



Wachira v Commercial International Bank Kenya Ltd (Employment and Labour Relations Petition E204 of 2024) [2026] KEELRC 654 (KLR) (4 March 2026) (Judgment)

Neutral citation: [2026] KEELRC 654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E204 OF 2024**

HS WASILWA, J

MARCH 4, 2026

BETWEEN

ROSEMARY NYAMBURA WACHIRA PETITIONER

AND

COMMERCIAL INTERNATIONAL BANK KENYA LTD RESPONDENT

JUDGMENT

Petitioner's Case

1. By a Petition dated 6th December 2024, the Petitioner sought for the following orders:
 - a. A declaration that the resignation letter dated 5th September 2024 was instigated by the Respondent's toxic environment, unfair labour practices, discrimination, unreasonable treatment and harassment, a violation of Article 41 of *the Constitution* of Kenya, 2010;
 - b. Kshs.10,526,604 being Contractual and terminal dues owed to the Petitioner by the Respondent as demonstrated below:12 months Compensation for unlawful termination (Kshs.723,478 for 12 months = Kshs.8,681,736)Housing Allowance at 15% of salary for 15 months from July 2023 to September 2024 (15% of Kshs.723,478 for 15 months = Kshs.1,627,825)Unremitted Pension by the employer (5% * Kshs 723,478 for 6 months = Kshs.217,043)
Total = Kshs.10,526,604
 - c. Expected Income to the retirement age of 60 yrs. The Petitioner is currently 48 yrs, therefore: (12 months by Kshs.723,478) for 12 yrs = Kshs.104,180,832.
 - d. Damages for the financial strain occasioned on the Petitioner by the Respondent for failure to confirm her employment resulting in her mortgage interest payment being made at market rate.



- e. General Damages for the Respondent's toxic environment, unfair labour practices, discrimination, unreasonable treatment and harassment that led to the Petitioner's Resignation;
- f. A certificate of Service be issued by the Respondent in favour of the Petitioner;
- g. Any other relief that this Honourable Court may deem fit;
- h. Costs of the suit; and
- i. Interest on the above at the Court rate from the day of filing suit until payment in full.

Petitioner's Case

2. The Petitioner avers that she is a reputable and respected banker with an illustrious career spanning twenty-nine (29) years, during which she held senior leadership roles in leading banks in Kenya. Her career is marked by exceptional performance, integrity, regulatory compliance and professional recognition.
3. She avers that throughout her career she successfully managed large branch balance sheets, including the second-largest branch by balance sheet size, led high-performing sales and non-sales teams, reduced non-performing loan portfolios to below 5%, established new branches from business case development to profitability, spearheaded bank-wide projects including core banking system migrations and EMV implementation, and championed multiple audits, including internal, Central Bank and group audits.
4. The Petitioner further avers that she was consistently recognised for excellence, including ranking among the top 20% of achievers at Stanbic Bank Kenya, receiving the Managing Director's Certificate of Recognition for Service Excellence, serving on the Stanbic – CFC post-merger integration team, being named Top Salesperson at Westlands Branch, and receiving the Staff of the Year Award at Prime Bank.
5. Owing to her proven track record and professional standing, the Respondent poached the Petitioner and vide a letter of appointment dated 31st May 2023 employed her as Senior Branch Manager – Westlands Branch on a six (6) month probationary period, at an all-inclusive salary of Kshs. 700,000, later revised to Kshs. 723,478 following the introduction of the housing levy.
6. The Petitioner avers that upon assumption of duty she diligently executed her mandate and successfully turned around the performance of the Westlands Branch, driving it to meet and exceed targets. Her performance was consistently acknowledged by her immediate supervisors and senior management, including the Respondent's CEO, Retail Banking.
7. The Petitioner states that prior to October 2023, her Key Performance Indicators (KPIs) had not been set. This fact was expressly confirmed by the Respondent's then CEO and Managing Director, Hossam Rageh, vide an email dated 9th October 2023 at 9:48am, acknowledging that her KPIs were only then being formulated.
8. The Petitioner avers that vide her email of 6th October 2023, she raised concerns over the feasibility of some of the targets as they were unreasonably high and discrepancies in the targets set as compared to her peer senior branch managers. She further sought support and proposed practical interventions aimed at facilitating growth of both the branch and the bank.



9. The Respondent summarily dismissed these concerns vide an email dated 8th October 2023, stating that the targets were non-negotiable and characterising her professional concerns as excuses, a response the Petitioner avers was dismissive, unfair and devoid of merit.
10. Notwithstanding this uncertainty and dismissive treatment, the Petitioner continued to perform exceptionally and during the same period received multiple accolades from the Respondent. Vide an email dated 1st November 2023, she was expressly praised for her October performance and credited with “saving the month” for the Respondent, with further congratulatory messages from senior management.
11. The Petitioner avers that no adverse performance appraisal existed during for her probationary period. The document relied upon by the Respondent, described as a Performance Appraisal Form, is in fact a Goal Setting Form dated 12th October 2023, which on its face does not assess performance and cannot lawfully be construed as evidence of poor performance.
12. It is not disputed that the Petitioner’s probation lapsed on 2nd January 2024. By operation of law, her employment stood confirmed. No intention to extend probation was communicated on or before that date.
13. However, vide a letter dated 16th February 2024, the Respondent belatedly and unilaterally sought to extend an already lapsed probation period with effect from 3rd January 2024. The Petitioner avers that this was unlawful, irregular and in breach of her contract.
14. The Petitioner states that her signature on the purported probation extension was not appended voluntarily but under economic duress, as she was faced with the imminent risk of losing her employment while servicing a mortgage that had already reverted to market interest rates following the Respondent’s failure to confirm her employment.
15. Following recruitment of a new Head of Retail in February 2024, the Petitioner was required to agree on extension-period targets and an action plan. Despite the illegality of extending a lapsed probation, she nonetheless engaged in good faith, culminating in a Performance Assessment Form signed on 27th February 2024.
16. During this period, and without notice, some of the Petitioner’s roles and accounts were transferred to her supervisee, an act she avers was calculated to humiliate, undermine and frustrate her in the discharge of her duties.
17. Upon lapse of the impugned probation extension period, the Petitioner underwent a formal performance review on 9th April 2024, for the period between January 2024 to 31st March 2024; it was recorded that the Petitioner met expectations. “met expectations” and demonstrated good improvement. This appraisal was subsequently confirmed by the same supervisor as authentic and reflective of the actual performance discussion.
18. The Petitioner avers that barely a week later, the Respondent vide their letter dated 18th April 2024 under ref: CIBKE/HO/HR/04-18/APP contradicted themselves by stating that the Petitioner had not met expected standards for confirmation as a Senior Branch Manager Role- Westlands branch. Based on this, the Respondent unfairly demoted her from the position she was to be confirmed (Senior Branch Manager Role- Westlands branch) to Branch Manager- Upper Hill Branch; and reviewed her salary downwards without any justifiable cause, from Kshs.723,478 to Kshs.500,000.



19. The Petitioner protested this decision vide her letter dated 22nd April 2024, noting that it was unfair and contrary to the Respondent's human resource policy and fair labour practices that her confirmation would be at a junior position and at a reduced remuneration.
20. Instead of addressing her protest, the Respondent hearing vide a letter dated 8th May 2024 summoned the Petitioner for a 'staff performance disciplinary meeting' on contrived low performance; this is despite all the while her performance outranked most of her peers (having achieved 135% of her key KPI's (Targets)) none of whom were subjected to similar harsh and unfair practices. This was an outright attempt to frustrate, humiliating and downright harassing the Petitioner.
21. The Petitioner avers that Respondent unilaterally redeployed the Petitioner to a newly minted and non-existent role of Senior Relationship Manager – Wealth. The role lacked a job description, support staff, tools, budgetary allocation and realistic benchmarks. The Petitioner protested that the targets assigned were exorbitant and designed to ensure failure.
22. Owing to the continued silence, the escalating mistreatment and the toll on her health, the Petitioner escalated her grievances vide an official complaint to the chairman of the Respondent stationed in Egypt vide her letter dated 6th June 2024.
23. The Petitioner avers that vide a letter dated 8th August 2024, the Respondent put her under a Performance Improvement Plan (PIP); despite the fact that her previous performance reviews noted that the Petitioner met expectations.
24. Contrary to the Respondent's Human Resource Manual, which requires a minimum of six months in a role before performance appraisal, the Petitioner was subjected to the Performance Management and Appraisal System barely two months into the new role. There was no previous position as Senior Relationships Manager and the Petitioner started from scratch with no benchmark to gauge her performance. These were efforts to frustrate the Petitioner.
25. The Petitioner avers that both her immediate supervisor and the Head of Human Resources informed her that they were under pressure to exit her from the bank, a fact that explained the contradictory correspondence and sustained mistreatment she endured.
26. As a result of the sustained hostile work environment, humiliation and psychological torture, the Petitioner's health deteriorated significantly in August 2024. She was exposed to high stress levels that deteriorated her mental health, lowered her immunity and caused her to have elevated migraines, leading her to seek medical attention, including undergoing CT scans at the Aga Khan University Hospital on 19th March 2024.
27. Unable to endure the unfair, discriminatory and degrading treatment any longer, the Petitioner tendered her resignation vide a letter dated 5th September 2024.
28. The Petitioner contends that the Respondent has grossly misapprehended her grievance, and through incredulous denials, misrepresentation and a derisive tone, has sought to further aggravate the psychological torture inflicted upon her by falsely deposing that she sought an escape route from poor performance, allegations the Respondent knew to be untrue.
29. The Petitioner avers that the Respondent's Preliminary Objection dated 30th December 2024, challenging the jurisdiction of this Court on the doctrine of constitutional avoidance, was conclusively dismissed vide a ruling delivered on 16th June 2025 by Justice Wasilwa. The issue is therefore res judicata and unavailable for re-litigation.



30. The Petitioner maintains that this Petition is properly before this Court, as it raises grave and particularised violations of her constitutional rights, including the right to equality and non-discrimination, dignity, freedom from psychological torture and degrading treatment, fair labour practices, fair administrative action and fair hearing under Articles 27, 28, 29(d) & (f), 41, 47 and 50 of *the Constitution*.
31. She avers that the Respondent's conduct was not merely unreasonable or repudiatory, but systemic, deliberate and designed to humiliate, frustrate and unlawfully strip her of constitutional protection.
32. The Petitioner therefore urges this Honourable Court, in the interest of justice, constitutionalism and the rule of law, to exercise its jurisdiction, interrogate the violations pleaded and grant the reliefs sought.
33. The Petitioner states that she brings this Petition in good faith and prays that it be allowed with costs.

Respondent's Case

34. The Respondent contends that the Petition offends the doctrine of constitutional avoidance and Rule 10(3) of the Employment and Labour Relations Court Rules, 2024.
35. The Respondent avers that the Petitioner was employed as a Senior Branch Manager vide a letter of appointment dated 31st May 2023, stationed at the Westlands Branch, subject to the Respondent's right to transfer her.
36. The Respondent states that the Petitioner was aware of what was expected of her from the outset, and that performance targets were discussed and communicated to her via email. In particular, the Respondent relies on an email dated 9th October 2023 from Hossam Rageh indicating that the Petitioner had promised to double the branch deposits.
37. The Respondent avers that it was only after the first review meeting in October 2023 that the Petitioner began alleging that she lacked signed targets. The Petitioner alleges absence of targets while asserting that she met and exceeded those targets, which presupposes their existence. It is inconceivable that a senior officer could work for four months without understanding expected outcomes.
38. The Respondent maintains that the Petitioner did not meet expected targets and relies on a performance appraisal report dated 12th October 2023, in which the Petitioner is stated to have scored four (4), the lowest possible score.
39. The Respondent further avers that the Petitioner's performance did not improve in the next quarter and relies on an email dated 11th February 2024 from her supervisor assessing her performance as below average.
40. The Respondent avers that it extended the Petitioner's probation vide a letter dated 16th February 2024. The Respondent admits that the extension occurred one month after the lapse of probation but explains that discussions regarding the Petitioner's performance were ongoing between her and her supervisor. Additionally, the Petitioner agreed in writing to the extension notwithstanding the lapse of the initial probation period.
41. At the conclusion of the three-month extended probation period, the Petitioner's performance was again evaluated and found to be unsatisfactory. Consequently, vide a letter dated 18th April 2024, the Respondent re-assigned the Petitioner to the position of Branch Manager – Upper Hill Branch on a reduced monthly salary of Kshs. 500,000.



42. The Respondent disputes the authenticity of the document dated 9th April 2024 allegedly signed by Elly Odhong, which purports to rate the Petitioner's performance between January and March 2024 as having met expectations. The Respondent avers that it does not have any resemblance with the performance appraisal reports that the Respondent uses.
43. Additionally, it is unusual that a review was supposedly done by Head of Retail, yet the Petitioner was contractually reporting to CEO Consumer Banking who did the two (2) previous appraisals. The letter dated 16th February 2024 extending probation, co-signed by Elly Odhong, is express that the CEO Consumer Banking would evaluate the Petitioner's progress.
44. The Respondent further avers that it is unusual that Elly Odhong could, just nine (9) days after the supposed satisfactory performance rating, sign the letter dated 18th April 2024 re-assigning the Petitioner to Branch Manager - Upperhill Branch on account of unsatisfactory performance.
45. The Respondent avers that the Petitioner rejected the offer to serve as Branch Manager – Upper Hill vide her letter dated 22nd April 2024. Faced with her unsatisfactory performance and refusal to accept the re-assignment, it could have dismissed the Petitioner since its Human Resource Manual does not permit a further probation extension. However, in the hope that the Petitioner would improve, the Respondent opted to accommodate her.
46. The Respondent therefore invited the Petitioner to a performance review hearing held on 13th May 2024; after the hearing, it concluded that she was unlikely to improve if retained in the same role. Consequently, the Respondent re-assigned her to the role of Senior Relationship Manager – Wealth, reporting to the Head of Retail and Consumer Banking(Elly Odhong), vide a letter dated 3rd June 2024.
47. The Respondent denies that the Petitioner's salary was reduced following this re-assignment and avers that at the time of her departure in September 2024, her salary stood at Kshs. 724,078, as evidenced by her payslip.
48. The Respondent further states that the re-assignment letter required the Petitioner to discuss her job description and KPIs with her new supervisor due to the mid-year nature of the role, and denies that the position lacked a job description.
49. In the new role, the Respondent avers that the Petitioner's performance was reviewed monthly. It denies that such reviews were discriminatory or contrary to the HR Manual, contending that nothing in the Manual prohibits monthly reviews and that, given the Petitioner's prior unsatisfactory performance, frequent reviews were reasonable, prudent and justified.
50. After reviewing the Petitioner's performance in July 2024, the Respondent found it necessary to place her on a three-month Performance Improvement Plan, which was communicated vide a letter dated 8th August 2024.
51. The Respondent avers that following issuance of the Performance Improvement Plan, the Petitioner resigned vide an email dated 6th September 2024.
52. The Respondent denies all allegations of discrimination, stating that no evidence has been produced of any similarly situated employee who was treated differently from the Petitioner, and that no specific comparator has been identified.
53. The Respondent further denies liability for the reliefs sought, including compensation for constructive dismissal, house allowance, pension contributions and salary up to retirement, contending that the Petitioner resigned voluntarily, was paid a gross salary inclusive of house allowance, continued to receive provident fund contributions, and is not entitled to payment for services not rendered.



54. The Respondent maintains that setting targets, assessing performance, reviewing performance frequently and taking steps to improve performance are actions of a reasonable employer and do not amount to a repudiatory breach of contract.

Petitioner's Submissions

55. The Petitioner submitted on three issues: whether the Respondent Bank's impugned actions are unlawful for violating the Petitioner's fundamental rights and freedoms under Articles 27(1)&(2), 28, 29(d), 41(1)&(2)(b), 47 and 50(1), Constitution and the *Employment Act*; whether the Petitioner is consequently entitled to the reliefs she has sought; and Petitioner can horizontally enforce violation of her rights as against the Respondent Bank's impugned actions.
56. The Petitioner submitted that *the Constitution* embeds her various fundamental rights and freedoms, among them being the protections guaranteed under Articles 27(1)&(2), 28, 29(d), 41(1)&(2)(b), 47 and 50(1) of *the Constitution*: being the right to equal protection and equal benefit of the law, full and equal enjoyment of all rights and fundamental freedoms; inherent right to have the dignity respect and protected; protection from psychological torture; right to fair labor practices and reasonable working conditions; right to fair administrative action and the right to be heard. The Respondent's actions, have exposed the Petitioner to violations and threatened violations of these fundamental rights.
57. The Petitioner submitted that under Clause 3 of her contract dated 31st May 2023, she was subject to a 6-month probation period that lapsed on 2nd January 2024, upon which her employment stood confirmed by operation of law. However, the Respondent unlawfully purported to extend an already lapsed probation vide a letter dated 16th February 2024 without her prior consent and long after the probation period had ended, contrary to Section 42(2) of the *Employment Act* and Article 41 of *the Constitution*.
58. It was submitted that her signature on the extension letter was coerced, appended under fear of losing her sole source of income after resigning from a nearly 3-decade career to join the Respondent.
59. The Petitioner submitted that extension of probationary period without the consent of the employee is unlawful and amounts to breach of terms of probation as affirmed in *Thomas Austin Obulutsa v NACADA* [2017] eKLR. In the instant petition, the Petitioner's consent was not sought prior to the extension, thus, the probationary period in law was considered/deemed over. The Respondent in the letter dated 16th February, admitted that the Petitioner's probation ended on 2nd January, 2024 after which in law her employment was automatically confirmed, absent any termination. She cited *David Namu Kariuki v Commission for the Implementation of the Constitution* [2015] eKLR
- “The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the *Employment Act*, 2007. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time.”
60. The Petitioner submitted that it was a requirement that the Respondent would engage her to come up with agreed key performance indicators to assist her execute her role. However, upon onboarding, the Respondent did not involve her to come up with the said performance indicators. Further, the Respondent admitted that the Petitioner had in a meeting with the Respondent's CEO indicated that she didn't have signed KPIs



61. She submitted that branch targets assigned to her were discriminatorily higher than those of her peers, a concern raised in her email of 6th October 2023, to which the Respondent responded dismissively that the targets were “not negotiable” (RNW-3).
62. It was submitted that despite the absence of agreed KPIs and discriminatory targets, she delivered exceptional performance, receiving commendations including the email of 1st November 2023 praising her for “saving the month.” Additionally, comparative branch performance data and WhatsApp communications confirmed that her branch outperformed others during the relevant period.
63. It is the Petitioner’s submission that no valid adverse performance appraisal exists. The document relied upon by the Respondent dated 12th October 2023 was a goal-setting form, not an appraisal; additionally critical appraisal columns were blank, making it incapable of evidencing underperformance.
64. The Petitioner submitted that after executing targets on 27th February 2024, her supervisor conducted a performance appraisal on 9th April 2024 rating her performance as “met expectations,” noting improvement. Further, her legal counsel reached out to Mr Odhong, who promptly replied and confirmed that, the he has reviewed the appraisal report dated 9th April 2024 and he confirmed that:

“I have reviewed the attached document and do hereby confirm that the document is authentic and a true reflection of the performance discussion I had with Rosemary.”

Therefore, it is untrue that the Petitioner’s performance during this period, supposedly did not improve, or was unsatisfactory.

65. She submitted that despite this positive appraisal, the Respondent unlawfully demoted her and reduced her pay by 31% vide a letter dated 18th April 2024, prompting her protest letter of 22nd April 2024. Instead of addressing her protest, the Respondent retaliated by summoning her to a “Staff Performance Hearing” on 13th May 2024, without notifying her of any outcome, in violation of Articles 27, 41, 47 and 50 of *the Constitution*.
66. It was submitted that the appraisal and hearing process violated the Respondent’s Human Resource and Manpower Development Policy, which requires a minimum appraisal period of six months, or three months where duties materially change. The material performance plan, was executed on 27th February, 2024, barely 2 months since the performance plan was executed; also no performance plan existed for the new demoted role of branch manager - Upperhill Branch. The attempt to subject the Petitioner to an appraisal was therefore clearly depriving her of the benefit of the lawful protection accorded to employees by the Respondent’s own policy contravening Articles 27(1) & (2), 41 and 47, Constitution.
67. It is the Petitioner’s submission that the Respondent’s charade of an appraisal review was merely a further ill-conceived attempt at violating the Petitioner’s lawful rights under the subject employment. Not only was it devoid of any objectivity, no actual underperformance subsisted and no rectification was ever determined nor communicated to date. Reliance was placed on *Naomi Connie Lusiche v Barclays Bank of Kenya [2021] eKLR*,

“An Objective Performance Management System, would first establish that indeed underperformance has taken place, and second, seek to unravel why its long-serving Employee has suddenly turned into an underperformer, and lastly seek to rectify the work environment that has probably triggered underperformance.”



68. The Petitioner submitted that on 3rd June 2024, she was unilaterally re-designated to the role of Senior Relationship Manager – Wealth, despite achieving 132% YTD targets. The re-designation amounted to a fundamental breach of contract as it was done without consultation, consent, job description, tools, or support. She cited *Patrick Madanji & 7 others v Vice Chancellor, Great Lakes University of Kisumu & another* [2022] KEELRC 967 (KLR)

“...the decision by the 1st Respondent to unilaterally vary the terms of the Claimant’s contract, is a violation of the Claimant’s right to fair labour practices per Article 41 of *the Constitution*, as it was made without consulting the persons who were to be affected by the decision.”

69. It was submitted that the Senior Relationship Manager – Wealth role was virtually non-existent, with unreasonable targets, prompting her emails of 10th and 25th June 2024. Despite escalating her grievances, including to the Group Chairman, the Respondent served her with a Performance Improvement Plan on 8th August 2024, barely a month into the new role and contrary to its HR policy. Reliance was placed on *Ndurumo v University of Nairobi; Kenya National Commission on Human Rights (Interested Party)* [2025] KEELRC 1477 (KLR) to argue that failure to accord equal benefit of HR policies violates Articles 27, 41 and 47 of *the Constitution*.

70. The Petitioner submitted that the cumulative conduct of the Respondent subjected her to intolerable working conditions, severe stress, migraines, and medical treatment, supported by medical records from Aga Khan University Hospital.

71. She submitted that having been exposed to these intolerable work conditions, and the Respondent’s conduct having become so unreasonable and so grave that it constituted a repudiatory breach of her contract of employment; she was forced to resign from her employment via her notice of 5th September, 2024, where she details her reasons that constrained her resignation. She cited *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, *Omache v National Bank of Kenya Limited* [2025] KEELRC 32 (KLR) and *Ojiambo v Islamic University of Kenya* [2025] KEELRC 2267 (KLR).

72. It was submitted that the totality of the Respondent’s unlawful actions, evidence a gross violation of the Petitioner’s fundamental rights and freedoms accruing under her contract of employment. She cited *Oyatsi v Judicial Service Commission* [2022] KEELRC 3 (KLR)

“It is pertinent to find that the cumulative effects of the acts of commission and omission by the respondent towards the petitioner set out in this judgment, degraded the human dignity of the petitioner in violation of article 28 of *the Constitution* by fact of being subjected to undignified work conditions as compared to her peers and a false narrative being sent out impliedly that she was incompetent and not deserving of the position, she so diligently, ably and graciously served for over a period of six years. She suffered and endured less remuneration as her counterparts which in itself is a humiliating and aggravating factor in this case.”

73. On the second issue, the Petitioner submitted that she was deeply frustrated by the Respondent’s behavior, particularly having worked for 29 years in the banking sector and having been appraised for her stellar performance. These frustrations led to a myriad of stress levels and occasional hospital visits due to migraines. Therefore, she is entitled to declarations that her resignation was instigated by a toxic



work environment. She cited *Mwangi v Luma Stores and Supplies Enterprises Ltd* [2025] KEELRC 2548 (KLR)

“In a nutshell, the plea of constructive dismissal exclusively hinges on the employer’s conduct which must be sufficiently frustrating to justify the employee’s resignation.”

74. She submitted that the Petitioner, having left a prestigious place of work in a tier one bank to serve the Respondent, was exposed to a very intolerable working environment. Issues such as her inconsistent performance review, non-confirmation of the probation when due, redesignation to a non-existent role and failure to accord her support and tools for the role led to her ultimate illness and thereafter resignation. These actions can be seen as undignifying upon the Petitioner. She is thus entitled to compensation for constructive dismissal under Sections 49 and 50 of the *Employment Act*, urging the maximum 12-month award, relying on *Meriko v Jubilee Insurance Company Kenya Limited* [2025] KEELRC 2856 (KLR).
75. It was submitted that Clause 4 of the Regulation of Wages (General) Order, 1982 provides for 15% pay of the basic minimum wage to be provided to all employees as housing allowance. A review of the Petitioner’s contract together with her pay slip produced by the Respondent reveal that no amount was designated to the housing allowance component, relying on *Mugo v Chase Bank (Kenya) Limited* [2024] KEELRC 2813 (KLR).
76. The Petitioner submitted that unremitted pension contributions from January to June 2024 are payable under Clause 8 of her contract dated 31st May 2023 provided that her would be entitled to the Provident Fund/Pension Scheme contribution of 5% from both employer and employee upon confirmation to Permanent terms. Therefore, the same should be contributed to the Pension scheme, the employment having been confirmed by operation of law and the Petitioner having not enjoyed the benefits for the said period.
77. The Petitioner submitted that she is entitled to salary loss from the date of resignation to retirement, noting that she had a thriving career at the previous Banks before her poaching by the Respondent. The Respondent took her from a place of comfort and led her to a series of frustrations, thus forcing her to resign. Due to this, the Petitioner has been unable to secure employment at another Bank or financial institution.
78. The Petitioner submitted that the Respondent’s failure to confirm the Petitioner’s employment affected her ability to repay her mortgage amounts. The constructive dismissal made the situation worse by making her resign with no alternative, since there was pressure from the Respondent’s superiors for having her out. She is therefore entitled to an award general damages for this in the sum of KES 10,000,000.
79. It was submitted that she is entitled to general damages for constitutional violation totaling KES 50,000,000, not to compensate but in vindication of the violations against them and to deter any future violations. The Respondent violated her fundamental rights, as demonstrated. She relied on the Court of Appeal decision in *Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR).
80. The Petitioner submitted that she is entitled to a certificate of service under Section 51 of the *Employment Act* which requires an employer to furnish an employee who has worked for more than four consecutive weeks with a certificate of service, relying on *COO v GAIN* [2025] KEELRC 2046 (KLR).
81. On the final issue, the Petitioner submitted that at the promulgation of the current Constitution, the Courts have equally observed that it is now settled law that the bill of rights applies horizontally as



against private individuals. She cited *Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others*, (2014)eKLR, *Isaac Ngugi v Nairobi Hospital & 3 Others* (2013)eKLR, *Satrose Ayuma and 11 others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme* [2013]eKLR; *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Ltd and others* [2013]eKLR; *Amy Kagendo Mate v Prime Bank Ltd, CRB & Another*, [2013]eKLR. The Respondent is yet to catch up with this legal reality.

82. The Petitioner submitted that the impugned violations against the Petitioner having arisen from the existence of an employment relationship between the Petitioner and Respondent does not insulate the Respondent from its enjoinder under Article 3(1) and 20(1), Constitution to uphold and respect *the constitution*: neither does it divest the Petitioner of the right to bring a Petition complaining against conduct that violates and/or threatens to violate her rights under Articles 27(1)&(2), 28, 29(d), 41(1)&(2)(b), 47 and 50(1), Constitution.
83. The Petitioner submitted that on the basis of the Court of Appeal judgment in *Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich* [1990] KECA 62 (KLR), it is unavailable for the Respondent to relitigate the issue already considered by the Court, “Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted.”
84. She submitted that the doctrine of estoppel with the extended aspect of *res judicata*, debars the Respondent from relitigating the supposed debarment doctrine of Constitutional avoidance. The grievance complained of by the Petitioner, coupled by the reliefs sought, it is only this Hon Court as a Constitutional court that can hear those grievance and once persuaded grant the reliefs sought threat.
85. It was submitted that the Petition meets the threshold for constitutional pleadings as set out in *Trusted Society of Human Rights Alliance v Attorney General* [2012] eKLR and that the reliefs sought are properly anchored under Article 23(3) of *the Constitution*.

Respondent’s Submissions

86. The Respondent submitted on three issues for determination: whether the Petition violates the constitutional avoidance doctrine; whether the Petitioner has proved any of the alleged constitutional violations; and whether the Petitioner is entitled to the reliefs sought.
87. On constitutional avoidance doctrine, the Respondent submitted that the Petition offends doctrine by improperly filing an ordinary employment dispute as a constitutional cause. Although a preliminary objection on this issue was dismissed in a ruling delivered on 10th June 2025, the issue is not *res judicata*. The Court expressly held that it was premature to determine whether constitutional violations had occurred without hearing the parties and reserved that determination for the substantive hearing. Therefore, there was no finding that the Petition complied with constitutional thresholds.
88. The Respondent reiterated its earlier submissions, supported by binding and persuasive authority cited at the preliminary objection stage, and urged the Court to find, upon considering the evidence, that the is an attempt at constitutionalizing an ordinary employment dispute.
89. On the second issue, the Respondent submitted that two settled principles govern the determination of the alleged constitutional violations. Firstly, a petitioner must plead constitutional violations with reasonable precision, identifying the specific provisions violated and the manner of violation. Reliance



is placed on *Busienei v National Police Service Commission & another* [2022] KEELRC 161 (KLR), “In the celebrated *Anarita Karimi Njeru v Republic* [1979] eKLR the court held that:

“We would, however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that which he complains of, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

90. Secondly, the burden of proof remains on the Petitioner to prove the alleged violations. That burden is not lessened because a party chooses the constitutional path as affirmed in *Monica Wangu Wamwere v Attorney General* [2019] KECA 579 (KLR).
91. The Respondent further relies on *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] KECA 743 (KLR), where the Court of Appeal held that pleadings must clearly disclose the grievance and relief sought, and that courts should not speculate or reconstruct a litigant’s cause of action. The paragraph number relied upon was not specified in the submissions.
92. The Respondent submitted that although the Petition cites Articles 47 and 50 of *the Constitution*, it does not disclose how those provisions were violated. The Petition and supporting affidavits merely list the constitutional articles without pleading particulars of infringement. The Respondent contends that it is exceedingly unfair to expect the Respondent to second guess what the Petitioner intends. On that basis alone, the Respondent urged the Court to reject the alleged violations of Articles 47 and 50 for want of precision.
93. The Respondent submitted that in a claim for discrimination, the law requires the Petitioner to point to a person who is similarly placed but who is receiving different treatment to what she is receiving. Reliance was placed on *Bajaber v Planning Systems Services Limited* [2024] KEELRC 1462 (KLR)

“In claims where an Employee alleges discrimination at the workplace, he is required to give evidence of comparators, to show that he was treated differently from the comparators. Without comparators’ evidence, what would discrimination be founded upon? Such evidence would necessarily include the preferential and different treatment, preferential and different terms and conditions of employment, availed to the comparators, viewed against the inferior treatment and/or terms and conditions of employment, imposed on the Claimant by the Respondent.”

94. The Respondent further submitted that it is not just differential treatment that amounts to discrimination. Rather, the differential treatment must be unreasonable or arbitrary. It cited *Mohammed Abduba Dida v Debate Media Limited & another* [2018] KECA 642 (KLR)

“.....it was observed in the case of *Kedar Nath vs State of W.B.* (1953) SCR 835 (843) that; “Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view.”

95. It is the Respondent’s submissions that the Petitioner failed to held two distinct roles being Senior Branch Manager between July 2023 and June 2024, and Senior Relationship Manager – Wealth thereafter, however, she did not identify any similarly placed officer in either role who had lower targets



- or was treated more favourably. The Petitioner instead compared herself to branch managers, who cannot have the same targets as senior branch managers.
96. The Respondent further submitted that even if a senior branch manager had been identified by name and shown to have a lower target; targets vary depending on branch location and business potential, and that comparing Westlands Branch to smaller branches amounts to comparing dissimilar circumstances.
 97. The Respondent submitted that on performance, the Petitioner has not provided evidence of an employee who was reviewed and found to have performed poorly, but was not taken through the performance review process that the Petitioner went through.
 98. It is the Respondent's submission that the Petitioner has merely made allegations of discrimination but has not presented any evidence in proof. This is insufficient to succeed in a constitutional claim
 99. On the alleged violation of Article 29 of *the Constitution*, the Respondent submitted that although the Petition does not specify whether the alleged torture is physical or psychological, the facts pleaded suggest psychological torture. The facts alleged in support of the psychological torture are: being rated as a poor performer yet she was performing exceptionally well; being consistently reviewed contrary to the HR Manual; her concerns about her high targets being ignored; being discriminated against; her probation being extended after it had lapsed; being demoted and reducing her salary. These are employment management actions attributed to a private employer.
 100. The Respondent submitted that the court held in *Monica Wangu Wamwere (supra)* ".....the law expects that an allegation of torture must encompass evidence of the severity of pain and suffering; reckless indifference to the possibility of causing the said pain and suffering; and must involve a public official. He further noted acts that do not cause extreme pain and suffering to an ordinary person are usually outside the ambit of the definition of torture."
 101. It is the Respondent's submission that it is not every misstep by an employer, which aggrieves an employee, that amounts to torture as known to law. Many practices, which may be unacceptable at the workplace, do not amount to torture just because of their unacceptability.
 102. The Respondent submitted that allegations of psychological torture must be supported by medical evidence. The only medical note produced, dated 19th March 2024, indicates normal findings and does not diagnose the Petitioner with any psychological condition.
 103. On the right to fair labour practices, the Respondent submitted that the Petition is vague as to which specific acts are said to violate Article 41 of *the Constitution*. Evaluation of performance and placing the affected employee on a performance improvement plan does not amount to unfair labour practice.
 104. The Respondent submitted that the Petitioner signed two appraisal forms dated 12th October 2023 and 27th February 2024, both reflecting the lowest possible performance score, and that disagreement with a supervisor's assessment does not amount to an unfair labour practice. It cited *Mwaura v Safaricom Limited [2025] KEELRC 2431 (KLR)* ".....an employee's self-assessment is not conclusive proof of the quality of his/her performance. The self-assessment must be validated by the employee's line manager or immediate supervisor for it to be conclusive."
 105. On the purported appraisal allegedly conducted by Mr. Elly Odhong in February 2024, the Respondent submitted that the documents show that Mr. Elly Odhong was not the Petitioner's supervisor at that point. It is difficult to reconcile that review with the extension of probation that he signed eight (8) days later. It is also difficult to understand why he used an unofficial document, yet the Respondent has a standard performance appraisal form.



106. On frequent performance reviews, the Respondent submitted that the HR Manual must be understood for what it is; a general guide not designed for every situation. It relied on *Mwaura v Safaricom Limited* (supra) in support of a purposive reading as opposed to the strict and literal reading advanced by the Petitioner.
107. It is the Respondent's submission that the frequent review of the Petitioner's performance does not amount to an unfair labour practice. Given the Petitioner's performance history and extended probation, more frequent reviews were reasonable and justified.
108. On allegations of demotion and salary reduction, the Respondent submitted that the Petitioner's salary remained unchanged at Kshs. 724,078, and that the proposed reassignment to Branch Manager – Upperhill was never implemented after the Petitioner rejected it. It cited
109. On the delayed extension of probation, the Respondent submitted that the extension does not amount to an unfair labour practice because the Petitioner expressly agreed to it in writing and was not coerced. When a party signs a document, they are bound by it and cannot later seek to resile from it. The Respondent distinguished the case relied upon by the Petitioner *Mwilo v Absa Bank (K) PLC* [2022] KEELRC 53 (KLR) and submitted that in that case the employee merely acknowledged receipt, whereas here the Petitioner expressly consented.
110. The Respondent further submitted that the delay was partly occasioned by the Petitioner's failure to submit her appraisal on time despite request by his supervisor.
111. It is the Respondent's submission that there is no evidence that the Respondent violated any law to amount to unfair labour practices prohibited by Article 41 of *the Constitution*.
112. The Respondent submits that the right to dignity enshrined under Article 28 of *the Constitution*, having shown that Articles 27, 29 & 41 were not violated, it would follow that Article 28 was not infringed. At any rate, the Petitioner, apart from saying that her juniors were given assignments that she was supposed to undertake, she did not present evidence that that was so. It cited *Charles Murigu Murithii & 2 others v Attorney General* [2015] KEHC 7213 (KLR) "we are alive to the fact that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for the enjoyment of all other rights..... Put differently therefore, if a person enjoys the other rights in the Bill of Rights, the right to human dignity will automatically be promoted and protected and it will be violated if the other rights are violated."
113. On reliefs, the Respondent submitted that having failed to prove any constitutional violation, the Petitioner is not entitled to general damages or any of the reliefs sought. The Respondent relied on *Postal Corporation of Kenya v Tanui* [2019] KECA 489 (KLR) to submit that awards beyond the *Employment Act* are not automatic, and further notes that *Ezekiel Nyangoya* is under appeal (*Kenya Marine & Fisheries Research Institute v Okemwa* [2022] KECA 990 (KLR)).
114. The Respondent submitted that with general damages, the other reliefs are equally unavailable. Clause 7 of the Petitioner's letter of employment provides that she was being paid an all inclusive gross salary, thus, she is not entitled to house allowance claimed at Kshs. 1,627,825. It cited the case relied upon by the Petitioner *Mugo v Chase Bank (Kenya) Limited* [2024] KEELRC 2813 (KLR) and submitted that it talks of "consolidated salary, therefore, inclusive of a house allowance". It did not say, as the Petitioner alleges, that "a contract must specifically cite that salary is or is not inclusive of house allowance".
115. The Respondent submitted that the claim for unremitted pension contributions of Kshs. 217,043, apart from being presumptive that the employment was automatically confirmed post January 2024 despite the extended probation, is beyond this court's jurisdiction.



116. The Respondent submitted that the claim for Kshs. 104,180,832, being the presumed salary until retirement, is unavailable in law. The Supreme Court has settled that issue in Ngokonyo & 2 others v Telkom Kenya Limited [2025] KESC 75 (KLR). Any decisions by the ELRC to the contrary, assuming they exist, are wrong and ought not to be followed.
117. I have examined all evidence and submissions of the parties herein. The issue for this court's determination are as follows:
1. Whether the resignation of the petitioner from employment was a constructive termination by the respondent.
 2. Whether the petitioner's rights under *the constitution* were breached.
 3. What remedies if any the petitioner is entitled to.

Issue No 1

118. The petitioner in her evidence has narrated her employment journey with the respondents. The petitioner explained that she was employed by the respondent vide a letter dated 31/5/23 as a Senior Branch Manager Wetlands Branch. She was placed on a 6 month probationary period and her salary was kshs 700,000/- all inclusive but later revised to kshs 723,478/-.
119. The petitioner contests that she did her job diligently but by October 2023, her KPIS had not been set and this was indeed experienced in the email she points out dated 9th October 2023 at 9.48 am from the respondent's CEO. From her email of 6th October 2023 the issue of her KPI was still being considered as she raised her concerns about meeting the targets being advanced.
120. It is evident that the petitioner continued to perform well despite these uncertainties and even vide email of 1/11/23 she was praised by her boss for saving the month of October for the bank.
121. The petitioner's probation period lapsed on 2/1/2024 and it is then apparent that she stood confirmed without any contrary communication as at 2/1/2024.
122. It is however surprising that vide a letter of 16/2/24 the respondent belatedly and unilaterally sought to extend an already lapsed probation period with effect from 3/1/24. This was in this courts view an illegality and an unfair labour practice. The respondent had a chance to communicate to the petitioner on or before 2/1/24 their intention not to confirm her employment or to extend the probation period but which they did not do. The assumption at this point was that she stood automatically confirmed in employment as at 2/1/24.
123. That notwithstanding case law on probationary contracts point to the fact that probationary employees are entitled to fair administrative action as held in Red Lands Roses Ltd vs Mugo (2029) KECA 96 (KLR). In Wilson Simiyu vs Chamai BOG Friends School Bokoli & Another (2016) 2KLR where the court held that extension of probation must be based on valid reason like now performance.
124. The extension of probation in this case was unfair coming as an afterthought and illegal in the circumstances. That notwithstanding on 18th April 2024 after the lapse of the impugned probation extension period, the respondents decided to demote her to another position of Branch Manager Upper Hill branch and reviewed her salary downwards without any justifiable cause from kshs 723,478 to 500,000/-. The petitioner protested this issue. Indeed, changing the terms and conditions of



employment of an employee is tantamount to a termination. This is supported by section 10(5) of the Employment Act 2002 which states as follows:

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

125. The action of the respondents of changing the terms of the contract without consultation was done unfairly and unjustifiably and was illegal. The petitioner protested this move but the respondent did not address this move but instead summoned her for a staff performance disciplinary meeting on contrived low performance. The petitioner chose to resign at this stage.
126. It is evident that the action of the respondent against the petitioner was targeted to remove her from office and this is indeed a constructive termination and against her rights to fair labour practices, fair hearing and a breach of her contract of employment as held in Patrick Mudanyi & 7 Others vs V.C. Great Lakes University of Kisumu & Another (2025) KEELRC 967 (KLR). This is also true as held in Oyatsi vs JSC (2022) KEELRC 3(KLR) (supra).
127. It is therefore my finding that the employment of the petitioner was constructively terminated following concerted illegal action by the respondent.

Issue No 2

128. The action of the respondent was indeed a breach of the petitioner’s rights under article 41 of the constitution on fair labour practices, Article 28 of the constitution on her inherent dignity leading to mental and degrading action by the respondents.
129. It is also true that her rights to a fair hearing under article 47 of the constitution was breached. It is therefore my finding that the petitioner’s rights under the constitution were breached.

Issue No 3

130. Having found as above, I find that the petitioner is entitled to certain remedies and I find for her and award her as follows:
 1. Compensation for unfair and unjustified termination equivalent to 8 months salary bearing in mind the inhumane treatment and her length of service in the banking industry = 8x723,478= 5,787,824/-.
 2. Damages for breach of her constitutional rights equivalent to 2 million.
 3. Unremitted pension as prayed = kshs 217,043/-.
Total ksh 8,004,867/- less statutory deductions.
 4. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF MARCH, 2026.

HELLEN WASILWA

JUDGE

