Watuku v Industrial & Commercial Development Corporation (Civil Appeal E206 of 2022) [2025] KECA 768 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 768 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E206 OF 2022

W KARANJA, F TUIYOTT & P NYAMWEYA, JJA

MAY 9, 2025

BETWEEN

ANTHONY KIBANDI WATUKU .... APPELLANT

AND

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION .... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment & Labour Relations Court (Nduma Nderi, J.) dated 20th December 2021 in ELRC Petition No. 128 of 2018)

JUDGMENT

1. The case by Anthony Kibandi Watuku (Watuku or the appellant), as set out in a lengthy constitutional petition (1,422 paragraphs), filed in the Employment and Labour Relations Court (ELRC) at Nairobi in ELRC Petition No. 128 of 2018, was that his resignation from the employment of Industrial and Commercial Development Corporation (ICDC, the Corporation or the respondent) on 7th May, 2017 was a constructive dismissal following acts of discrimination, embarrassment and humiliation in his 11 years of employment there.

2. Before that court Watuku sought the following orders:

   a. A Declaration that the Petitioner's fundamental rights under Articles 26, 28, 40, 41, 43 and 47 of *the Constitution* of Kenya 2010 have been and continue to be infringed by the Respondent;

   b. Special damages of a cumulative sum of Kshs.10,003,929.90 as itemised at paragraph 125 of the Petition;

   c. General damages for gross violation of fundamental rights;

   d. Interest on (b) at court rates from the date of filing until payment in full;

e. Interest on (c) at court rates from the date of judgment until payment in full;

f. Costs for the suit and interest thereon at court rate;

g. Any other appropriate relief that the Honourable Court shall deem fit to grant to protect the Petitioner's fundamental rights.

3. Watuku contended that he had never been promoted for the11 years despite meeting all requirements for promotion. He gives an example that when his colleagues Zephania Rono and Stephen Njagi were promoted from grade 6 to grade 5 he received a letter titled "career progression" dated 26th April 2012. This, he asserts was not a promotion. Upon writing a protest letter of 30th April, 2012, on the failure to promote him, the management of ICDC resorted to threats and intimidation, even threatening to terminate his services. He stated that even after being denied promotion, his colleague in ICT, one Benjamin Otieno, who did not meet all requirements was promoted. He was frustrated, humiliated, demoralised and demotivated by promotions of persons who were junior to him.

4. Sometime in the year 2008, the Corporation was undergoing review of grading and salary structure but Watuku was singled out and did not get a salary increment. He complained that even employees facing disciplinary action and on interdiction had salary raises and upward reviews.

5. Giving another example of humiliation, in May 2017, the corporation advertised his job as a systems administrator while he was still occupying that position. Watuku contends that it was the intention of the Human Resource and Administration Management (HRAM) that he be demoted to a Help Desk Support, a junior position.

6. In his petition, Watuku also gave several instances of bias in staff appraisals. In 2015/2016, Watuku set his target to be 100%. This would give him a rating of "very good". By mid-year his rating was at 65% but he was still working at meeting his targets and was on track. At the end of the year, Watuku reviewed himself to a rating of 88%. But as a work practice requirement he, together with his supervisor, reviewed the appraisal whereupon it was downward revised to 84% which warranted a "very good" score and a pay increase of up to 16.4%.

7. After the appraisal forms were forwarded to the HRAM, Watuku received back his appraisal form with handwritten comments with a cover letter titled "Performance Improvement Plan" signed by the HRAM with a revised score of 64%, yet she did not have authority to review the appraiser's score on her own. The mandate being reserved for the Staff Regulatory Committee (Moderation Committee) which never reduced Watuku's rating. After Watuku took issue with the 64% rating, the HRAM asked him to undertake a fresh self-appraisal providing evidence for each and every target. A fresh self-appraisal was undertaken with a score of 88% providing evidence as directed by HRAM. After a meeting with his supervisor a rating of 84% was agreed and the form forwarded to HRAM on 2nd February 2017, who returned it with adverse comments despite the evidence.

8. After consultation with the Chairman of the Moderation Committee, the score was reduced from 84% to 72%. Thereafter, Watuku was placed on Performance Improvement Plan (P.I.P) before he had received any formal communication and further, was required to accept that he will undertake the PIP. He averred that this was not the work practice and was against the appraisal process guidelines as spelt out in HR policies and other communications from the department. Due to the downgrading of the rating, Watuku was prejudiced as his salary increment dropped from 16.4% to 12.4%.

9. We turn to another set of complaints. Watuku contends that the HRAM singled him out for warning letters on non-issues. He singled out the notice to show cause memos issued on 8th May 2009 and 12th

May 2009 and a warning letter of 13th May 2009. That the time intervals show that no investigations were carried out by HR and Administration Department before the show cause letter was issued.

10. Watuku sought to impeach a surcharge made against him for parking when he was no longer using the services having sold his vehicle registration KAK 330T, a fact known to ICDC. His other complaint was that he did not benefit from a new salary structure that was backdated to January 2017.

11. On another front, Watuku asserted that as a result of the long and dedicated service, he developed a weakened retina, diabetes mellitus type 2 and hypertension all attributable to lack of protective gear and proper environment of service. And that although he received a formal communication from the HRAM on 30th September 2018 on change of working hours, damage was already done to his health.

12. In his petition, Watuku cited violation of Article 41 of *the Constitution* on the right to fair labour practices; violation of Article 27 on protection against discrimination; violation of Article 48 read with Article 260 on the right to property; violation of Article 43 on protection of economic and social rights; violation of Article 47 on the right to fair administrative action; violation of Article 21 and 24 on the right to life and human dignity; and violation of national values and principles of public service.

13. Responding to the issues raised in the petition, ICDC through an affidavit sworn by Faith Nene 18th April, 2019, stated as follows. By a letter dated 17th December 2008, Watuku was informed of the restructuring of job grades which resulted in compression of established grades from 16 to 11. He was slotted in the new created Grade 6 but his basic salary increased to Kshs.88,000 and a house allowance entitlement of Kshs.13,000.

14. On the allegation of bias in promotion, ICDC contends that Watuku's eligibility for promotion was regulated by a document titled "Promotion Towards Excellence Policy and Career Progression/ Promotion Policy" which provided inter alia:

    i. The excellence of an employee performance in his or her present job in the Corporation or the absence of suitable replacement should not be an automatic reason or promotion.

    ii. Lengthy of service alone will not warrant justification for promotion, however lengthy of service may be considered together with performance.

    iii. Promotion will be carried out at the discretion of the Corporation and subject to availability of a vacancy, possession of the required academic and professional qualifications, competence and open competition of all deserving staff through interviews.

15. Emphasising that promotion was at the sole discretion of the Corporation, ICDC cited paragraph 3.7 of the Code of Staff Rules and Regulations. The Corporation argued that it, and not the court, was best suited to determine whether Watuku deserved promotion. It is contended that Watuku's request of 10th April 2012 for promotion was disapproved because of poor customer service, wanting general attitude and failure to take initiatives to advance his career. He was advised to liaise with his supervisor and develop a suitable improvement programme, advice he did not accept. In attempting to debunk the allegation of bias in promotion, the corporation cites the promotion of Watuku from Senior ICT Officer – Grade 6 to Principal ICT Officer – Grade 5 made effective from 1st January 2010.

16. Turning to staff appraisal it was contended by ICDC that it was conducted according to "Performance Management Policy" and not the "ICDC Reward and Sanction Framework" which Watuku reproduced as the performance management policy. ICDC gave a breakdown of Watuku's appraisal score and rewards during his employment. Regarding the vexed 2015/2016 appraisal, ICDC stated the self-appraisal by Watuku and revised by his supervisor, was found by the Management Moderation Committee to be misleading as it was based on activities which had yet to be completed and on the

Committee's recommendation for re- appraisal, the supervisor revised the score to 64%. Aggrieved, Watuku sought the intervention of Moderation Committee whereupon a fresh re-appraisal was done resulting in a score of 72%.

17. ICDC contended that the warning letter issued to Watuku was justified and that he admitted to using the wrong data to prepare a report, and that his negligent oversight led to several discrepancies to the embarrassment of the respondent.

18. Answering the complaint regarding car park charges, ICDC asserted that Watuku did not give notice to terminate the agreement for use of the allocated parking bay nor was use of the bay restricted only to a specific vehicle.

19. As to whether Watuku should have benefitted from the new salary structure that was effective from 1st January 2017, ICDC stated that the new scheme was approved on 27th June 2017 and its approval communicated through a circular dated 3rd July 2017. At the time of approval and implementation of the new salary structure, Watuku was no longer an employee of the corporation.

20. The corporation pleaded that it is committed to maintaining a safe and health working environment; that the petitioner never requested for protective gear nor did his duties require wearing of protective gear; and Watuku as a member of the Safety Health Committee of ICDC had been trained on safety and health at the workplace. The corporation denied being responsible for Watuku's ailments.

21. Regarding alleged violations of constitutional rights under Article 26, 28, 40, 41, 43 and 47, the corporation argued that the petitioner did not disclose any breach of those rights.

22. The hearing of the petition proceeded by way of affidavit evidence and submissions. In the impugned judgment, the trial court identified three issues for determination: -

    i. Whether the Court should strike out and expunge from the record the documents identified by the respondent in the application dated 31st May, 2021 for having been obtained irregularly and without authority of the respondent.

    ii. Whether the claim brought in this petitioner ought to have been commenced otherwise by way of a constitutional Petition.

    iii. Whether the Petitioner is entitled to the reliefs sought in the petition.

23. Regarding the first issue the court concluded:

> " In answer to issue no 1 above, it is my view that no basis has been laid in the response affidavit as to how the inclusion of the impugned evidence would prejudice the respondent company i.e. the harm to public interest that would be occasioned as a result of the inclusion. The court therefore declines the invitation to strike out and or expunge the documents."

24. Whilst the learned trial judge had little difficulty in finding that the claim by Watuku could be brought by way of a constitutional petition, the learned judge held that Watuku had failed in providing any proof of the alleged violations.

25. The submissions filed by counsel for Watuku before the trial court reveals that the true character of the dispute before that court, whilst disguised as a petition seeking enforcement of fundamental rights, was a typical employment and labour matter. Counsel submitted that:

> " The key and most fundamental/pertinent question for determination by this Hon. Court is -

(i) Was the Petitioner constructively dismissed by the respondent from his employment at the respondent?”

26. It is through that lens that we should view the lengthy memorandum of appeal whose 24 grounds can be condensed into two substantive grievances:

i. Did the learned Judge err in law and fact in failing to find that Watuku was constructively dismissed by ICDC from the employment?

ii. Did the learned Judge err in law and fact in failing to find that Watuku had not proved a myriad of claims which included; car parking arrears, back pay and pension, special duty allowance, new salary structure and salary increment in year 2015/2016, bonus payment, overtime pay, accrued leave days, and damage to health.

27. In his written submissions and amended written submissions, Watuku makes several and lengthy arguments to support his appeal. Those prolix and repetitive arguments defied the directions of this Court that submissions by the parties be limited to 12 pages. A party need not be wordy so as to make out a case. A second observation is that the submissions by Watuku were substantially a rehash of the evidence. So we abridge those submissions.

28. The appellant’s arguments are primarily based on his letter of appointment, the respondent's Code of Staff Rules and Regulations Revised August 2011 (CSRR), *the Constitution* of Kenya and the *Employment Act*.

29. In his first argument, he contends that while under employment with the respondent and until his resignation on 7th April 2017, he was a victim of poor working conditions leading to deterioration of his health. He is emphatic that he was in excellent health when he joined the respondent but developed serious medical conditions, including diabetes mellitus, hypertension, and weakened retina of the eyes while working for the respondent due to the unhealthy and poor working conditions. He claims that he was exposed to long working hours without break because his department was grossly understaffed. He further contends that he worked 9,312.08 hours of overtime over 11 years, averaging 3.26 hours extra each day, often leaving work at 9 p.m. He submits that other staff members who worked overtime were compensated with rest/off-duty days to protect their health, but he was not, leading to his health damage. He claims these conditions have turned him to a person living with Disability- Adjusted Life Years (DALYs) and is now handicapped and ineligible to work in a competitive environment. He cites the respondent's Health and Safety Policy 2007 (Section 14.1 of CSRR) and a policy against discrimination based on medical status (12.9 of CSRR).

30. In his second argument, he contends that the respondent refused to pay his final/terminal dues/ benefits as follows:

i. Unpaid payback (ex-gratia and employer pension) of Kshs.2,331,255.79.

ii. Unpaid salary when the respondent's grade was promoted to PC8A category, amounting to Kshs.300,375.

iii. Unpaid salary increments for FY2015/2016 of Kshs.270,072.00, based on an 84% appraisal score entitling him to a 16.5% increment.

iv. Unpaid salary increments for FY2016/2017 of Kshs. 162,084.00, based on a 60% mid-year appraisal score entitling him to an 8.5% increment.

v. Unpaid Bonus of Kshs. 244,575.00 for FY2015/2016, based on an 84% appraisal score entitling him to 1.5 times basic salary.

vi. Unpaid accrued annual leave days equivalent of Kshs.238,463.85, calculated based on Section 6.3 of the CSRR.

vii. Unpaid Special Duty Allowance of Kshs.74,400.00 for acting in a higher position, as per Section 4.1.1 of the CSRR.

viii. Unpaid Salary for May 2017 of Kshs.45,251.61 for the 7 days worked during his notice period, based on Section 3.2 of the CSRR.

ix. Unlawful surcharge on parking of Kshs.28,768.00.

x. Unrefunded deposit on allocation of parking slot of Kshs.2,400.00.

31. A third issue argued is on the respondent's demand for instant repayment of his house deposit loan balance of Kshs.908,335.18 upon his honorary exit. He argues that the respondent's amended policy (May 2014) required clearance within one year at prevailing commercial interest rates for honorary exits. He claims the instant demand was a discriminatory, a retaliatory act driven by vendetta, going against the corporation's own policy. He submits that this action prevented him from paying the balance within one year, leading to the balance increasing to Kshs.1,958,829.41 as of April 2024 due to unwarranted charges. He requests this Court to order the respondent to maintain the original balance of Kshs.908,335.18.

32. The fourth issue raised is that he was denied many promotion opportunities despite meeting the criteria in Section 3.7 of CSRR and the career progression/promotion policy. He cites instances where eligible colleagues were promoted while he was not, and even ineligible colleagues were promoted. He attributes this to discrimination, hatred, and witch-hunt, particularly by Mrs. Faith Nene, the HRAM. This led to his career stagnation, unlike many who joined after him and were promoted multiple times and became his seniors. He estimates lost gross earnings of at least Kshs.40,233.70 p.m. from 2008, totalling Kshs.4,345,239.60. He claims that he was arbitrarily demoted. Fifth, he reiterated that his Systems Administrator position was advertised by Mrs. Faith Nene while he was still occupying it, with the intention to demote him to a junior role. The position had never been vacant and that he was already covering the vacant Helpdesk Support role, contributing to his overtime.

33. On a sixth issue, he argues that he was singled out for a warning letter regarding an error, contrary to an audit report that recommended action against multiple staff and supervisors. He contends that this was discriminatory and based on Mrs. Faith Nene's personal grudge. He views the appraisal process as malicious, with his score deliberately lowered to force him into a Performance Improvement Program (PIP). He alleges double standards were applied in the appraisal process, where he was held to stricter accountability than a colleague, leading to his score being unfairly revised downwards without explanation. The seventh issue is that he was forced to resign due to the respondent's conduct, behaviour, and mannerism, describing his employment there as a "living HELL!" He claims costs for constructive dismissal of Kshs.5,000,000.

34. On the eighth issue, he claims that after naming Mrs. Faith Nene in his resignation letter, the respondent initiated a criminal case (MCCR/166/2019) against him, alleging he hacked their systems after leaving. He views this as retaliation, weaponizing state agencies, and a waste of public resources. He asserts that as Senior Systems Administrator for 11 years, he had authority to access systems, citing the respondent's 'Information Usage & Security Policy August 2010'. He alleges denial of exculpatory evidence and falsification of documents by Mrs. Faith Nene to incriminate him. He requests the

termination of the criminal case. Further, he accuses the respondent of producing incomplete or falsified documents in court, specifically mentioning the 'Information Usage & Security Policy August 2010' and minutes of Board and Staff General Purposes Committee meetings, claiming pages were inserted and are forgeries, contrary to Section 357(A) of the *Penal Code*.

35. He argues that the respondent's actions violated his fundamental rights under *the Constitution* including:

    i. Article 41: Right to fair labour practices, citing differential treatment, withheld pay, unfair decisions, and toxic working conditions leading to ill health.

    ii. Article 27: Protection against discrimination, citing denial of promotions, unfair appraisal, and failure to implement salary structures/increments. This is cited together with Section 5 of the *Employment Act*.

    iii. Article 40: Protection of property, citing unlawful deprivation of earned income and entitled interest, listing the various unpaid amounts as his property.

    iv. Article 43: Protection of economic and social security, citing failure to implement pay increments, refusal to settle dues, constructive dismissal, and unlawful surcharge.

    v. Article 47: Right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, citing unfair placement on PIP, malicious appraisal, demotion, and unlawful surcharge.

    vi. Article 26 & 28: Protection of life and human dignity, arguing that the deprivation of property and constructive dismissal, in the context of his handicap, have caused him misery and suffering.

36. He further contends that the respondent violated its duty to heed the national values (Article 10) and principles of public service (Article 232) of *the Constitution* and cites the case of George Bala v Attorney General [2017] KEHC 8350 (KLR) to support the significance and binding nature of Article 10 (National Values), stating that their violation can lead to decisions being struck down. He concludes by urging this court to consider the hardships he endured over the 11 years at the respondent's establishment which led to his resignation and current physical disability.

37. In response, the respondent began by objecting to the additional documents filed by the appellant on 19th December, 2023 that were not part of the evidence presented at the trial. It is contended that this constitutes new evidence and should not be admitted at the appeal stage. While Rule 29 of this Court's Rules (2010) (now Rule 31 2022 Rules) allows for additional evidence, the respondent asserts that the appellant has failed to meet the stringent conditions for its admission as set out in case law. These conditions include obtaining leave of the Court, ensuring no prejudice to the respondent, relevance, credibility, and the evidence not being intended to create a fresh case or to patch up weak points arising from failure at trial. The respondent cites Republic v Ali Babitu Kololo [2017] KECA 133 (KLR) and Mahamud v Mohamad & 3 others (Petition 7 & 9 of 2018 (Consolidated)) [2018] KESC 62 (KLR) in support of these principles and submits that the appellant's failure to meet the test requires the disregard of the additional documents. The respondent further submits that the appellant is attempting to introduce new issues in his written submissions that were not part of the original petition or evidence presented at trial. Specific examples cited include allegations of the respondent's Human Resource Manager falsifying minutes and interfering with the judgment writing process. The respondent cites Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR), which states that submissions cannot take the place of evidence. ICDC also argues that introducing new issues on appeal is contrary to the principle that parties are bound by their

pleadings and should not spring surprises or deny the other party an opportunity to respond. Cited are decisions in Ng'ang'a & another v Owiti & another (2008) 1 KLR (EP) 749 [1994] KEHC 133 (KLR), Mugenda v Itolondo & 4 others; President & 6 others (Interested Parties) (Civil Application 21 of 2015) [2016] KESC 16 (KLR), and Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2014] KEHC 6357 (KLR) to support the argument that the Court should not frame new issues or base decisions on matters not pleaded or proved.

38. Moving on to the substantive issues, learned counsel Mr. Mbeche at plenary highlighted three issues; whether the appellant was constructively dismissed; whether his rights were in any way violated; and whether he is entitled to the reliefs that he seeks. Counsel strongly disputes the appellant's claim of constructive dismissal and explained that constructive dismissal is a concept established through case law, and the burden of proof lies with the employee. He referenced the criteria for establishing constructive dismissal outlined in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR), which involves demonstrating a fundamental breach of contract by the employer that forces the employee to resign. Counsel argued that the appellant had not supported any frustration and voluntarily resigned by giving one month's notice and only came about to complain eight years after he received his first notice to show cause on an error he committed and admitted committing. Counsel contends that the appellant thus failed to terminate his employment within a reasonable time after the alleged conduct occurred. Furthermore, counsel submitted, the words expressed in the appellant's resignation letter, are inconsistent with someone who had been forced to terminate his contract involuntarily. The decision of Milton M Isanya v Aga Khan Hospital Kisumu [2017] KEELRC 571 (KLR) restates that the tone of a resignation letter can negate a claim of forced resignation. Counsel maintains that the appellant voluntarily resigned.

39. In responding to the several specific arguments made by the appellant, the respondent submits as follows. It is denied that Ms. Faith Nene unfairly reduced the appellant's performance score. The respondent states that Ms. Nene, in her affidavit, confirmed the score was assigned by the Moderation Committee, and the appellant's final moderated score was 72%, not 64% as claimed. The respondent further opposes the argument by the appellant linking his resignation to health issues like hypertension caused by working conditions and contends that the appellant's medical records proves that he suffered from hypertension since March 2008. It is argued that hypertension has various causes (age, genetics, diet, lifestyle) and the appellant cannot factually claim that it is the respondent who caused his condition. In response to the argument raised by the appellant about a warning letter issued in May 2009, the respondent reiterated that the appellant responded to a show cause letter regarding the issue and admitted to the error and, therefore, the respondent was justified in issuing a warning letter following this admission of wrongdoing. Similarly, it is argued that an event of 2009 is irrelevant to a resignation in 2017 or a constructive dismissal claim. The respondent further denies that the appellant was not promoted for 11 years and points this Court to the promotion of Watuku to the position of Principal ICT Officer Grade 5 on 21st December 2015, a position he held until he resigned. Citing E.D.K v K.U [2014] KEELRC 479 (KLR), it is asserted that promotion is within the employer's prerogative. Referring to section 5(4)(b) of the *Employment Act*, the respondent similarly argues the appellant has not provided specific particulars of discrimination beyond general claims.

40. Opposing other specific reliefs sought by the appellant, the respondent argues that general damages for violation of rights are not typically awarded in wrongful termination cases in the Employment & Labour Relations Court and cites the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019] KECA 65 (KLR) to support this position. In addition, the respondent contends that special damages must be specifically pleaded and proven as was held in John Njenga vs Bata Shoe Company Limited [2001] KEHC 572 (KLR) and Kenya Methodist University v Kaungania & another (Civil Appeal 61 of 2017) [2022] KECA 90 (KLR) ,which the appellant has failed to do. Regarding claims

for unpaid salary and increments (Kshs.300,375 and Kshs.270,072), the respondent argues that the appellant is not entitled as he voluntarily accepted his terms of employment. Concerning the Special Duty Allowance (Kshs.74,400), the respondent states the appellant was not appointed to perform special duties to warrant this payment. For Accrued Leave and May 2017 salary (Kshs.238,463.85 and Kshs.45,251.61), the respondent states that the appellant had 24 leave days and worked 7 days in May 2017, and these amounts were used to offset his indebtedness to the respondent. Regarding the overtime claim (Kshs.6,468,368.65), the respondent questions the evidence supporting this claim and argues that section 90 of the *Employment Act* made it time barred. Furthermore, that the appellant's contract did not provide for cash payment of overtime, only leave in lieu, and the court cannot rewrite the contract, citing National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR). For the parking arrears (Kshs.28,768 and Kshs.2,400), the respondent states that parking was allocated and the appellant continued to use the bay after being given notice, thus accumulating arrears and demand for the same was a contractual obligation. Regarding the Back Pay and Pension claims, the respondent refers to explanations provided in their replying affidavit dated 18th April, 2021, wherein the respondent asserted that during financial years 2013/2014 and 2014/2015, the appellant had reached the maximum level of salary within his salary scales hence he was awarded ex-gratia payment in a lump sum representing the amount he would have earned on a monthly basis if he was to be given a salary increment and as such contends that, in fact, the appellant gained compared to those who had their salaries adjusted as he was able to receive as a bullet, payment what he would receive over twelve months period. In addition, it is submitted that the pension deductions were remitted to the relevant scheme on a monthly basis and the same continued to be paid so the appellant suffered no loss. Nevertheless, it is contended, a dispute over pension entitlement cannot form a subject matter of a constitutional petition or an employer/employee dispute and should be referred to the Retirement Benefits Authority.

41. The role of this Court in a first appeal is to re-evaluate, re-assess and reanalyze the evidence on record afresh and to draw its conclusion. Where, like here, the hearing proceeded by way of affidavit evidence, the latitude to reach a different conclusion from the trial court is greater as we stand in the same position as the trial court given that there is no demeanour test of witnesses.

42. The concept of “constructive discharge” is defined by Black’s law Dictionary (Ninth Edition) as follows:

> “ A termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave.
>
> [Cases: Civil Rights C>1123; [Cases: Labor and Employment C>825.)
>
> "Most constructive discharges fall into one of two basic fact patterns. First, the employer can cause a constructive discharge by breaching the employee's contract of employment in some manner short of termination. Second, the employer can make working conditions so intolerable that the employee feels compelled to quit." Mark A. Rothstein et aI., Employment Law § 9.7, at 539 (1994).”

43. Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR), is a leading decision of this Court on constructive dismissal that is referred to by both parties in this appeal. In that decision, the Court endorsed the holding of Lord Denning MR in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761;

> “ If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound

by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1)."

44. Before setting out the legal principles relevant to determining constructive dismissal, this Court observed:

> "The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test."

45. The relevant principles are:-

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."

46. As we embark on analysing the evidence before the trial court, we observe an attempt by Watuku to introduce additional evidence before us notwithstanding that his formal attempt to do so was declined in a ruling of this Court of 2nd August, 2024. We consider this appeal only on the basis of the evidence before the trial court.

47. The first allegation by Watuku is that for the 11 years of employment with the Corporation, he was never promoted. While it is true that at one time there was re-organization of job grades in the Corporation in which Watuku seemed to suffer a down grade, the evidence is that his salary was increased to a basic salary of Kshs.88,800 and entitled to a house allowance of Ksh.13,000. Overall, the

re-organization, which also affected other members of staff, left Watuku in a better financial position. There is further evidence that effective from 1st January 2016 Watuku was promoted from the position of Senior ICT Officer to principal ICT Officer Grade 5. In this new position, his salary was adjusted to Kshs.136,400. This debunks the allegation by Watuku that he was never promoted.

48. We also think there is merit in the argument by the Corporation that by dint of their own policy (Code of Staff Rules and Regulations), promotion of an employee was to be at the sole discretion of the Corporation, dependent on the availability of a vacancy and based on performance, professional qualifications, merit and where applicable, seniority. We are unable to find clear evidence of breach of that policy on the part of the Corporation.

49. There is then the performance management policy which governed staff appraisal. The grouse by Watuku was on the 2015/2016 appraisal. He blames his supposed tormentor, Faith Nene, the HRAM, for review of his performance downwards to 64% without authority and in contravention with the appraisal policy. It is common ground that the remit to revise appraisals was reserved for the Moderation Committee. The truth of the matter is that the proposed revision by the HRAM was not the end of the matter as there was further revision undertaken after Watuku protested. After a meeting with his supervisor and a rating of 84% agreed, some scores were downgraded in a discussion between Watuku's supervisor and the chairman of the Moderation Committee lowering the final score from 84% to 72% on 24th March 2017. In the end, it is the Moderation Committee and not the HRAM who carried out the revision.

50. In the petition, Watuku specifically asserts that:

> "It was a practice of the respondent that before the downgraded final score was awarded, the concerned employee would be given a chance to defend their appraisals. This chance was not afforded to the petitioner before being downgraded to 64%."

51. That may be so but whatever infraction was committed by the HRAM would have been mitigated by the further re-appraisal and revision by the committee charged with revision and which in the end settled at a rating of 72%. We do not perceive any egregious conduct on the part of the Corporation in regard to the performance appraisal that would make Watuku's continued stay untenable or would amount to a fundamental breach of contract.

52. Preceded by show cause memos, the Corporation issued a warning letter to Watuku, which was the next grievance he raised. This followed a mix up of data involving Centum Investments Limited, a subsidiary of the respondent, resulting in under payment and overpayment of shareholders of the subsidiary. On 8th May, 2009, the HRAM wrote a show case memo to Watuku regarding the mix up. The memo, as was customary, was to pass through Mr. Watuku's immediate supervisor, the IT Manager.

53. On receipt of the memo, the IT Manager declined to forward it to Watuku stating that he required more justification so as to discuss the matter objectively. The IT Manager did so because:

> "… the objective of sending the memo to Watuku through my office, as his immediate supervisor is to allow me to convey a position which I can convincingly defend."

54. While it is unclear whether the matter was discussed further between Watuku's supervisor and the HRAM, what is clear is that on 12th May 2009, another show cause letter, on similar terms and on the same subject matter, was issued by the HRAM and this time round, the ICT Manager forwarded the memo to Watuku. It would be safe to assume that on this occasion the ICT Manager was satisfied that there was sufficient reason for the notice to be issued.

55. Watuku responded to that letter on 13th May 2009 and after making some explanation, pens off:

> " I regret the error in mismatch of data and shall ensure it does not happen in future."

It is upon this response that the HRAM issued a warning letter. Given the chronology of events and the response by Watuku, in which he took some responsibility for the mismatch of data, we cannot say that issuance of the warning letter was unwarranted.

56. We now turn to what is certainly less controversial. ICDC provided parking for its staff at the basement of Uchumi House Building, Aga Khan Walk. Until 23rd June, 2015, staff would pay for the parking. After that date, the Corporation stopped charging its staff so as to increase employee motivation and satisfaction. While it is common ground that Watuku disposed of his vehicle in 2009, there is no evidence that he notified the Corporation that he no longer needed the parking space. On this basis, the Corporation levied a surcharge for the space. The argument by Watuku that the Corporation was well aware that he had disposed of his car, is effectively countered, we hold, by the rebuttal that Watuku did not give notice that he would cease using the parking and further, the use, in terms of the contract governing the use of the space, was not restricted to only one specific vehicle. Nothing turns on this matter.

57. There is, however, a matter that was not answered by the Corporation. He makes the allegation that when the Corporation was advertising for job vacancies in other departments in May 2013, the HRAM included the job of Systems Administrator while Watuku was still occupying that position. He contends that the intention was to demote him to a Help Desk Support, a junior position. In an internal memo dated 22nd May, 2013, Ms. Faith Nene states:

> "Although we had not agreed on this, I have also included the System Administrator job as one of those to be advertised. This is the role currently held by Watuku but lacks the job requirement for the role."

58. Although the intention was not followed through, Ms. Nene did not address the matter in the response filed at trial. We have agonized as to whether this one proved incident was grave enough to force a constructive dismissal and have reached an answer that it is not. Whilst Watuku's theory was that he was a victim of a systemic and sustained witch-hunt orchestrated or led by Ms Nene, there has been a dearth of evidence in support of that allegation. Secondly, the mischievous advertisement happened in May 2013 and Watuku made the decision to resign in 2017, four years later. Given the passage of time, it does not seem plausible that his reason for leaving can be connected to the 2013 incident. It is far removed, it is remote. There is no causation. We do so bearing in mind that the test adopted in this Country for constructive dismissal is a narrow test. The employees conduct must be so grave that it constitutes "a repudiating breach of the contract of employment". This narrow and precise test is to "prevent manipulating or overstretching the concept of constructive dismissal" (Coca Cola (supra)). It cannot be that any oppressive conduct or misfeasance by the employer, however minor, can be deployed to set up a case for constructive dismissal. The concept must be construed narrowly so as not to fall to abuse.

59. We now turn to the claim for unpaid dues. The first is although a new salary structure was implemented in the payment of July 2017, it was given retrospective implementation to be effective from 1st January 2017. The Corporation withheld this pay, reasoning that the approval of the new salary structure was made on 3rd July 2017, a date after Watuku had resigned. We do not accept that just because he had left employment at the time the enhanced pay was implemented he would not be entitled to the new

salary because it was backdated to a period when he was in service. In fairness, he should benefit from this enhanced pay from the month of January 2017 to the time he left.

60. Regarding salary increment for the year 2015/2016, we have upheld the claimant's appraisal rating of 72%. This rating fell short of entitling him to the increment he seeks. This holds true for the claim of the bonus payment which was premised on an appraisal rating that Watuku did not achieve.

61. Watuku claims a sum of Kshs.6,468,368.65 for working outside the contractual normal hours. This claim is resisted by ICDC on four main grounds: no payment for overtime was provided in the contract of service; the claimant does not belong to the category of employees who are entitled to overtime; at Watuku's request he was allowed to adopt flexible working hours; and that at any rate the claim is time barred.

62. Watuku lay a basis for this claim by producing documents that showed that certain tasks had to be undertaken when all systems were logged off and so needed to be carried out after 5:00 pm or on weekends. He then, in annexure AKW-50 to his affidavit in support of the claim, painstakingly produces staff appraisal forms, daily attendance registers, daily back up registers and schedules showing the overtime together with calculations of money owed. Neither the documents nor the calculations were disputed or rebutted by the Corporation and we have no reason to doubt. Yet that is not the end of the matter.

63. Key answers posited by ICDC to this claim are that Watuku was not entitled to overtime as it was not provided for under his employment contract nor did he fall in the category of employees regulated by the Wages Council under the *Labour Institutions Act* 2007. To counter these arguments, Watuku swore a further affidavit in which he gave examples of two employees, Samuel Theuri and Samuel Musomba, who were paid overtime notwithstanding that their contracts did not expressly provide for it. But it turned that these two were drivers whose overtime was regulated by subsidiary legislation that did not cover Watuku.

64. His further attempt to prove this entitlement was to show the letter of employment of the Executive Director which, unlike his, expressly provided that the Executive Director was not entitled to overtime. We do not accept the proposition that we should read in certain provisions into Watuku's contract by comparing it with another contract, in this case that of the Executive Director. In the absence of an express covenant in the appellant's contract or legislation providing for payment of overtime, we cannot find in favour of the appellant. We do so bearing in mind that Watuku did not put forward a case that, in his circumstances, non- payment of overtime would amount to an unfair labour practice. Sadly, Watuku's meticulous record of time worked outside the normal working hours is of no help.

65. The claim for accrued leave days and seven (7) days salary for the month of May 2017 is not controversial and is acknowledged by the Corporation. All the Corporation says is that this payment was used to offset part of Watuku's indebtedness to the Corporation which comprised of a staff deposit house loan, parking fees and staff development loan, all amounting to Kshs.1,160,159.58. That Watuku was indebted to the Corporation, too, is not controversial.

66. In respect to the bank pay and pension, the explanation by the Corporation is as follows:

> "That with due respect to the petitioner this claim makes no sense to the respondent. As already explained above during the financial years 2013/2014 and 2014/2015 the petitioner having reached the maximum level of salary within his salary scales was awarded ex-gratia payment in a lump sum representing the amount he would have earned on a monthly basis if he was to be given a salary increment. In the final analysis the petitioner did not lose but

gained compared to those who had their salaries adjusted as he was able to receive it at one go what he would have received over twelve months periods."

We are not persuaded by Watuku that this explanation is faulty.

67. The Corporation disputes that Watuku was assigned any special duties or performed any such duties as to be entitled to special duty allowance. Again in respect to this, we are inclined to agree with the Corporation. Watuku's supervisor explained that Watuku turned down the offer to act as a Principal IT Officer. As the onus was always on Watuku to prove each aspect of his claim, on a balance of probabilities, he failed to do so because he did not provide any proof that he indeed took up the acting role or roles. All there was is the word of one person against the other.

68. The penultimate issue surrounds the claim by Watuku regarding the damage to his health associated with long and dedicated service for 11 years. Whilst Watuku produced medical reports in proof that he suffered a weakened retina, diabetes mellitus type 2 and hypertension, there was no medical evidence that linked those conditions with his occupation. The conclusion we are asked to reach by Watuku cannot be made through conjecture, there is need for a medical opinion that connects the ailments to the occupation and conditions at the work place.

69. Lastly, we were asked by Watuku to make some declarations regarding the house loan. We are afraid that we cannot do so as it was never prayed for in the petition before the trial Court.

70. In the end, save for the success in the appellant proving that he was entitled to enhanced salary from January 2017 to May 2017, when he had a separation with the Corporation, the appeal has no merit. The difference between the salary paid to the appellant and the enhanced salary for this period shall be worked out by the Corporation. The difference shall attract interest at court rates from the date when the petition was filed until payment in full or on the date it shall be offset from any amounts owed to the respondent by the appellant. Save for this very limited success, the appeal fails. Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025.

W. KARANJA

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JUDGE OF APPEAL

F. TUIYOTT

....

JUDGE OF APPEAL

P. NYAMWEYA

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR