

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E677 OF 2023

WINNIE **NAFULA**
KUNDU.....CLAIMANT

VERSUS

W3 **HOSPITALITY**
LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant commenced these proceedings through a Statement of Claim dated 30th May 2022. She states that she was employed by the Respondent on 1st May 2021 as a Network Manager, and that she diligently executed her duties with commitment and enthusiasm. According to the Claimant, this contributed to the Respondent’s significant growth, leading to an expansion of her roles and responsibilities. She further avers that she recruited additional staff who also performed exceptionally well.

2. From the record, the Claimant’s woes in the employment relationship arose following an accident she sustained on 22nd November 2021. She asserts that

the Respondent neglected its obligations by failing to provide medical cover, remit her basic and mandatory National Hospital Insurance Fund (NHIF) contributions, secure insurance coverage, and by withholding her salary, thereby breaching both the employment contract and statutory requirements. The Claimant further avers that at the time of her alleged forced resignation and/or unfair termination, the Respondent failed to pay her full salary in lieu of notice together with other due benefits. As a result, she seeks the following reliefs against the Respondent:

- i. A declaration that the termination of the Claimant's employment by the Respondent was unlawful;*
- ii. Kshs 240,000/= being Payment for days worked but not paid for being equivalent to Three (3) months' pay.*
- iii. Kshs 80,000/= being One (1) months' Notice pay.*
- iv. Kshs.960,000/= being the equivalent of 12 months gross salary as compensation for the unlawful and unfair termination;*
- v. Kshs. 1,400,000/= being compensation under the work Injury Benefits act for injuries suffered as a result of the accident and failure to comply with the statutory requirement under the Employment Act, violation of her Employment and Human rights and the Constitution of Kenya 2010.*

- vi. *Kshs.350,000/= being medical expenses and future medical expenses incurred and anticipated to be so incurred until she is fully recovered*
- vii. *Compensation for failure to remit deduction made on his salary to Madison Pension scheme for a period of over 2 years as per his statement for the said pension scheme.*
- viii. *Interest at court's rates from the date of filling claim till payment in full; and*
- ix. *Any other relief the court may deem fit to grant.*

3. In response to the Claim, the Respondent asserts that the Claimant was never terminated. It maintains that the Claimant issued a demand letter dated 18th January 2022, which the Respondent also treated as her notice of resignation.
4. The Respondent, putting the Claimant to strict proof, contends that she ceased reporting to work and instead sent emails enclosing sick leave notes to justify her absence.
5. The Respondent further avers that although it was experiencing financial difficulties that affected salary payments, the Claimant nonetheless proceeded to resign by giving a two-week notice, having already been absent from work

for two months following the accident. Accordingly, the Respondent prays that the Claim be dismissed with costs.

6. The matter proceeded for hearing on 26th March 2025 and 30th October 2025, during which both parties called oral evidence in support of their respective cases.

Claimant's Case

7. The Claimant testified in support of her case as CW1 and, at the outset, adopted her witness statement together with the list and bundle of documents filed alongside the Statement of Claim as her evidence-in-chief.
8. In her testimony, the Claimant stated that due to the nature of her role, she was an essential service provider and her responsibilities continually increased. Despite this escalation, her salary was never reviewed or adjusted to reflect the expanded scope of her duties.
9. She further testified that on 22nd November 2021, while riding as a pillion passenger on a motorcycle on her way to work, she was involved in a hit-and-run traffic accident in which she sustained serious injuries, including a badly fractured leg.

10. The Claimant averred that she promptly informed the Respondent of this unfortunate incident and continued to work remotely from her hospital bed despite experiencing significant pain and relying on crutches.
11. She added that under her employment contract, the Respondent was required, at its own cost, to provide her with a health plan then in force or as may be introduced from time to time. However, she contends that the Respondent failed to provide the necessary medical support as required by law.
12. The Claimant asserted that the Respondent abdicated its obligations by failing to provide medical cover, failing to remit her basic and mandatory NHIF contributions, failing to take out any insurance cover, and withholding her salary thereby fundamentally breaching both the employment contract and statutory requirements.
13. Despite her injuries and ongoing treatment, she stated that she continued to discharge her duties remotely. Nevertheless, instead of offering support, the Respondent placed her on probation on the allegation that she was not meeting targets, a move she viewed as a calculated attempt to unlawfully and procedurally remove her from employment.

14. The Claimant also contended that the Respondent failed and refused to pay her monthly salary, which accumulated to three months' arrears, and did not provide house allowance or issue her with monthly pay slips.
15. She further testified that the Respondent withheld her salary, removed her from various WhatsApp groups and internal communication platforms, changed the password to her official work email, blocked communication between her and colleagues, and ceased assigning her any work, all while she was undergoing treatment for injuries sustained on her way to work.
16. According to the Claimant, the working environment became intolerable and irredeemably hostile, making it impossible for her to continue in employment. As a result, she states that she was forced to resign with effect from 31st January 2022 and duly issued the Respondent with a resignation notice. In her view, her resignation was justified given the Respondent's conduct and amounted to a constructive dismissal.

Respondent's Case

17. The Respondent called **Omondi Onono** as its witness, who testified as RW1. Mr. Onono identified himself as a Director of the Respondent company and similarly, he adopted his witness statement together with the Respondent's list and bundle of documents as his evidence-in-chief.

18.RW1 testified that in November 2021, following the Claimant's accident while on her way to work, the company complied with all statutory requirements relating to sick leave.

19.He stated that the Claimant was granted seven days of paid sick leave as mandated by law and that her full salary for November 2021 was duly paid.

20.RW1 further testified that the Claimant did not report to work at all during December 2021. Despite this, the company attempted to engage her on the matter and invited her to attend a meeting with management to discuss the way forward, but she failed to attend.

21.He added that on 18th January 2022, the Claimant submitted her resignation letter. According to RW1, the company was facing financial difficulties at the time, which had caused delays in salary payments. He confirmed that any pending dues for the Claimant would therefore relate to December 2021 and January 2022, subject to review since she had not worked during December.

22.RW1 was categorical that at no point during the Claimant's employment did she raise any complaints of mistreatment or unfair treatment by the company, whether before or after the accident.

Submissions

23.After the close of the hearing, both parties were directed to file written submissions. Although the Claimant uploaded her submissions on the online portal, they were not paid for and are therefore deemed not to have been duly filed. On the other hand, the Respondent did not file written submissions.

Analysis and Determination

24.Flowing from the record, the issues identified for determination are as follows:

- i. Whether the Claimant was constructively terminated; and**
- ii. Whether she is entitled to the reliefs sought.**

Constructive dismissal?

25.The Claimant contends that she was constructively terminated due to the Respondent's breach of her employment contract and statutory obligations. In this regard, she alleges that following the road traffic accident she was involved in on 22nd November 2021, the Respondent neglected its obligations by failing

to provide medical cover, remit the basic and mandatory NHIF contributions, secure insurance coverage, and by withholding her salary.

26. She further avers that the Respondent removed her from various WhatsApp groups and other workplace communication platforms, changed the password to her official work email, blocked communication with colleagues, and refused to assign her any work while she was undergoing treatment.

27. In response, the Respondent contends that despite the Claimant not working during December 2021, it made efforts to engage her and sent communication requesting her to attend a meeting with management to discuss the way forward, but she failed to attend.

28. The Respondent further states that when the Claimant submitted her resignation letter on 18th January 2022, the company was experiencing financial difficulties, which caused delays in salary payments.

29. In light of the rival positions of the parties, the key issue for determination is whether the Claimant was constructively terminated or voluntarily resigned.

30. The Black's Law Dictionary (10th Edition, p.561) defines constructive dismissal as ***“an employer’s creation of working conditions that leave a particular***

employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

31. Fundamentally, constructive dismissal occurs when an employee is compelled to terminate their employment, not out of free will, but as a direct consequence of the employer’s conduct. In such cases, the employee may lawfully end the employment without giving notice.

32. In the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR*, the Court of Appeal outlined the principles for determining constructive dismissal, emphasizing that the employer’s conduct must amount to a fundamental or significant breach going to the root of the employment contract, or show that the employer no longer intends to be bound by one or more essential terms of the contract.

33. In the present case, it is undisputed that the Claimant was involved in a road traffic accident on 22nd November 2021, in which she sustained injuries, and that she resigned from her employment effective 31st January 2022.

34. The Claimant contended that the Respondent withheld her salary following the accident. Indeed, the Respondent has admitted withholding the Claimant's salary for December 2021 and January 2022. The question, therefore, is whether the Respondent's actions entitled the Claimant to terminate her employment on the grounds of constructive dismissal.

35. **Section 30(1) of the Employment Act** provides that an employee is entitled to at least seven days of sick leave with full pay, and a further seven days with half pay, provided a certificate of incapacity from a qualified medical practitioner is submitted.

36. The Claimant presented medical certificates showing that she was on sick off from 22nd November 2021 to 6th December 2021, from 6th December 2021 to 22nd December 2021, and from 21st December 2021 to 5th January 2022.

37. It is therefore clear that the Claimant's sick leave exceeded the statutory entitlement provided under Section 30(1) aforesaid. It is also notable that the Claimant's employment contract did not specify how sick leave beyond the statutory period should be treated, nor did the Respondent have a policy addressing such a situation.

38. The record bears that on 14th December 2021, the Claimant emailed a request for additional recovery time, sharing her medical reports. In response, one Kaye advised her of the statutory sick leave limits and noted that Directors' approval was required for further leave, promising to follow up. There is no evidence as to what occurred between this communication and the Claimant's resignation.

39. Given that the Claimant had exhausted her statutory sick leave under Section 30(1) of the Employment Act, the Court finds that the Respondent was not obliged to continue paying her salary.

40. Consequently, the Respondent's action of withholding the Claimant's salary after the exhaustion of the statutory leave cannot, by itself, constitute a breach of contractual or statutory obligations, and does not amount to constructive termination.

41. Another grievance raised by the Claimant is that the Respondent failed to secure her a medical cover and failed to remit her NHIF contributions.

42. **Section 34(1) of the Employment Act** requires an employer to ensure the provision of proper medical care for its employees during illness, including medical attendance during serious illness.

43. It is noteworthy that, under **Section 26 of the Employment Act**, the obligation to provide medical assistance by an employer constitutes the basic minimum terms and conditions of employment.
44. There is no evidence that the Respondent facilitated proper medical care for the Claimant following her injuries in line with its statutory obligations and Clause 5 of her employment contract, which required the Respondent to provide health coverage at its expense.
45. What's more, RW1 admitted during cross-examination that the Respondent did not remit the Claimant's NHIF contributions, citing system challenges and requiring employees to remit themselves. This contravened Section 16 of the National Health Insurance Fund Act (now repealed), which mandated an employer to make remittances to the Fund on account of the employee.
46. What can be discerned from the foregoing is that the Respondent breached both its statutory and contractual obligations by failing to provide the Claimant with proper medical assistance following the accident she sustained on 22nd November 2021. Further, the Respondent's failure to remit the Claimant's NHIF contributions compounded the statutory breach.

47.Indeed, it is not doubtful that at the time, the Claimant was in dire need of proper medical care to enable her recover and resume work. It is highly probable that the Respondent's failure to fulfill its statutory and contractual obligations prolonged her recovery, thereby delaying her return to work.

48.Applying the principles from *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga (supra)*, to the case herein, it becomes apparent that the Respondent's failure to provide proper medical care to the Claimant during her illness constituted a fundamental breach going to the root of the employment contract.

49.As a result of this breach, it is evident that the Respondent no longer intended to be bound by a fundamental term of the employment contract. The Claimant was therefore justified in treating herself as constructively dismissed and entitled to resign, with or without notice.

50.All things considered, the Court finds that the Respondent's conduct amounted to constructive dismissal, demonstrating an intention not to be bound by the employment contract. Accordingly, the Claimant's termination from employment was unfair and unlawful.

Reliefs?

51. Having found that the Claimant's termination was unfair and unlawful due to constructive dismissal, the Court holds that she is entitled to compensatory damages under **Section 49(1) of the Employment Act**. Accordingly, the Claimant is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to three (3) months' gross salary. In assessing the quantum of this award, the Court has taken into account the relatively short duration of the employment relationship and the circumstances surrounding the termination of the employment relationship.

52. The Claimant's claim for unpaid salary succeeds only to the extent of one month's salary and half a month's salary for seven days, for the following reasons. Although the Respondent contends that it paid the Claimant's salary for November 2021, no evidence was provided to support this. Further, since the Claimant had exhausted her statutory sick leave before her resignation, she is not entitled to full salary for December 2021 and January 2022.

53. Regarding the claim for medical expenses amounting to Kshs 350,000/-, the claim succeeds only to the extent of Kshs 3,000/-. This is because the Claimant did not provide evidence to substantiate the full amount claimed. She was only

able to produce a receipt from a consultant surgeon, evidencing a medical expenditure of Kshs 3,000/-.

54.The claim for work injury compensation is dismissed for want of jurisdiction.

The Claimant is required to pursue this claim through the Directorate of Occupational Safety and Health Services, through the mechanisms outlined under the Work Injury Benefits Act.

55.The claim for compensation regarding the Respondent's failure to remit the

Claimant's pension contributions to the Madison Pension Scheme is dismissed.

This is for the reason that the Claimant has neither specified the amount claimed nor provided evidence to substantiate it, leaving the Court unable to determine the sum sought.

Orders

56.In the final analysis, judgment is entered in favour of the Claimant against the Respondent as follows: -

(a) A declaration that the Claimant was constructively terminated.

(b) The Claimant is awarded Kshs 80,000.00, representing one (1) month's salary in lieu of notice.

(c) The Claimant is awarded compensatory damages of Kshs 240,000.00, equivalent to three (3) months' gross salary.

- (d) The Claimant is awarded Kshs 89,333.33, representing the unpaid salary for November 2021 and half salary for seven days in December 2021.**
- (e) The Claimant is awarded Kshs 3,000.00 for the proved medical expenses incurred.**
- (f) The total award amounts to Kshs 412,333.33.**
- (g) Interest on the amount in (f) shall accrue at the court rate from the date of judgment until full payment.**
- (h) The Respondent shall also bear the costs of the suit.**

DATED, SIGNED and DELIVERED at NYERI this 17th day of February 2026.

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**STELLA RUTTO
JUDGE**

In the presence of:

For the Claimant	Mr. Omboko
For the Respondent	No appearance
Court Assistant	Ndati

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the

Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE