



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. E063 OF 2022**

REHMAN ALI AHMED.....**CLAIMANT**

**VERSUS**

SAHER MALIK  
(sued as Chairman of Sir Ali Muslim Club).....**1<sup>ST</sup>**  
**RESPONDENT**

AUSHAD HAKADA  
(sued as Treasurer of Sir Ali Muslim Club).....**2<sup>nd</sup>**  
**RESPONDENT**

AYUB KHAN  
(sued as secretary of sir Ali Muslim Club).....**3<sup>RD</sup>**  
**RESPONDENT**

SIR ALI MUSLIM CLUB.....**4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondents via a Memorandum of Claim dated 3<sup>rd</sup> February 2022 seeking the following the following reliefs:

- (1) A Declaration that the his fundamental right under Article 41 of the Constitution to fair labour practices has been violated and/or infringed by the Respondents.
- (2) A Declaration that his forced resignation was unfair, unjustifiable, unlawful, null and void *ab initio*.
- (3) A declaration that the his constructive termination from his employment was unjust, unlawful and unfair.
- (4) An order that the Respondents pays the sum of Kshs. 3,637,500/-particularized as follows: one month's salary in lieu of notice, house allowance, unpaid salary for six months, salary for days worked in October 2020, accrued leave, service pay, damages for wrongful dismissal, and commissions on bookings.
- (5) A certificate of service
- (6) costs of the suit.
- (7) Interest on items 4 and 6
- (8) Any other relief the court may deem just.

2. The Claimant's case is that he was employed as a manager of the 4<sup>th</sup> Respondent on 24<sup>th</sup> July 2007 on permanent and pensionable terms. He avers that the terms and conditions of his employment were contained in a Letter of Appointment of the same date, which provided, inter alia, that his appointment took effect from 9<sup>th</sup> July 2007, with a starting salary of Kshs. 30,000/- per month and entitlement to 21 days' annual leave. He avers that he served diligently for approximately twelve years without complaints regarding his performance, his salary rising to Kshs. 125,000/- by the time of his termination from employment. It is the Claimant's case that on or about 13<sup>th</sup> October 2020, he was approached by the 4<sup>th</sup> Respondent's Vice Chairman, one Mr. Saher Malik, who informed him that the 4<sup>th</sup> Respondent's Managing Committee was dissatisfied with his services and had levelled unspecified serious allegations against him. The Claimant avers that he was neither informed of the nature of these allegations nor accorded an opportunity to respond to them. Thereafter, he contends that he was coerced, intimidated, and threatened with summary dismissal without pay unless he tendered his resignation. He avers that he was

then presented with a resignation letter and compelled to sign it under duress, thus his resignation amounted to constructive dismissal.

3. It is the Claimant's further case that the termination of his employment was unlawful, malicious and in violation of 41, 43, 44 and 45 of the Employment Act, particularly because: he was not issued with any notice, was not informed of the reasons for termination, was not accorded a hearing, and was not informed of his right to be accompanied by a representative of his choice during any disciplinary process. He further avers that the Respondent lacked any valid or fair reason to terminate his employment and that the alleged grounds were extraneous and intended merely to remove him from employment.

4. In addition, the Claimant avers that the Respondent failed, refused, and/or neglected to pay him salary for the months of April, May, June, July, August, and September 2020, amounting to Kshs. 750,000/-, which remains due and owing. He also states that he was not paid for 13 days worked in

October 2020, nor was he compensated for accrued leave for the year 2019/2020. The Claimant further avers that he was entitled to commissions of Kshs. 10,000/- per hall booking procured, and that the Respondent owes him commissions for ten (10) confirmed bookings, totalling Kshs. 100,000/-. He also contends that the Respondent failed to issue him with a Certificate of Service as required by law. It is also the Claimant's case that having served the Respondent diligently for twelve (12) years, he had a legitimate expectation to continue in employment until the mandatory retirement age of 60 years, which expectation was frustrated by the Respondent's actions.

5. In opposition to the suit the Respondents filed an amended Memorandum of Response and Counter Claim dated 5<sup>th</sup> October 2022. They acknowledged employing the Claimant but denied that he was a diligent employee. They contend that the Claimant engaged in misconduct involving under-declaration of hall booking charges in the process receiving sums in excess of what was recorded. The Respondents further aver that upon being confronted with evidence of the alleged misconduct, the Claimant voluntarily opted to resign

and authored his own resignation letter. They contend that the Claimant requested that the matter not be escalated to the police. In those circumstances, the Respondents deny that the Claimant was coerced, intimidated, or forced to resign, and consequently deny the allegations of constructive dismissal. The Respondents maintain that the Claimant resigned of his own volition and therefore deny that there was any unlawful or unfair termination or any violation of his rights under Article 41 of the Constitution or the Employment Act.

6. With regard to the monetary claims, the Respondents deny that they failed, refused, or neglected to pay the Claimant six months' salary as alleged and put him to strict proof thereof. They further deny that the Claimant is entitled to payment in lieu of leave, averring that he took his leave for the year 2019/2020 and is therefore not owed any leave dues. The Respondents also deny the existence of any arrangement to pay the Claimant commissions of Kshs. 10,000/- per hall booking or that any such sums are due. They further deny having refused to issue a Certificate of Service. The Respondents deny that the Claimant is entitled

to any of the reliefs sought, including compensation, damages, or the sum of Kshs. 3,637,500/-, and aver that he has not suffered any loss or hardship attributable to them. They also deny that the Claimant had any contractual or legitimate expectation to remain in employment until the age of 60 years.

7. With respect to the counterclaim which is by the 1<sup>st</sup> Respondent, he contends that the Claimant was paid Kshs. 312,500/- service pay in error as the Claimant was at all material times a contributor of NSSF. It is his contention that the payment was therefore unlawful and a mistake and consequently the Claimant's suit should be dismissed with costs and the counterclaim for Kshs. 312,500/- be allowed with costs.

8. The parties presented oral testimony by the Claimant and Mr. Saher Malik. Nothing major turned on the oral testimony. Thereafter the parties were to file submissions.

### Claimant's Submissions

9. The Claimant contends that his resignation was not voluntary but was occasioned by the Respondents' conduct which created intolerable working conditions, thereby amounting to constructive dismissal. It is submitted that constructive dismissal arises where an employer's conduct constitutes a repudiatory breach of the employment contract, particularly the implied term of mutual trust and confidence, entitling the employee to treat the contract as terminated. The Claimant argues that he was subjected to an abrupt and coercive interrogation without notice, evidence, or representation, despite prior audit clearance and commendation. This conduct, he submits, fundamentally breached the employment relationship and rendered continued service untenable. He relies on the case of **Josiah v Texas Alarms (K) Ltd (Employment and Labour Relations Appeal E171 & E176 of 2024 (Consolidated) [2025] KEELRC 3118 (KLR))**, where the Court, citing **Wanyonyi v Principal, Kamusinde Secondary School & another (Appeal E010 of 2023) [2024] KEELRC 648**, held that constructive dismissal occurs where an employee is subjected to intolerable conditions forcing resignation, and

the employee bears the burden of proving such conditions. Further reliance is placed on **Kenya Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023) [2024] KEELRC 843 (KLR)** for the proposition that resignation is a necessary element and signifies the employee's rejection of intolerable conduct. The Claimant further relies on **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)**, adopting the definition in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 222**, that constructive dismissal arises where the employer commits a fundamental breach going to the root of the contract, entitling the employee to resign. Additional reliance is placed on the case of **Thaiya v Twiga Foods Limited [2023] KEELRC 1960 (KLR)**, citing **Henry Ochido v NGO Coordination Board [2015] eKLR** and **Nathan Ogada Atiagaga v Davis Engineering [2015] KEELRC 75 (KLR)**, where constructive dismissal was defined as arising where an employer's conduct makes continued employment intolerable, leaving the employee with no option but to resign. The Claimant also cites the case of **Emmanuel Mutisya Solomon v Agility Logistics**

**(Cause No. 1448 of 2011)** (unreported) on the underlying principle that an employer must not act in a manner likely to destroy the relationship of trust and confidence. The Claimant maintains that the elements of constructive dismissal, as distilled in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga** (*supra*), are satisfied, namely: intolerable working conditions; causation between the employer's conduct and resignation; absence of reasonable alternative; employer responsibility for the conditions; and lack of affirmation of the contract.

10. The Claimant therefore submits that the resignation of 13<sup>th</sup> October 2020 amounted to constructive dismissal and thus constituted unfair termination within the meaning of sections 43 and 45 of the Employment Act. On procedural fairness, the Claimant submits that the Respondents violated section 41 of the Employment Act by failing to issue a notice to show cause, failing to notify the Claimant of the allegations, and denying him an opportunity to be heard. It is further submitted that no disciplinary hearing took place, no notice to show cause was issued, no evidence was provided,

and no minutes of any hearing were produced, thereby rendering the process procedurally unfair. On substantive fairness, reliance was placed on section 43 of the Employment Act, which requires the employer to prove valid reasons for termination, failing which termination is deemed unfair. The Claimant cites the case of **Liz Ayany v Leisure Lodges Limited [2018] eKLR**, which adopted the holding in **Jared Aimba v Fina Bank Limited [2016] eKLR**, where it was held that termination must be accompanied by a fair process. Further reliance is placed on the case of **Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR**, **Kenya Union of Commercial Food & Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR**, and **Rebecca Ann Maina & 2 others v JKUAT [2014] eKLR**, for the proposition that compliance with section 41 is mandatory and failure renders termination unfair.

11. The Claimant also relies on the case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**, where the Court held that termination is unfair where no

notice, reasons, or hearing is provided, and that the employer must justify termination under sections 43 and 45 of the Act.

12. On remedies, the Claimant submits that under sections 49 and 50 of the Employment Act, he is entitled to compensation for unfair termination, including twelve (12) months' salary and one month's salary in lieu of notice. The Claimant further submits that he is entitled to unpaid salary arrears, accrued leave, service pay, house allowance, and commission, and disputes the authenticity and probative value of documents produced by the Respondents purporting to show prior resignation and payment of dues. Reliance is placed on **Lokamiti & 4 others v Olsuswa Farm Limited (Appeal E058 of 2024) [2025] KEELRC 992 (KLR)**, where the Court awarded twelve months' salary for constructive dismissal arising from non-payment of salary. In conclusion, the Claimant submits that the Respondents' conduct amounted to constructive dismissal and unfair termination, and urges the Court to award the full claim together with costs and interest.

## Respondents' Submissions

13. The Respondents identify the issues for determination as:
- a. Whether the Claimant's cessation of employment amounted to a voluntary resignation or an unlawful termination/constructive dismissal under the Employment Act, 2007;
  - b. Whether the Claimant is entitled to the remedies sought, including notice pay, housing allowance, salary arrears, pro-rated salary, damages, leave pay, service gratuity, and commissions;
  - c. Whether the Respondents are entitled to restitution of Kshs. 312,500/- allegedly paid in error as gratuity; and whether they are entitled to costs.
14. On the Claimant's termination of employment, The Respondents submit that the Claimant voluntarily resigned, as evidenced by his signed resignation letter. They contend that under section 35(1)(c) of the Employment Act, an employee is entitled to resign by notice, and the Claimant exercised this right voluntarily. Reliance is placed on **Peter Njuguna Chege v Timsales Limited [2015] eKLR**, where

the Court held that resignation remains valid even where prompted by disciplinary concerns, unless bad faith is proved. The Respondents further submit that the disciplinary process was fair and compliant with Section 41 of the Employment Act. The Claimant was informed of the issues and afforded an opportunity to respond. The existence of a prior resignation in May 2019 is cited as evidence that the Claimant was familiar with resignation procedures. The Respondents submit that they did not create intolerable working conditions relying on **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, where constructive dismissal was defined as arising only where an employer creates intolerable working conditions compelling resignation. they further assert that the allegation of coercion was raised belatedly, approximately two years after resignation, and is therefore an afterthought. The Claimant did not indicate any grievance at the time of resignation. The Respondents distinguish the authorities relied upon by the Claimant, including the case of **Josiah v Texas Alarms (K) Ltd [2025] KEELRC 3118 (KLR)**, on the basis that those cases involved proven harassment or

oppressive conditions, which are absent herein. Salary adjustments were mutually agreed due to COVID-19, and audit processes were legitimate. They therefore submit that sections 41, 43, and 45 of the Employment Act apply only to termination and not to voluntary resignation. In any event, the Respondents contend that a fair process was followed and that substantive justification existed for disciplinary concerns relating to alleged financial irregularities.

15. Regarding the remedies sought, the Respondents submit that the claim for one month's notice pay is not payable, as resignation was voluntary and no notice obligation arises. On housing allowance, it is submitted that the same was already consolidated within the agreed gross salary of Kshs. 170,000/- and is therefore not separately payable. On salary arrears for April-September 2020 and pro-rated October salary, the Respondents submit that salary adjustments were mutually agreed due to COVID-19 operational constraints, as reflected in management minutes, and payments were made accordingly. On compensation for unfair termination, the Respondents submit that Section 49 of the Employment Act

is inapplicable in the absence of termination. Even if considered, no procedural or substantive unfairness has been established. On leave pay, it is submitted that no evidence of accrued leave entitlement was produced, and prior settlement arrangements extinguished any outstanding leave. On service pay, the Respondents rely on section 35(5) of the Employment Act, submitting that the Claimant was an NSSF contributor and therefore statutorily disqualified from service pay. On commissions, it is submitted that no contractual basis or documentary evidence exists to support the claim, and therefore the claim fails under Section 107 of the Evidence Act.

16. With respect to the counterclaim the Respondents maintain that the sum of Kshs. 312,500/- paid as gratuity was made in error, as the Claimant was an NSSF contributor and thus not entitled to service pay under section 35(6)(d) of the Employment Act. They urge the Court to order its refund to avoid unjust enrichment. Consequently, they urge the Court to dismiss the Claimant's suit with costs and allow the Counterclaim.

## Disposition

17. The case herein was premised on the alleged constructive dismissal by the Respondents. The ingredients for constructive dismissal were enunciated very elaborately by my brother Rika J. in the case of **Ligaga v Cocacola East and Central Africa Limited (Cause 611 (N) of 2009) [2011] KEIC 36 (KLR) (31 May 2011) (Award)**. In the decision, it was held that:

*The issue was whether she had reason to resign, whether she was justified in resigning and whether the events leading to that resignation were of the respondent's making. The actions of the respondent need not have been coercive, threatening or in the nature of duress. The respondent in this dispute appears to us, to have been an employer who created an intolerable work environment, fundamentally breached the contract of employment, through sheer professional incompetence, rather than through any deliberate acts of coercion, threats or duress. It is enough that the employer is shown to have made the contract of employment unworkable or severely damaged the employment relationship. This in our understanding is*

*what constitutes constructive dismissal. Indeed, the concept demands that the employee initiates the termination and does so within a reasonable time after the trigger.*

18. The employee must be shown to have resigned due to intolerable working conditions created by the employer. In this case there was no such thing. The Claimant resigned after he was asked to give an account for money he had acquired on activities he was supervising at the Club. He was not placed in the same category as Maria Ligaga in the Coca Cola case cited above. The elements of intolerable work environment, fundamental breach of the contract of employment, whether deliberately or through sheer professional incompetence as was the case in the Maria Ligaga case are absent here. The Court therefore returns there was no evidence of unfair termination meted out. In fact, during the pendency of the relationship the Claimant enjoyed certain perks that were incompatible with hostile environment. The suit by the Claimant is therefore for dismissal with no order as to costs.

19. The Counter claim sought to recover money that was paid to the Claimant as final or terminal dues. The sum of Kshs. 312,500/- paid as service pay to the Claimant is said to have been made in error. There was no error discerned. The Respondents paid the sum knowing full well they had been paying the Claimant's NSSF dues. The sum is not an entitlement but an employer can make such payment as the Respondents did without duress in acknowledgement of the long service of an employee. In fact, many CBA's recognise this as a benefit some employees enjoy on termination of their services. There was a lot of time between the parties to have led the Respondents to reconsider the payment and it seems the sum was sought to spite the Claimant as he had sued the Club and former officials. As such the Counter claim is equally dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Kisumu this 27<sup>th</sup> day of April**

**2026**

**Nzioki wa Makau, MCI Arb.  
JUDGE**