

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

ELRC CASE NO. E002 OF 2025

CONSOLATA KATUA. ....CLAIMANT

-VERSUS-

KENYA UNION OF POST PRIMARY

EDUCATION TEACHERS (KUPPET).....1ST RESPONDENT

SECRETARY GENERAL (KUPPET).....2ND RESPONDENT

CORAM

Before Justice Jemimah Keli

C/A Otieno

JUDGMENT

1. The claimant was employed as a personal secretary to the 2<sup>nd</sup> respondent. Aggrieved by the sanction of suspension following a contested disciplinary process, resigned from the employment of the respondents and filed a claim of constructive dismissal vide a memorandum of claim dated 9<sup>th</sup> February 2025 seeking for the following reliefs-
  - a. A declaration that the termination of the Claimant was constructive dismissal.  
Salary in lieu ksh. 393,000 1 month Ksh 393,000/-

Unfair dismissal Ksh 393,000 12 months Ksh 4,716.000/=

Payment of Ksh. 45,884,000 as compensation for

b. Unfair Disciplinary Process, Unlawful Suspension, and Loss of Earnings.

Loss of 6 months' suspension period salary:  $393,000 \times 6 =$  Ksh 2,358,000/-

For unfair disciplinary processes:  $393,000 \times 12$  Ksh 4,716,000/-

c) Gender Discrimination - Ksh 3,000,000/-

d) Privacy Violations - Ksh 5,000,000/-

e) Violation of Fair Labor Practices Ksh  $393,000 \times 12$ - Ksh 4,716,000/-

f) Negligence and Lack of Due Process in Investigation - Ksh 3,000,000/-

g) Breach of Employment Contract and Employee Handbook Ksh 393,000 12-Ksh 4,716,000/-

h) Retaliatory Actions - Ksh3,000,000/-

i) Violation of the Right to Dignity (Article 28) - Ksh 3,000,000/-

j) Lack of Transparency in Investigative Process - Ksh 393,000 12-Ksh 4,716,000

Payment of All Outstanding and Due Financial Entitlements as follows:

k) Leave allowance 2009-2010 (Ksh 35,000\*3 years) + 2011-2013 (Ksh 45000\*3)+2014-2016 (80,000\*2)+2016-2017 (113000\*1)+ 2017-2018 (113000\*1)+2019-2020 (233000\*1)+2020-2021 (Ksh 270000\*1)+ 2021-2022 (Ksh 290,000\*1) + 2022-2023 (308000\*1)+2023-to date (393,000\*2)Total Ksh 2,513,000

1) Pension Contribution and arrears 2009-2016

m) Remittance of all pending SHIF/SHA and NSSF contributions.

n) Unpaid overtime allowance of Ksh. 30,000 for the year 2024.

o) Remittance of all salary deductions to Mwalimu National Sacco, including accrued interests and penalties to date Ksh 843,960/-

p) A formal public apology to be issued to the Claimant and circulated to all union members, media outlets, and social media platforms where defamatory statements were made.

q) Costs of this suit.

r) Any other relief that this Honourable Court may deem fit to grant.

2. The claimant in support of the claim filed her witness statement together with a list of documents, all dated 9th February 2025, together with the bundle of documents (documents at pages 44 of 115 of the trial bundle).
3. The claim was opposed by the respondents who entered appearance through the lawfirm of J K Mungania & Company Advocates and filed witness statement dated 7<sup>th</sup> November 2025 of Moses Nthurima, the Deputy Secretary General of the 1<sup>st</sup> respondent, and denied the claim, together with list of documents and the bundle of documents (documents at pages 5-37 of the respondents' trial bundle).

#### Hearing

4. The claimants' case was heard before me on the 20<sup>th</sup> January 2026, with the claimant appearing in person and testifying as the sole witness in her case. She adopted her witness statement dated 9th February 2025 as her evidence in chief and produced her filed documents as exhibits C-1-32. The claimant was cross-examined by the advocate for the respondent , Mungania and thereafter she made concluding remarks.
5. The respondents' case was heard on an even date, where Moses Nthurima, who testified on oath and adopted his witness statement as his evidence in chief, produced the respondents' documents as R-exhibits 1-9.

#### DETERMINATION

6. The parties filed written submissions on conclusion of the hearing.

7. The claimant identified the following issues for determination –
  - a) Whether the suspension of the Claimant was lawful and procedurally fair;
  - b) Whether the Respondents violated the Claimant’s constitutional rights, including: - fair labour practices (Article 41), - fair administrative action (Article 47),
  - c) Whether the Claimant was constructively dismissed; and
  - d) What remedies should be issue.
  
8. Conversely, the respondent identified the following issues in the suit-
  - i. Whether the suspension and disciplinary process were lawful and procedural? a. Whether the suspension was lawful? b. Whether the disciplinary process was lawful and procedural?
  - ii. Whether the Claimant was constructively dismissed?
  - iii. Whether the Claimant allegations on rights violations are merited?
  
9. The court adopted the issues raised by the parties summarized as follows-
  - i. Whether the suspension and disciplinary process were lawful and procedural?
    - a. Whether the suspension was lawful? b. Whether the disciplinary process was lawful and procedural?
  - ii. Whether the Claimant was constructively dismissed?

iii. Whether the Claimant allegations on rights violations are merited?

iv. Remedies

Whether the suspension and disciplinary process were lawful and procedural ?

On whether the suspension was fair

10. The claimant submitted that there was non-compliance by the respondents with procedural fairness before the suspension as stated in sections 41 and 43 of the Employment Act. Specifically: a) No show-cause letter was issued before suspension; b) No pre-suspension hearing took place; c) Suspension was stated as being “to allow investigations,” proving no evidence existed at the time. During cross-examination, the Respondents’ witness was unable to answer whether a show-cause letter or a hearing preceded the suspension, remained silent until prompted by the Court to proceed, and identified no documentary evidence of compliance. The claimant submitted that silence in cross-examination, without contrary documentation, supports the Claimant’s account. The claimant relies on the decision in *Judicial Service Commission v Gladys Boss Shollei* [2014] eKLR, submitted that the authority cited the principle of procedural fairness in suspension, not for its public office context. That effect that suspension must follow fair procedure. The claimant further submitted that the suspension violated Sections 41, 43, 45, and Articles 41 and 47 of the Constitution.

11. Conversely, on the suspension, the respondent submitted In the case of Luka Korir v Moi Teaching and Referral Hospital [2022] eKLR, cited with approval in the case of Biwott & another v County Government of Uasin Gishu [2025] KEELRC 1658 (KLR) the Honourable

Court stated as follows, "... the argument by the Claimants that they ought to that they ought to have been heard before being suspended is not anchored on the law. Under the Employment Act, there is no requirement for a hearing prior to suspension being effected by an employer... the Court held as follows regarding the issue:- "... A suspension from employment is not a termination. It is in essence a temporary separation from day-to-day duties of an employee suspected of committing a disciplinary offence...To require an employer to hear an employee in such a preliminary stage before handing the suspension does not sound practical." It therefore follows that the Respondent did not have an obligation to subject the Claimants to a hearing as contemplated under section 41 of the Employment Act, prior to suspending him." The respondent submitted that the suspension of the Claimant communicated through the letter dated 23rd September, 2024, was undertaken as an administrative suspension to allow investigations into the matter. Accordingly, as an administrative suspension is not prohibited by any law, nor is it necessary to hear the employee prior to suspension, the subject suspension was not illegal. The only requirements for an administrative suspension is that the employer must have clear reasons and to state them, and that the, suspension must be time-bound.it is the position that the reasons for the suspension were well set out in the letter dated 23rd September, 2024, being insubordination, divulging union information and abuse of office to solicit bribes. Further, the suspension was time-bound to two months with the specific reporting date communicated as 22nd November, 2024. In addition, the reason for suspension was to facilitate the union to investigate the matters, which was similarly communicated through the letter. At all times, the suspension letter did not condemn the Claimant, who was considered innocent until proven guilty and whose expectation of a hearing before a tribunal

later crystallized. The evidence before this Honourable Court is that she was summoned to a hearing vide the show-cause letter dated 14th November, 2024.

Decision on challenge to fairness of the suspension

12. The claimant was issued with a suspension letter dated 23<sup>rd</sup> September 2024 by the 2<sup>nd</sup> respondent. The content of the body of the letter was as follows- '*Dear Ms Katua, RE: SUSPENSION FROM DUTY*

*It has come to the attention of my office that you have been using your office in performing activities against the union by engaging in the following:*

- 1. Insubordination of the office of the Secretary General.*
- 2. Divulging union information obtained in the course of your duty to unauthorised persons without express permission of the Secretary General.*
- 3. Using your official position to solicit and accept bribes.*

*These Actions amount to gross violation of your Employment contract and the Union's Employee Policy Manual.*

*To enable the union to properly investigate these matters, you are hereby suspended from duty for a period of two (2) months with immediate effect with pay. You will report back on 22nd November 2024 at 8.00 am.*

*During this suspension period,*

- 1. You are required to keep away from the office.*

2. *You should be reachable on phone and your personal email.*
3. *You should not share the above matters with any union member or official.*
4. *You are required to maintain the confidentiality of union information under your care.*

*You are required to hand over your duties and all the union properties in your possession including laptops, hard disks, emails and passwords to the Union Deputy Secretary General.*

*Yours faithfully,*

*Akelo Misoni, SECRETARY GENERAL*” The court confirmed there was no prior show cause letter and that the basis for the suspension was stated, the purpose of the suspension was to initiate investigations and the same was time-bound. It is true that the Employment Act has not legislated the conditions for suspension, and indeed, section 41 of the Employment Act relates to termination. Suspension is not termination. I read the cited decisions. The Supreme Court has now pronounced itself on the suspension issue. The decision is binding on this court. The Court, as the trial court, had held that there was no compliance with fairness before suspension and equated the same as *fait accompli*, the employment. The Court of Appeal found the trial court’s decision was erroneous. Before the Supreme Court, the court upheld the decision of the Court of Appeal in PETITION NO. E034 OF 2024 —BETWEEN HAMISI BWENI DZILA-AND- KWALE COUNTY ASSEMBLY SERVICE BOARD AND OTHERS (JUDGMENT OF 25<sup>TH</sup> MAY 2025) as follows- ‘*Asked differently, was the appellant entitled to be heard before his suspension? We find in the negative.*

*[60] Suspension is a preliminary step that may or may not end up with removal. It, therefore, does not necessitate a full disciplinary hearing entailing presentation of evidence, and the*

*hearing of the clerk on the allegations. The main purpose of a suspension is merely to pave the way for investigations. Upon conclusion of the inquiry, as we have already noted, there can be two outcomes: the allegations may be found to be without basis and at that point the clerk may be exonerated; or if sufficient evidence disclosing facts constituting grounds for removal under Section 22, is presented, the clerk may be removed.*

*[61] By issuing the appellant with an undated notice to show cause, the Board was at that stage satisfied that there were, prima facie, grounds to remove the appellant from office. At this stage, the provisions of Section 23 on the removal of the appellant were inapplicable. Section 23(1)(a) only set in when the undated notice to show cause informed the appellant that the investigations were complete, communicating the charges against him, and invited him to respond to the charges.’’ Applying the foregoing binding decision of the Supreme Court, I hold that the claimant was not entitled to be heard before the issuance of the impugned suspension letter dated 23<sup>rd</sup> September 2024. The suspension is held to have been legal and within the employer's management prerogative the exercise of which was reasonably justified.*

#### Whether the disciplinary process was fair

13. The claimant submitted as follows-
  
14. Failure to disclose evidence -The Respondents withheld material required for a fair hearing contrary to the audi alteram partem rule. The Claimant repeatedly requested disclosure of evidence (pages 51–53, 56–58, 60 of the Claimant's bundle), but received none. The forensic report was sent less than 24 hours before the hearing, preventing meaningful preparation,

and the author (one Francis Oluoch) did not testify, nor were any affidavits or credentials filed to prove his qualification. After the determination, the Claimant: Appealed on 30 December 2024 requesting detailed findings and committee minutes (page 80 of the claimant bundle); and Requested forensic expert credentials on 9 January 2025 (page 81 of claimant bundle). No responses issued. This violates Section 41 (right to be heard), Section 43 (burden of proof), and Article 47 (fair administrative action).

15. Absence of decision-maker & adverse inference -The 2nd Respondent authored, The suspension letter, and The determination letter. He did not file a witness statement or testify. No affidavit explained his absence. Under Section 112 of the Evidence Act, adverse inference arises where material evidence within a party's control is not produced. Case authority: *BNK v Council of Legal Education* [2017] eKLR. The Court should draw adverse inference that: a) No valid reasons existed, and b) No fair process occurred.

16. Conversely, the respondent submitted as follows- it is our assertion that the disciplinary process and its consequent verdict were lawful and procedural. In *Walter Ogal Anuro V Teachers Service Commission* [2013] KEELRC 386 (KLR) the court stated as follows: "..... for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness." . In addressing the substantive element of the test of the disciplinary process, we invite the Honourable Court to consider the provisions of Section 47(5) of the Employment Act, which states as follows, "For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of

employment or wrongful dismissal shall rest on the employer." Similarly, we wish to call attention to the binding decision of the Court of Appeal in Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] KECA 300 (KLR), where the learned bench stated doth, "It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test... More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. that the justification for the subjecting the Claimant to the disciplinary process was weighty and passes the test set out in KRA v Reuwel Waithaka Gitahi & 2 others (supra). The charges as enunciated in the suspension letter dated 23rd September, 2024, are as follows: i. Insubordination of the office of the Secretary General ii. Divulging sensitive union information to unauthorized persons without express permission iii. Using her official position to solicit and accept bribes iv. To keep the aforementioned matters confidential and to refrain from divulging further information. In addition, the show-cause letter dated 14th November, 2024, gave further particulars of the charges and added the failure to keep the issues in the suspension letter confidential, alongside misuse of union property as further charges. Despite the applicable standard of proof, the 1st Respondent subjected the devices to a forensic examination by Francis Oluoch, FIMIS, who prepared a report on September, 25, 2024. The said examination returned evidence of unauthorized data transfer, absence of official communication tools,

legal and compliance risks, and the need for a forensic investigation by the Directorate of Criminal Investigations to eliminate all reasonable doubt. We invite the court to further note that the evidence of Francis Oluoch, an IT Consultant, was submitted during the disciplinary hearing and whose evidence established use of the union devices by unauthorized personnel, and likelihood of compromise of union data contrary to clause 11 of her contract. It is worth noting that the Claimant, during the disciplinary hearing held on 10th December, 2024, admitted to improperly filing documents leading to loss of union documents, sharing the contents of her suspension letter with third parties and having failed to timeously act on instructions by the 2nd Respondent, tantamount to insubordination. The Claimant's admission that she refused to follow the 2nd Respondent's orders amounts to a sufficient ground for summary dismissal under section 44 (4) (c) and (e) of the Employment Act, which states the following as sufficient grounds for dismissal as follows: "(c)an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly; (e)an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer" We urge this Honourable Court to consider the facts and to find that the loss of union documents and insubordination as admitted, coupled with the evidence from the preliminary forensic report are actions that breach the faith inherent to the work relationship, and are fundamentally and directly inconsistent with the Claimant's obligations to the 1st and 2nd Respondents. We further urge the Honourable Court to find that as the same are grounds for summary dismissal, the punitive suspension meted on the Claimant was justified. In regard to the

second limb of the test, being the procedural aspect of the same, we rely on the Court of Appeal decision in *Postal Corporation of Kenya v Tanui* [2019] KECA 489 (KLR) as regards procedure which states as follows, "Four elements must thus be discernible for the procedure to pass muster: (i)an explanation of the grounds of termination in a language understood by the employee; (ii)the reason for which the employer is considering termination; (iii)entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; (iv)hearing and considering any representations made by the employee and the person chosen by the employee." In the first instance, the grounds of the disciplinary action were set out in two instances, both in English. The letter dated 23rd September, 2024, suspending the Claimant, as well as the summon to the hearing dated 14th November, 2024, were set out in English, a language in which the Claimant is well versed. We submit that the first condition under *Postal Corporation of Kenya v Tanui* (supra) was met. In the second instance, the two aforementioned letters all referenced the charges against the Claimant clearly. The Claimant received the above-referenced documents promptly. We submit that the second condition under *Postal Corporation of Kenya v Tanui* (supra) was met. In the third instance, the letter dated 14th November, 2024 to the Claimant expressly referenced the Claimant's right to representation during the disciplinary hearing. That right is communicated as the very last sentence of the letter prior to signing off. The venue and time were duly communicated. We submit that the third condition under *Postal Corporation of Kenya v Tanui* (supra) was met. In response to her letter dated 15th November, 2024, requesting that the hearing be postponed to enable her prepare her defence, the 1st Respondent through a letter dated 18th November, 2024, postponed the hearing to 10th December, 2024. This was appreciated in

the Claimant's letter dated 20th November, 2024. The Claimant put in a response dated 23rd September, 2024, in response to the suspension letter, and a further response dated 15th November, 2024. made further representations on the matter in a letter dated 9th September, 2024, wherein she referenced the forensic report of Francis Oluoch, showing that she had access to all the relevant evidence in the matter. A report of the Disciplinary Committee was compiled dated 10th December, 2024. That report expressly mentioned both the oral and written submissions of the Claimant. The conclusion of the report was that the Claimant be suspended for six months on half pay in accordance clause of 13.1.17 of the Employee Handbook. We submit that the fourth condition under *Postal Corporation of Kenya v Tanui* (supra) was met. On response of the failure to call the 2<sup>nd</sup> respondent as a witness the respondent relied on the decision in *Opuka v Judicial Service Commission* [2024] KEELRC 13344 (KLR) wherein the Court held "Even though in her Petition she says the respondent did not invite the complainant or the officer from Ombudsman office as witnesses however, in disciplinary proceedings it is not necessary to always call witnesses. In the case of *Judicial Service Commission -v- Mbalu Mutava & another* (2015) eKLR the court held: "All these cases including *Nancy Makhoka Baraza* (Supra) case show that an investigation is not a trial and that cross-examination of witnesses, if called is a rare occurrence."

#### Decision on fairness of the disciplinary hearing

17. The court on perusal of the documents by the parties found that the process under section 41 of the Employment Act was complied in that the claimant was issued with notice of charges and informed of right to representative at the hearing vide letter dated 14<sup>th</sup> November 2024 which was also the invitation to the hearing. The court noted that additional issues were

raised in the letter of invitation to hearing. The claimant responded and in letter dated 20<sup>th</sup> November 2024 raised the failure to be served with the evidence relied on (page 60 of Claimant's bundle). The claimant in her response dated 9<sup>th</sup> December 2024 to the show cause stated she was only issued with the report the previous day, meaning 8<sup>th</sup> December 2024 when the hearing was on the 10<sup>th</sup> December 2024. The claimant also raised the issue of the authenticity of the report, stating it was not signed by a certified individual or organization. It was true the report was not signed. The claimant was heard on the 10<sup>th</sup> December 2024 and the proceedings were produced by the respondent (page 12-18 of the response) The author of the investigation report one Francis Oluoch produced the report at the disciplinary and the claimant was granted opportunity to cross-examine him where the claimant told the committee the report was not true and that Francis had no capacity to prepare the report and had not produced his credentials. Oluoch stated his report was authoritative. During the disciplinary hearing as well as in response to the show cause the court found the claimant admitted having failed to heed instructions of the union Chairman to label a letter as fake which alleged the Secretary General had resigned and circulate it only to do it 6 hours later, and to having failed to file important union documents even after being asked by the Secretary General.

18. The respondents made a decision of the disciplinary hearing and stated the claimant was guilty of insubordination of the office of the Secretary General and misuse of union properties under her care. (page 79 of the claimant's documents)The sanction was suspension with half pay, effective 10th December 2024, for 6 months.

19. The claimant aggrieved by the decision filed an appeal on the sentence and further requested a detailed report of the findings of the disciplinary committee. There was no response. During the hearing, the witness for the respondent confirmed that there was no document before the court on the professional qualifications of the author of the forensic report, Oluoch. The witness further confirmed the decision did not have reasons on the findings. That the concerns on the report were raised before the hearing and were not addressed in the decision. The author of the decision, the 2nd respondent, was not a witness. The witness told the court he was the acting Secretary General during the disciplinary hearing. The witness admitted the claimant raised an appeal dated 30th December 2024 and asked for the report. The witness was silent when asked about the appeal and maintained they had reached a verdict. The court concluded there was no response to the appeal. The court from the foregoing was satisfied that the reason of insubordination was proved as the claimant admitted to having failed to heed to the Chairman's direction on immediate release of letter of disclaimer as fake of a letter in circulation alleging the Secretary General had resigned only to do it 6 hours later to the detriment of the reputation of the respondents, and in failing to file important union documents which was within her mandate. The court agreed with the respondent that it met the test of proving insubordination and upheld decision of the Court of Appeal in Kenya Revenue Authority v Reuwel Waitaha Gitahi & 2 others [2019] KECA 300 (KLR), where the learned bench stated doth, "It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the

employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test.' The court finds that respondents proved on balance of probability that the claimant was guilty of insubordination which is a valid ground for summary dismissal under section 44(4)-'c) *an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;* (e) *an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;*' The employer need not prove all grounds under show cause to justify a termination. The employer having proved a reason of insubordination, which the claimant admitted, met the test in section 43 of the Employment Act.

20. On procedural fairness, the court found that the failure to provide the claimant with the investigation report at time of issuance of the show cause letter which stated the investigation had been done and thereafter even after several requests by the claimant, only to issue the same on 8<sup>th</sup> December when the hearing was on 10<sup>th</sup> December 2024 breached the right of the employee to fair hearing by denying her ample opportunity to prepare for defence. The delay is held to have been deliberate. The failure to respond to the appeal was a further unfairness. The foregoing tainted the procedural fairness of the disciplinary process.

Whether there was constructive dismissal

21. The claimant, upon conclusion of the disciplinary process and sanction of suspension for 6 months, and after a non-responsive appeal tendered resignation from employment. She alleged constructive dismissal. The claimant submitted on the test of constrictive dismissal and relied on the classic case in Coca-Cola East & Central Africa v Ligaga [2015] eKLR and stated the test is: 1. Employer's conduct must be intolerable; 2. Intolerability is assessed objectively; 3. Resignation must be caused by the employer's conduct. Application to facts: (i) Intolerable Conduct: Suspension without cause or hearing, Withholding salary (pp. 36–37 Respondents' bundle),, No evidence disclosure, No response to appeal, No forensic credentials, Misuse of DCI process, Prolonged uncertainty. (ii) Objective Test: A reasonable employee cannot endure indefinite suspension, withheld salary, ignored appeals, and unanswered evidence requests. (iii) Causal Link: The Claimant did not resign immediately. She Appealed on 30 December 2024, and Sought credentials on 9 January 2025, but received no response. Resignation on 27 January 2025 was a reasonable response. All three limbs are satisfied.

22. The respondent on the issue submitted -The burden of proof in claims for constructive dismissal is on the employee. Commenting on this, the court in Susan Waitherero Rukungu v Boniface Kamau & another [2018] eKLR expressed itself as follows: - "Whereas in cases of termination under Section 43 of the Employment Act, the employer has a duty to show the termination was fair, in cases of constructive dismissal, the burden of proof shifts to the employee to show that the situation was intolerable and that he had no choice but to leave." In Coca Cola East & Central Africa Limited V Maria Kagai Ligaga [2015] KECA 394 (KLR) the Court of Appeal lay down the principles of constructive dismissal as follows: a.

What are the fundamental or essential terms of the contract of employment? b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer? c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. d. An objective test is to be applied in evaluating the employer's conduct. e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved. f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination. g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach. h. The burden to prove repudiatory breach or constructive dismissal is on the employee. i. Facts giving rise to repudiatory breach or constructive dismissal are varied. From the definition of constructive dismissal in the Coca Cola case (supra), the employee must provide evidence that establishes either or both of the following on a balance of probabilities: - a. That the employer has subjected him to conditions that are so unreasonable as to force him into giving up on the engagement. b. That the employer has engaged in conduct which in effect constitutes a repudiation of the contract of service between them. Disciplinary control, when exercised procedurally as in the instant case, cannot be construed as hostility. Accordingly, we refer to the case of Wanjala v Majid Al-Futaim Limited [2024] KEELRC 780 (KLR) where the learned judge stated as follows, "The Court does not see how an Employer, exercising disciplinary control over an Employee, can be said to have created a hostile work environment, and

constructively dismissed an Employee. It would completely disable the managerial prerogative, if letters of suspension, notice to show cause, and invitation to disciplinary hearing, are deemed as hostile workplace actions by an Employer, warranting an affected Employee to resign and claim constructive dismissal. The managerial prerogative of Employers, to have disciplinary control over their Employees, must be protected. The Court can only intervene where the prerogative is exercised unreasonably, unfairly, contrary to the law and contract to which parties are subject." It is our assertion that the Claimant has failed to discharge that burden of proof. The Claimant's basis for her voluntary resignation was alleged stoppage of payments, which would amount to a repudiatory breach. In direct contradiction of the Claimant's position, the 2nd Respondent placed before this Honourable Court evidence that the Claimant was duly paid, being her pay slips for the months of September 2024, through February, 2025. In further support of our contention, we restate the contents of paragraph 23 of the 2nd Respondent's Replying Affidavit dated 20th March, 2025. In opposition to her claim of non-payment, isolation, denial of information and defamation, we invite this Honourable Court to find that all screenshots adduced by the Claimant are inadmissible for not being properly certified under section 106B of the Evidence Act. Accordingly, they cannot be admitted as evidence. Moreover, the screenshots adduced by the Claimant as evidence that her loan arrears were not being settled and that her statutory deductions were not being remitted are also inadmissible in the absence of the certificate of electronic evidence under section 106B of the Evidence Act. The binding judgment of the Court of Appeal in *John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others* [2018] KECA 439 (KLR) obliges the Honourable Court to dismiss electronic evidence in the absence of a certificate. The reasoning for the same was

expressed as follows, "It is at this juncture that the provisions of section 106B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do. is the settled position that any electronic record must be accompanied with a certificate. However, the Claimant, in adducing WhatsApp screenshots, screenshots of alleged loan balance statements from mobile applications and screenshots of balances of statutory deductions fails to meet the requisite standard of evidence. 75. Your Ladyship, we note that a document allegedly from Mwalimu SACCO at page 98 of the Claimant's trial bundle is tampered with and unsigned. It therefore fails to meet the requirements of section 68 of the Evidence Act. The said provision requires the maker of the document to attest to it. The alleged maker of the document is the Chief Executive Officer of Mwalimu National SACCO. The document is not executed by the CEO. The CEO did not testify before this Honourable Court. Accordingly, the document is not evidence for the purposes of Section 68 of the Evidence Act. The documents referenced in paragraphs 76 and 77 are inadmissible as evidence. The Claimant's allegations stand unsupported. As it stands, there is no evidence that the Claimant was isolated, w defamed, in loan or statutory arrears, or denied information. The case of Kilima v Centre for Rights Education and Awareness (supra), which had similar facts to the instant case. The Claimant in that case was in receipt of her decision after a disciplinary hearing, initiated the appeal process, but resigned shortly afterwards citing loss of faith in the process. The Honourable Court held that her resignation was voluntary. There are

several parallels with the instant case. The instant Claimant was in receipt of the decision dated 23rd December, 2024, suspending her and placing her on half pay. She appealed the decision on 30th December, 2024. However, she proceeded to resign on 27th January, 2025, citing mistrust of the disciplinary process. The totality of the above circumstances leads to an inference similar to that in *Kilima v Centre for Rights Education and Awareness* (supra). Consequently, we invite the Honourable to consider that the Claimant resigned voluntarily. The Claimant has failed to prove repudiatory breach under as required under *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga* (supra) and *Njuguna v Sybrin Kenya* (supra). Additionally, the Claimant does not discharge her burden of proof in support of any claim of unreasonable action by the Respondents. Accordingly, we invite the Honourable Court to find that in the instant circumstances, the Claimant resigned voluntarily.

23. Decision on whether there was prove of constructive dismissal – The court found the parties were in agreement on the applicable threshold for constructive dismissal and relied on the same authority in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga [2015] KECA 394 (KLR)* where the Court of Appeal lay down the principles of constructive dismissal as follows:-

*a. What are the fundamental or essential terms of the contract of employment?*

*b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*

*c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*

*d. An objective test is to be applied in evaluating the employer's conduct.*

*e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.*

*f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*

*g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*

*h. The burden to prove repudiatory breach or constructive dismissal is on the employee.*

*i. Facts giving rise to repudiatory breach or constructive dismissal are varied. I do uphold the authority to apply in the instant case.*

24. The court agreed with the respondent that the electronic documents filed by the claimant were not in compliance with section 106B of the Evidence Act for lack of electronic evidence to wit- *'(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following-*

*(a) identifying the electronic record containing the statement and describing the manner in which it was produced;*

*(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of **Evidence Cap 80 [2009]** showing that the electronic record was produced by a computer;*

*(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and*

*(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is*

*appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.’ The court upheld the decision in the Court of Appeal in John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others [2018] KECA 439 (KLR) to effect that non-compliance obliges the Honourable Court to dismiss electronic evidence in the absence of a certificate. The court of appeal reasoning for the same was expressed as follows, “It is at this juncture that the provisions of section 106B of the Evidence Act come into play as the section sets out the conditions to be fulfilled to have this evidence admissible since evidence shall only be admissible if a certificate is presented identifying the electronic record and a description of the manner in which the electronic evidence was produced, together with any particulars of any device involved in the production of that document, which the appellant did not do..”*

25. The claimant at the hearing was emphatic that she did not receive any salary for the months of December 2024, January 2025 and February 2025. The respondent stated it was because it was zero salary following deductions. The respondent produced the payslips up to January 2025. The claimant was instructed to proceed on leave on half pay on the 23rd September 2024. The payslip produced before the court for October 2024 indicated full salary, yet the respondents’s witness stated the claimant was on half pay. The claimant also received a salary during the period of suspension before the decision. The court was left with questions as to whether the reasons for the zero salary in December and January were due to the conclusion of disciplinary proceedings. The deduction of all salary leading to Zero payment to the claimant crippled the claimant financially and affected her dignity as an employee.

How can deductions which had been there lead to zero salary all of a sudden, on conclusion of the disciplinary process? This was obviously an unfair labour practice and meant to frustrate the claimant, as she was paid some money previously for the previous months while on suspension. The claimant filed appeal on 30<sup>th</sup> December 2024. She resigned on 27<sup>th</sup> January 2024. The respondent relied on the decision in Kilima v Centre for Rights Education and Awareness [2024] KEELRC 614 (KLR) wherein the court stated as follows, *"It is an accepted practice that sometimes, an employer may ask an employee to step aside to facilitate investigations into alleged misconduct against him (the employee). Unless the employee is able to demonstrate that the decision was driven by spite and ill will for him, the court has no business upstaging it. To do otherwise would be to interfere with the employer's prerogative to manage the workplace... In any event, there is evidence that when the investigation results were issued, the Claimant asked for a copy of the report and it was issued to her. She appealed the decision to report back to work because she wanted to challenge the investigation results and the request was granted. Instead of pursuing the appeal, she opted to resign. The Claimant now asserts that she resigned because she had lost faith in the process. She asserts that the Respondent was hell bent on subjecting her to a hostile work environment. The Claimant must appreciate that she was still in the Respondent's employment at the time that investigations against her were completed. Therefore, when the Respondent lifted her suspension from duty, she was duty bound to resume her work and address the issues that she had whilst on duty. The Respondent's decision to require the Claimant to resume duty before her appeal was heard cannot, of itself, be said to have been intended to subject her to a hostile work environment. Therefore, her decision to resign because she had been asked to resume duty whilst her appeal was*

*pending cannot be termed as involuntary. It was voluntary action by her.’* The respondent countered this decision by stating that she did not resign immediately. That she appealed on 30 December 2024, and sought credentials of the author of the investigation report on 9 January 2025, but received no response. She contended her resignation on 27 January 2025 was a reasonable response. The court was persuaded to agree with the claimant that the Kilima decision did not apply to her as the witness of the respondent failed to explain the failure to respond to the appeal, and he reiterated they had made a verdict, which statement the court interpreted to mean they had no intention of responding to the appeal. The court, for the foregoing reasons of zero salary post the disciplinary decision and non-response to the appeal, agreed that the employer created uncondusive work environment, leading to the resignation. Why was the claimant’s salary reduced to zero for December 2024 and not the previous months she was on suspension ? What was she to eat , pay rent with and meet her normal basic needs? The employment no longer made sense. Deductions from salary ought not to exceed 2/3 for a good reason, one of which the court opines to prevent the financial embarrassment of the employee. The respondents by zero salary violated the dignity of the claimant. The deduction to Zero salary was in violation of the law on deduction of wages as stated in section 19(3) of the Employment Act to wit- *‘(3)Without prejudice to any right of recovery of any debt due, and notwithstanding the provisions of any other written law, the total amount of all deductions which under the provisions of subsection (1), may be made by an employer from the wages of his employee at any one time shall not exceed two thirds of such wages or such additional or other amount as may be prescribed by the Cabinet Secretary either generally or in relation to a specified employer or employee or class of employers or employees or any trade or industry.’* The respondents represent workers, thus

were very much aware of the law, and the court can only conclude the conduct to be a deliberate effort to frustrate the continued employment of the claimant . The respondents are guilty of illegality on the zero salary. Why did the employer not respond to her appeal? The court concluded the respondent deliberately frustrated the continued employment of the claimant by creating a very toxic work environment . The court found that the claimant had, on the balance of probabilities, proved constructive dismissal.

26. On whether there was violation of constitutional rights of the claimant- the claimant pleaded violation of gender discrimination but no evidence was placed before the court on the same. That is dismissed. There was privacy violation claim of which the court returned that the employer only investigated its own gadgets; thus, the issue of privacy violation does not arise. The issue of fair labour practice is covered under section 41 of the Employment Act, thus addressed under the fairness of the disciplinary process.

Whether the claimant is entitled to remedies sought.

27. The claimant pleaded several prayers. Taking into account the findings of the court of valid grounds of the sanction of suspension of 6 months, the finding of procedural unfairness and constructive dismissal, I find the claimant is entitled to remedies under section 49 of the Employment Act. The claimant had worked for 16 years without evidence of disciplinary issues. The court found proof of constructive dismissal on the basis of violations of the law on deductions and non-response to the appeal. The award is as per the payslips produced by the respondent, as the claimant did not dispute the same. The gross monthly salary in

the payroll was Kshs. 308,613. The claimant contributed to the sanction of suspension for insubordination and thus does not deserve the maximum compensation. The court awarded a remedy of 1 month's notice pay and 8 months' compensation for the constructive dismissal.

28. The claimant sought leave allowance. Leave allowance is not the same as a claim for leave days. The court finds that the said allowance was not justified and is disallowed.
  
29. The claim for overtime allowance was not disputed in response or at the hearing and is allowed as prayed for Kshs. 30,000 for year 2024.
  
30. On the remittances, the claimant was obviously on check off. The deduction to statutory bodies and to the pension is under the jurisdiction of bodies capable of pursuing the same. On the remittance to the Sacco, the claimant at the hearing had issues on the month of December 2024, January 2025 and February 2025 . At the outset, I state that the claimant having resigned on 27th January 2025 with immediate effect, was not entitled to salary for February 2025 as resignation is unilateral and need not be accepted. The acceptance letter of 5th February 2025 was of no legal consequence. The court finds that since the deductions were made, the respondents have a duty to remit the deducted monies to the relevant bodies, and they are ordered to do so in the event they have not.

### Conclusion

31. The court held that the claimant was constructively dismissed from employment. The disciplinary process was unfair. The court held that the suspension prior to disciplinary action was lawful and that there was a valid reason for it. The court entered judgment for the claimant against the respondents for lack of procedural fairness and constructive dismissal as follows-

- a. Notice pay for 1 month's salary Kshs. 308,613
- b. Compensation for contract dismissal equivalent of 8 months' salary (Kshs 308,613 x 8) Kshs.2,468,904.
- c. Overtime pay Kshs. 30,000.
- d. The above amount awarded(total Kshs. 2,807,517) to attract interest from judgment date if not settled within 30 days of the judgment.
- e. Costs of the suit.

32. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8<sup>TH</sup> DAY OF MAY, 2026.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

claimant: in person

Respondent: Mwenda h/b Mungania