

In reply to the averments by the respondent, the appellant contended that he was not a member of the respondent's Investment Committee which ordinarily made its decisions independently. He reiterated that he honestly relied on information provided by the Investment Manager on the investments that had been made by the respondent's Investment Committee. Further, the Unit Trust Manager was better placed to expound on the decisions of the Investment Committee, a committee which he headed, and their reasons for not disclosing that they had also invested the sum of Ksh.200,000,000 and Ksh.83,000,000. The appellant denied the allegation that he performed his duties carelessly and negligently and caused deposits to be made to the Bank in excess of the agreed limit. He confirmed attending a disciplinary meeting on 12<sup>th</sup> February 2016, but insisted that he was compelled to write the resignation letter. He in the end urged that the Statement of Response be struck out.

During trial, the appellant gave oral testimony and adopted his written statements dated 13<sup>th</sup> September 2017 and 25<sup>th</sup> November 2018, as well as supporting documents. He reiterated the claims

made in his statement of claim and reply, while asserting that he did not write his resignation letter voluntarily and thus he was constructively dismissed. **Tom Mbutia Gitogo**, the CEO of the respondent, testified on its behalf. He relied on his written statement together with a bundle of supporting documents whose substance of which he clarified during cross-examination.

At the end of the trial, the learned Judge (H. S. Wasilwa, J.) delivered a judgment on 8<sup>th</sup> July 2019, in which she found the appellant's case to be unmerited and accordingly dismissed it with no order as to costs.

The appellant was aggrieved by that judgment and filed this appeal on 5 grounds complaining that the learned Judge erred by;

1. Finding that the appellant was fairly terminated despite having already found that he was constructively terminated.
2. Failing to make an order for payment of the appellant's terminal dues including his salary for the month of February 2019, in accordance with Sections 18 (4) & (5) of the Act.
3. Finding that the respondent had a valid reason for terminating the appellant's employment.
4. Holding that the appellant's employment was terminated in accordance with fair procedure.

5. Selectively interpreting the provisions on unfair termination.

In the end the appellant prayed that the appeal and his claim as pleaded in the Memorandum of Claim be allowed, with costs.

The respondent lodged a cross-appeal on 3 grounds contending that the learned Judge erred by;

- a) Holding that the appellant did not voluntarily resign but was constructively terminated by the respondent.
- b) Declining to award costs to the respondent.
- c) Selectively treating evidence tendered before the court.

The respondent urged that the judgment of the trial court be set aside to the extent that it found the appellant's employment to have been constructively terminated. Further, the appeal be dismissed and the cross-appeal be allowed with costs.

When the appeal came up for hearing, learned Counsel **Mr. Makumi** appeared for the appellant while **Mr. Kiche** appeared for the respondent. Both parties highlighted their written submissions which they had filed prior together with bundle of authorities.

**Mr. Makumi** delineated four (4) issues for determination namely; whether the appellant was constructively dismissed; whether constructive dismissal can amount to fair termination;

whether the

appellant was entitled to the reliefs sought, and; whether the trial court erred in not awarding the respondent the costs of the suit. While defending the learned Judge's finding that the appellant was constructively dismissed, counsel urged that particulars of the constructive dismissal were that the respondent's CEO followed the appellant to his office after the disciplinary hearing and demanded that he tender his resignation within 10 minutes and leave the respondent's premises. The CEO then took the appellant's keys and left, and when the resignation was not submitted as demanded, he returned to the appellant's office where he threatened him with dismissal and security escort if he did not leave, thereby prompting the appellant to draft a 2-line resignation letter before leaving. Counsel thus argued that since the resignation was influenced by the employer, it amounted to constructive dismissal. On reliance of this Court's decision in **COCA COLA EAST & CENTRAL AFRICA LIMITED Vs. MARIA KAGAI LIGAGA [2015] eKLR**, it was contended that the conduct of a supervisor as was in this case may be enough to justify constructive dismissal.

The learned Judge was faulted for negating her finding that the appellant was constructively terminated, by further finding that the termination was fair. **Mr. Makumi** submitted that the dismissal of the appellant was unfair as it was influenced by coercion, threats and intimidation, and it failed to meet provisions of **section 45(2), (4) and (5)** of the Act. Citing **section 43(1)** of the Act and the decision in **CORNEL OTIENO OTIENO & ANOTHER Vs. MIDLAND ENERGY LIMITED [2017] eKLR**, for the principle that an employer has to prove the reason(s) for termination in a claim arising out of termination of a contract, counsel argued that the respondent did not prove the reasons for the termination. He urged that the respondent was under a duty to prove that, its approved exposure limit at the bank was Ksh.485,000,000 as opposed to Ksh.687,000,000; the misleading figures were verifiable from the system; and that the investment committee's quarterly meetings were a breach of the law. **Mr. Makumi** submitted that the respondent's exposure limit at the bank was Ksh.687,000,000 and not Ksh.485,000,000, as alleged, and therefore the deposit of

Ksh.605,482,191.78 was still within the allowed limit. Moreover,  
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appellant gave a good explanation on why two figures namely, Ksh.200 million and Ksh.83 million, were omitted from the summary that he presented to the Board and the CEO.

Counsel submitted that the appellant could not have picked the omitted sums from the company system, even after verification because, as explained by one Victor Odendo, the employee who furnished him with the misleading information, the sums had not yet been updated in the system. **Mr. Makumi** contested the allegation that the appellant had failed to ensure that the Investment Committee held monthly meetings, which was a good practice, as opposed to the quarterly meetings. He urged that no evidence was tendered in form of minutes or a policy document to show that it was the respondent's policy for the committee to hold monthly meetings. Counsel submitted that the appellant had explained to the respondent that failure to hold regular meetings was occasioned by a lack of quorum which was later rectified. Further the appellant's supervisory role as concerns the committee was on what they decided as opposed to when they decided, since it was the duty of the secretary of the committee

to call meetings. Counsel contended

that the respondent failed to prove that the quarterly meetings that were held by the committee did not amount to good practice. To counsel, the reasons advanced for the termination of the appellant's employment were, therefore, not valid and the respondent did not act according to equity and justice as provided under **section 45(4) and (5)**.

**Mr. Makumi** faulted the respondent for not informing the appellant of the Board's resolution to terminate his employment but with the option to resign. He submitted that the appellant was only informed of the resignation option. Moreover, the appellant deserved to be treated better considering that his conduct from the date of employment till the day of termination was noble. Counsel argued that it had been established that the appellant was constructively dismissed and hence he was entitled to the reliefs that he sought in the Statement of Claim. It was contended that prior to termination of the appellant's employment on 12<sup>th</sup> February 2016, he had worked for 12 days in the month of February but was not paid and therefore he was entitled to Ksh.770,800, being his unpaid salary for the said period. Moreover,

in accordance with **section 49(1)(a)**, the appellant

was entitled to 3 months' pay in lieu of notice, as per his contract of employment, which in his calculation amounted to Ksh.5,781,006. Relying on **sections 49(1)(c)** and **49(4)** of the Act and the decision in **COCA COLA EAST & CENTRAL AFRICA LIMITED Vs. MARIA**

**KAGAI LIGAGA** (supra), the appellant prayed for one year's pay for loss of employment, being Ksh.23,124,024. He also claimed an award of general damages to the tune of Ksh.5,000,000, for the threats, coercion and intimidation which he allegedly suffered. In the end, it was contended that since the appellant had established that termination of his employment was unfair, he ought to be awarded costs of this appeal and those of the trial court.

In view of the outcomes that the board considered after the disciplinary hearing, as reflected at page 103 of the record, we inquired from **Mr. Makumi** whether his argument was that the appellant did not opt to resign. His answer was that the appellant had preferred early retirement.

In opposition to the appeal, **Mr. Kiche** for the respondent delineated three (3) issues for determination by this Court namely,

whether the appellant was constructively dismissed; whether he is

entitled to the reliefs sought, and whether the respondent is entitled to costs of the claim and the appeal. On whether the appellant was constructively dismissed, reference was made to this Court's decision in **COCA COLA EAST & CENTRAL AFRICA LIMITED Vs. MARIA**

**KAGAI LIGAGA** (supra) where the Court adopted with approval the meaning of the term constructive dismissal as articulated in **WESTERN EXCAVATING (ECCO LTD Vs. SHARP [1978] ICR 222 or**

**[1978] QB 761**. It was contended that the learned Judge did not find as a matter of fact that termination of the appellant's employment met the legal principles for constructive dismissal as enunciated in the above case. Specifically, there was no finding that there was repudiatory breach of the fundamental terms of the contract through the conduct of the respondent. Counsel submitted that in this case after the respondent established that the appellant had given it erroneous information, it issued him with a notice to show cause letter dated 5<sup>th</sup> February 2016, the appellant responded to it on 8<sup>th</sup> February 2016, and subsequently attended a

disciplinary hearing on 12<sup>th</sup> February 2016. In his response, the appellant conceded that the report he presented to the Investment Committee and the Board on

17<sup>th</sup> November 2015, was misleading. It was further submitted that during the disciplinary proceedings, the appellant regretted not regularly checking whether the respondent was excessively exposed to any bank. He also acknowledged that the limit for the Bank at the time was Ksh.485 million, based on June 2015 financials.

Referring to the minutes of the disciplinary meeting, at pages 98 to 103 of the record, counsel urged that in his final submissions before the disciplinary panel, the appellant acknowledged that properly done reconciliations would have picked up the discrepancy. He also pleaded for leniency and requested that in the event the Board was not willing to pardon him, he should be given an opportunity for early retirement as per the scheme provisions. The Board in the end unanimously agreed that his employment should be terminated but given his long service, it suggested that he be accorded an opportunity to resign if he so wished. The appellant opted to resign. Citing the trial court's finding that the respondent had valid reasons for terminating the appellant's employment, **Mr. Kiche** asserted that the respondent's

conduct did not amount to repudiatory breach of the employment contract.

The decision in **MILTON M. ISANYA Vs. AGA KHAN HOSPITAL**

**[2017] eKLR** was relied on for the argument that a constructive dismissal occurs where the employer does not express the threat or desire to terminate employment, but frustrates the employee to the extent that he/she tenders resignation. Further, it was urged that in **REUBEN BORO GITAH I Vs. P. M KAMAU & 10 OTHERS [2018]**

**eKLR**, a claimant attended a disciplinary hearing which resulted in a dismissal decision and being faced with that decision, he opted to resign. The court rejected the claimant's plea for constructive dismissal and held that his contract of service was terminated by way of a resignation agreement which amounted to a soft landing. In view of the foregoing authorities, counsel submitted that the appellant failed to prove constructive dismissal. He placed reliance on the decision in **STEVE MUTUA MUNGA Vs. HOMEGROWN (K) LIMITED & 2 OTHERS [2013] eKLR** for the proposition that for a claimant to be able to plead constructive dismissal on account of duress or coercion, he/she must first establish that there was such coercion. Reference was made to the decision in **PAO ON Vs. LAU**

**YIU [1979] 3 ALL ER 65** for the argument that in determining

whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether at the time he was allegedly coerced into making the contract he did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and, whether after entering the contract he took steps to avoid it.

Mr. Kiche cited **EDWARD MACHUKA NYAMORA Vs. KENYA ANIMAL GENETIC RESOURCE CENTRE formerly CENTRAL ARTIFICIAL INSEMINATION STATION [2018] eKLR**, where after a claimant had been taken through a disciplinary hearing, he was presented with an option to resign or his employment would be terminated. The claimant chose to write a letter of resignation, without providing reasons for resignation. In dismissing the case, the court held that if the resignation was not voluntary, a reasonable employee in a senior position as was the claimant, would tender the resignation under protest and state that the resignation was not voluntary, but forced. Counsel urged that the

appellant neither signed his resignation letter under protest nor did he state that the

resignation was involuntary, not until 15<sup>th</sup> November 2016, nine (9) months later, when he wrote a demand letter alleging that he was coerced into resigning. Further, the appellant had the option of declining to resign and have the respondent terminate his contract of service, but he did not. Counsel contended that the appellant resigned from his employment and therefore the learned Judge erred in holding that he was constructively dismissed.

As to whether the appellant was entitled to the reliefs sought, Counsel submitted that in deciding the remedies to be awarded to the appellant, if at all this Court were to find that he was constructively dismissed, the Court must take into account the factors under **section 49(4)** of the Act, including any conduct of the employee which to any extent caused or contributed to the termination. It was submitted that the Act does not provide for general damages as a remedy for wrongful dismissal and unfair termination. To buttress this argument, the decision in **ALPHONSE MAGHANGA MWAHANYA Vs. OPERATION 680 LIMITED** [2013]

**eKLR** was cited. Concerning whether the trial court erred in failing

to award the respondent costs of the suit, on the strength of  
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holding in **DEVARAM MANJI DALTANI Vs. DANDA [1949] 16 EACA**

**35**, counsel submitted that a successful litigant can only be deprived of his costs where his conduct has led to litigation which might have been averted. **Mr. Kiche** contended that in this case the learned Judge did not find as a fact that the respondent's conduct caused the litigation and thus she erred in declining to award it costs of the suit. In conclusion we were implored to dismiss the appeal with costs and allow the cross-appeal with costs.

We have given due consideration to the record of appeal, the submissions for and against both it and the cross-appeal together with the authorities cited by counsel, cognizant that as the first appellate Court we have an obligation to re-consider and re-evaluate the evidence and come up with independent conclusions. See **SELLE Vs. ASSOCIATED MOTOR BOAT CO. [1968] EA 123** and **ABOK JAMES ODERA T/A A. J. ODERA & ASSOCIATES Vs. JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] eKLR.**

Having reviewed both the record and the submissions, we

think the issues that emerge for our determination in both the appeal and

the cross-appeal are, whether the appellant was constructively dismissed; whether he was entitled to the reliefs sought and, who is entitled to the costs of the claim and the appeal.

On whether the appellant was constructively dismissed, this Court adopted the definition of the term, 'constructive dismissal' as articulated by Lord Denning MR in **WESTERN EXCAVATING (ECC) LTD. -V- SHARP [1978] ICR 222 or [1978] QB 761**, in **COCA COLA EAST & CENTRAL AFRICA LIMITED Vs. MARIA KAGAI LIGAGA**

(supra), as follows;

**"28. [...]**

*'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 essential terms 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 at the instant without giving any notice at all or alternatively, he may give 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 .... (See also Nottingham County Council -v- Meikle (2005) ICR 1).'*

**29. 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."**

Similarly, in **MILTON M ISANYA Vs. AGA KHAN HOSPITAL KISUMU**

(supra), the court upon considering whether a claimant's resignation

constituted constructive dismissal concluded thus;

**"In his testimony the Claimant did not give a history of treatment that would be considered as a hostile environment at work. In fact, it was the Claimant's evidence that he did not want to resign but only did so because he was threatened with summary dismissal. This means he resigned to avoid a possible summary dismissal. That does not fit into the definition of constructive dismissal. In constructive dismissal the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation. I find no evidence of constructive dismissal in the**

***Claimant's case."***

In **EDWARD MACHUKA NYAMORA Vs. KENYA ANIMAL GENETIC RESOURCE CENTRE formerly (CENTRAL ARTIFICIAL INSEMINATION STATION** (supra), the court held as follows;

***“19. In the present case, the Claimant wishes the court to believe that he was forced to resign from his employment and therefore his separation with the Respondent was unlawful termination and not a voluntary resignation.***

...

***21. If the resignation was not voluntary as claimed by the Respondent, a reasonable employee in a Senior position as was held by the Claimant would tender the resignation under protest and state that the resignation was not voluntary but was forced. To the contrary the letter of resignation produced by the Claimant was not under protest and did not state the reasons for the resignation and whether the action was forced.”***

From the foregoing authorities, it is discernible that a core aspect of the term constructive dismissal is existence of intolerable working conditions brought about by the employer, which ultimately compel the employee to resign.

The appellant contends that following the disciplinary hearing held on 12<sup>th</sup> February 2016, the CEO followed him to his office and demanded that he tenders his resignation within 10 minutes and

leave the premises, prompting him to draft a 2-line resignation letter. The respondent disputes that argument, citing the trial court's finding that it had valid reasons for terminating the appellant's employment contract. In evaluating whether the appellant was constructively dismissed, the court concluded as follows;

***“49. The resignation was indeed a ‘request’ from the respondent as seen from the Minutes of 16/2/2016 (sic) and could not have been voluntarily. This indeed shows that the same was influenced by a certain promise or a threat to be terminated which in this case is a constructive termination.”***

The court further made the following finding;

***“64. From the Minutes submitted, the respondent had a valid reason to consider terminating the claimant's services, which was negligence of his duty as the Managing Director CIC Asset Management Limited.”***

It is common ground that the appellant misguided the Board and the CEO of the respondent company on its level of exposure at Imperial Bank, following the placement of the bank under the management of the Kenya Deposit Insurance Corporation. During his disciplinary hearing, he explained that he had received the information which turned out to be erroneous, from the Investment

Manager, and he had no reason to doubt. We, however, note that the appellant

acknowledged that had he done reconciliations with the custodian of the records, the error would have been highlighted. He also admitted that he was not regularly checking whether the respondent was excessively exposed to any bank. The appellant confirmed that his roles as Managing Director/Principal Officer of CIC Asset Management Ltd included, overseeing investments and ensuring that they are wisely invested, providing leadership to the CIC Asset Management staff, as well as ensuring that internal controls and procedures are adhered to and followed. In his submissions before the Board, he regretted having presented wrong information and pleaded for leniency. We note that at the end of the disciplinary hearing, the Board considered, requesting him to step aside for further investigations, early retirement as he had requested or termination for gross negligence. The Board eventually concluded as follows;

***“Upon various considerations, it was unanimously agreed that Mr. Mwaura’s employment would be terminated but given his long service he would be given an opportunity to resign instead if he so wished.”***

Upon our review of the record, we are not persuaded that the

appellant was constructively dismissed. The record shows that his

employment was due for termination owing to his own undoing, but he chose the easier alternative of resigning. His resignation letter does not in any way exhibit that he was forced to resign by his employer. Accordingly, we are of the considered view that the learned Judge misdirected herself in finding that the appellant was constructively dismissed. Having so found it follows that the appellant was not entitled to any of the reliefs that he sought in the memorandum of claim, save for the prayer for unpaid salary for 12 days that he seemingly worked in the month of February, 2016, before his resignation, which amount the respondent's counsel indicated before this Court that it would be payable, subject to confirmation by the respondent.

As to who should be awarded costs, it is trite that costs are at the discretion of the court. In this matter, we are inclined to order that each party bears their own costs.

Ultimately, we partly allow the appeal to the extent that the appellant is entitled to the twelve (12) days unpaid salary for the month of February, 2016. The cross-appeal is also partly allowed to

the extent that the trial court erred in holding that the appellant was constructively terminated by the respondent which we reverse.

Each party to bear their own costs.

**Dated and delivered at Nairobi this 13<sup>th</sup> day of February, 2026.**

**P. O. KIAGE**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

**W. KORIR**

.....  
**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR**