



**Musyimi v Kobian (Kenya) Limited (Cause 399 of 2018)  
[2025] KEELRC 210 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 210 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 399 OF 2018  
JW KELI, J  
JANUARY 31, 2025**

**BETWEEN**

**MAKAU CAXTON MUSYIMI ..... CLAIMANT**

**AND**

**KOBIAN (KENYA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed a memorandum of claim dated 15<sup>th</sup> March 2018 against the respondent, his former employer, seeking the following reliefs :-
  1. A declaration that the Claimant was unlawfully dismissed by the Respondent.
  2. Maximum compensation in law as more particularly set out in Paragraph 13 above, that is to say, Kshs. 1,656,000/-.
  3. One month's salary in lieu of notice in the sum of Kshs. 138,000/- in lieu of notice.
  4. Total salary withheld as set out in Paragraph 13 above, that is to say Kshs.943,800/-
  5. Withheld interest as set out in Paragraph 13 above, being Kshs. 39,325/-.
  6. Unpaid service pay set as out in Paragraph 13 above, being Kshs. 315,000/-.
  7. Costs of this suit and interest at Court rates from the date of filing suit.
  8. Any other better and further relief that the court may deem appropriate in the
  9. circumstances.
2. In support of the claim, the claimant filed a witness statement dated 15<sup>th</sup> March 2018 and a list of documents of even date and annexed the bundle documents.



3. In response to the claim the respondent filed Answer dated 26<sup>th</sup> April 2018 and amended on the 24<sup>th</sup> October 2019 to the memorandum of claim and raised a counterclaim as follows:-
- a. The Respondent (by original action, Claimant by counterclaim) adopts and reiterates the contents of paragraphs 2 to 16 of its answer to memorandum of claim.
  - b. The Respondent (by original action, Claimant by counterclaim) hereby claims the sum of Kshs.2,500,518.00 due and owing to the Respondent (by original action, Claimant by counterclaim) from the Claimant (by original action; Respondent by counterclaim) on account of fraudulent and unlawful salary increments implemented by the Claimant through an unauthorized adjustment of the Respondent's payroll system, full particulars whereof are known to the Claimant.
  - c. The Respondent (by original action, Claimant by counterclaim) avers that there is no other suit pending and there have been no previous proceedings in any court between the Respondent (by original action, Claimant by counterclaim) and the Claimant (by original action; Respondent by counterclaim) over the same subject matter.
  - d. The cause of action arose within the jurisdiction of this Honourable Court.  
Reasons Whereof the Respondent (by original action, Claimant by counterclaim) prays that the Claimant's (by original action; Respondent by counterclaim) suit be dismissed with costs and judgment be entered in favour of the Respondent (by original action, Claimant by counterclaim) as against the Claimant (by original action; Respondent by counterclaim) for:-
    - a. The sum of Kshs.2,343,500.00 with interest thereon until payment in full.
    - b. The sum of Kshs. 861,300 being the costs accruing from the forensic audit conducted
    - b. Costs of and incidental to this suit with interest thereon.
    - c. Any other relief or remedy that this Honourable Court may deem fit to grant.
4. In support of the response and counterclaim the respondent filed its list of documents dated 14<sup>th</sup> September 2018, witness statements of Joseph Alushula Kokoyo, Hellen Kavinza and Nathan Bwosi Aruda all dated 24<sup>th</sup> August 2018, filed supplementary list of documents dated 14<sup>th</sup> February 2019 being the forensic investigation report on overpayment of salaries for the period 1<sup>st</sup> January 2012 to 31<sup>st</sup> December 2017.

### **Hearing And Evidence**

5. The claimant's case was first heard before Justice Ocharo Kebira on the 28<sup>th</sup> of June 2022 where he testified on oath and adopted as his evidence in chief his statement dated 1<sup>st</sup> March 2018, produced as his evidence document under list dated 1<sup>st</sup> March 2018 as C-exh 1-6. He was cross-examined by counsel for the respondent Mr. Kiragu and re-examined by his counsel Mr. Mwinzi. RW1 was Peter Kahi who testified on oath and produced the forensic report dated 11<sup>th</sup> February 2019. He was cross-examined by counsel for claimant, Mr. Mwinzi and re-examined.
6. This Court took over following the transfer of Justice Ocharo Kebira and heard the respondent's part heard case on the 30<sup>th</sup> May 2023. RW2 was Joseph Alushula Kokoyo who testified on oath and adopted his witness statement dated 24<sup>th</sup> August 2018 and was cross-examined by the counsel for the claimant and re-examined. RW3 was Hellen Kavinza who testified on oath and adopted her witness statement dated 24<sup>th</sup> August 2018 as her evidence in chief and was cross-examined by counsel for the claimant



and re-examined. RW4 was Charanadhar Maganbhai Patel who told the Court that he was the director of the respondent. He testified on oath and adopted his witness statement dated 26<sup>th</sup> April 2018 as evidence in chief and produced a bundle of documents filed on the 17<sup>th</sup> of September 2018 and of 27<sup>th</sup> April 2018 as defence evidence. He was cross-examined by counsel for the claimant and re-examined.

7. On the closure of the defence hearing, parties took directions on the filing of written submissions and both parties filed.

## **Determination**

Issues for determination

8. The claimant identified the following as issues for determination in the claim: -
  - a. Whether the respondent illegally and unlawfully reduced the claimant's salary.
  - b. Whether the claimant was constructively dismissed from the employment by the respondent.
  - c. Whether the respondent is entitled to the counter claim.
9. The respondent identified the following issues for determination in the claim:-
  - a. Whether the Claimant fraudulently increased his salary.
  - b. Whether the Claimant was constructively dismissed from employment.
  - c. Whether the Claimant is entitled to the prayers sought.
  - d. Whether the Respondent is entitled to the prayers sought in the counterclaim.
10. The court having heard the case and perused the proceedings before Justice Ocharo Kebira concerning evidence of the claimant and part defence and the issues by the parties was of the considered opinion that the issues placed before the court for determination in the claim were as follows:-
  - a. Whether the respondent illegally and unlawfully reduced the claimant's salary.
  - b. Whether the claimant was constructively dismissed from the employment by the respondent.
  - c. Whether the Claimant is entitled to the prayers sought.
  - d. Whether the respondent is entitled to the reliefs sought in the counterclaim

Whether the respondent illegally and unlawfully reduced the claimant's salary.
11. The respondent admitted through RW4 to having started the reduction of the salary of the claimant on the basis of alleged unapproved salary increments. Evidence of the RW2 and RW3 who were employees of the respondent was to effect that the salary increments were never at same rate. Evidence before the court vide the forensic report established that the increments on the claimant's salary were consistent with the salary increments effected to other employees. There was evidence on payment to the claimant was the December 2016 extra payslip of net pay Kshs. 244700. The claimant had produced payslip of net pay of Kshs. 96,803. The respondent produced the two payslips as evidence of irregular payment. The other evidence by the Respondent was the bonus payment of Kshs. 150,000 which the court found was admitted by defence witnesses to have been paid in September 2016 to all employees. RW4 stated that he had sat with Willis (boss of the Claimant) and the claimant and the two admitted to the irregular payments and to the deductions. That this was oral. RW4 stated he did not know how much the irregular payment was at the time of the first deduction in February 2017 when he reduced the Claimant's salary of January 2017 Kshs. 120000 Basic pay to Kshs. 52000 basic pay in February 2017.



12. On the extra payslip of December 2016 the claimant told the trial court (Justice Ocharo Kebira) that the investigator report (forensic) indicated he received Kshs. 244000. He told the court that he was looking for a loan from the bank and he requested the finance director to give him a payslip for the purpose of loan application. The payslip was produced by the respondent at page 201 of the forensic report. At page 203 was evidence of the money having been paid to the claimant. The two payslips for December 2016 were at page 204 of the forensic report.
13. The Court finds that there was evidence on payment to the claimant in December 2016 extra net pay Kshs. 244700. The claimant had produced payslip of net pay of Kshs. 96,803. The respondent produced the two payslips as evidence of irregular payment. There was evidence of the money have been paid to the claimant. The court held that on a balance of probabilities the claimant was paid extra Kshs. 244700 being double payment of salary in December 2016. The court was convinced on balance of probabilities that RW4 had met the claimant with Willis and discussed deductions. The only issue was that the claimant, unlike Willis, did not follow up with a letter on what was discussed. The respondent produced a letter dated 27<sup>th</sup> February 2017 by Willis Arodi who he stated had colluded with the claimant. Willis in the letter admitted to have made errors in the payroll and forfeited salary the next 5 months. The court noted that Willis had also filed a suit and in the judgment in *Arodi v Kobian (Kenya) Limited (Cause 987 of 2018) [2024] KEELRC 809 (KLR) (17 April 2024) (Judgment) Neutral citation: [2024] KEELRC 809 (KLR)* the court observed as follows with respect to the deductions:- “ It is common ground that wages and salaries are protected by Part IV of the *Employment Act*, 2007. The provisions of Section 17 to 25 of the Act address various aspects of salaries and wages including mode of payment, when due, deductions, payslip deductions as well as repayment of remuneration wrongfully withheld or deducted. An employer who violates the provisions of Part IV of the *Employment Act*, 2007 commits a criminal offense and is liable to criminal sanctions and the amount withheld or wrongfully deducted is repayable. From the evidence on record, the Claimant has not demonstrated that his salary or part thereof was withheld and/or reduced by the Respondent illegally or unlawfully and if it was, then it was with his express consent as expressed in his letter dated 27<sup>th</sup> February, 2017 by which he promised to forego his salary for 5 months effective 30<sup>th</sup> March, 2017. 120. 121. This was a tacit admission of guilt and that his carelessness had occasioned loss. From the evidence on record, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that the Respondent wrongfully or illegally withheld his salary”
14. The instant case is distinguished as the claimant never wrote any letter authorizing deductions. The court found he was aware of the reasons for the deductions. The court finds that since the respondent could not establish the exact amount to be deducted at the time of effecting deductions, the claimant was unfairly deducted unjustified monies save for Kshs. 244700 which he was paid irregularly. In January 2017 the claimant had a basic salary of Ksh. 120,000 and a house allowance of Kshs. 18000. The other allowances are varied from month to month. In February 2017 Kshs. 52000 basic salary and house allowance of Kshs 7800. That was what was paid until his resignation with the last working date of 13<sup>th</sup> October 2017.
15. The court thus awards the claimant unpaid wages of Kshs. 120,000(basic pay) plus 18,000 (house allowance) less paid salary of Kshs 52,000(basic pay) plus Kshs 7,800(house allowance) for 8 months and 13 days less Kshs. 244,700.  
  
Whether the claimant was constructively dismissed from the employment by the respondent.
16. The claimant vide letter dated 19<sup>th</sup> September 2017 resigned and gave one month notice to the employer and stated it had been a pleasure working with everyone at Kobian over the last 5 years and three months, he wished the company success. There was no iota of indication of being frustrated



due to the deductions. Perhaps because they had talked with Willis and RW4. In the case of his immediate boss Willis Arodi, *Arodi v Kobian (Kenya) Limited (Cause 987 of 2018) [2024] KEELRC 809 (KLR) (17 April 2024) (Judgment)* Neutral citation: [2024] KEELRC 809 (KLR) the court made observations and decision on the resignation and cited relevant case law. This Court found the facts were similar and upheld the decision to apply on the issue in the instant case as follows :-” It is not in contest that the Claimant separated from the Respondent vide resignation letter dated 3rd August, 2017 which he did not contest on any ground. He gave the Respondent a 28 days notice as required by law. The two sentence resignation letter addressed to Charan Patel, the Respondent’s Finance Director under the reference “Resignation” stated the Claimant’s postal address as P.O. Box 23650 00100 Nairobi and stated; “I wish to resign from the company effective 31st August, 2017. I wish you good health and lots of success.” Regards Signed Willis Arodi On cross-examination, the Claimant confirmed that he wrote the resignation letter and gave no reason of the resignation. In his evidence. On cross-examination, the Claimant confirmed that he wrote the resignation letter and gave no reason of the resignation. In his evidence before the court, the Claimant makes no reference to the alleged withheld salary, duration or amount. Similarly, he makes no reference to the alleged frustration he was subjected to by the Respondent. The principle of constructive dismissal was domesticated and applied by the Court of Appeal in its decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (Supra)* cited by both counsels, where the court adopted the contractual test approach and enunciated the guiding principles under the contractual test. An employee alleging constructive dismissal must demonstrate that the Respondent’s conduct complained of constitute a repudiatory breach of the contract of employment. The burden of proof is borne by the employee. The court outlined the guiding principles as; what the fundamental or essential terms of the contract of employment are, repudiatory breach of a fundamental term(s) of the contract, conduct of the employer is a fundamental breach going to the root of the contract, an objective test is applied, causal link between the employer’s conduct and reason for the termination of employment, the conduct of the Respondent must be the effective reason for leaving, the employee must not accept, waive, acquiesce or conduct himself in sum a manner to be estopped from asserting the repudiatory breach and the employee must discharge the burden of proof. In the instant case, although the Claimant pleads frustration by the employer, he tendered no scintilla of evidence of the alleged frustration. First, the resignation letter gave no reason for the Claimant’s action, a fact the Claimant admitted on cross-examination. Second, neither the written statement dated 13th June, 2018 nor the oral testimony adduced in court paint a picture of what had transpired from January 2017 to 3rd August, 2017. Indeed, the Claimant availed no sustainable or reliable evidence on why or the circumstances in which he resigned from the Respondent’s employment. If for instance it was the alleged reduction of salary, when did it commence, how much was it, had he complained or enquired about it and what was the Respondent’s response The principle of constructive dismissal was domesticated and applied by the Court of Appeal in its decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (Supra)* cited by both counsels, where the court adopted the contractual test approach and enunciated the guiding principles under the contractual test. An employee alleging constructive dismissal must demonstrate that the Respondent’s conduct complained of constitute a repudiatory breach of the contract of employment. The burden of proof is borne by the employee. The court outlined the guiding principles as; what the fundamental or essential terms of the contract of employment are, repudiatory breach of a fundamental term(s) of the contract, conduct of the employer is a fundamental breach going to the root of the contract, an objective test is applied, causal link between the employer’s conduct and reason for the termination of employment, the conduct of the Respondent must be the effective reason for leaving, the employee must not accept, waive, acquiesce or conduct himself in sum a manner to be estopped from asserting the repudiatory breach and the employee must discharge the burden of proof. In the instant case, although the Claimant pleads frustration by the employer, he tendered no scintilla of evidence of the



alleged frustration. First, the resignation letter gave no reason for the Claimant's action, a fact the Claimant admitted on cross-examination. Second, neither the written statement dated 13th June, 2018 nor the oral testimony adduced in court paint a picture of what had transpired from January 2017 to 3rd August, 2017. Indeed, the Claimant availed no sustainable or reliable evidence on why or the circumstances in which he resigned from the Respondent's employment. If for instance, it was the alleged reduction of salary, when did it commence, how much was it, had he complained or enquired about it and what was the Respondent's response." (Long citation acknowledged and justified as the conditions of employment and resignation were similar)

17. The circumstances of the resignation of Willis Arodi and the claimant were the same. Their resignation letters were full of praise to the employer(the Respondent), they both gave one month notice and iota of frustration was disclosed. The Court found no reason to deviate from the decision by Justice Dr. Gakeri in the instant case. The Court held that the claimant was not constructively dismissed.

Whether the Claimant is entitled to the prayers sought.

18. The Claimant sought several reliefs which the court considered separately.
- a. On the prayer for a declaration that the Claimant was unlawfully dismissed by the Respondent. The court returned a negative on the prayer. The Court held that the claimant was not constructively dismissed from employment.
  - b. Maximum compensation in law as more particularly set out in Paragraph 13 above, that is to say, Kshs. 1,656,000/-. The court returned a negative on the prayer.
  - c. One month's salary in lieu of notice in the sum of Kshs. 138,000/- in lieu of notice. The court returned a negative on the prayer.  
  
Prayers a , band c are unavailable having held that the claimant's resignation did not meet the test of constructive dismissal.
  - d. Total salary withheld as set out in Paragraph 13 above, that is to say Kshs.943,800/-
19. The court held that the deductions from February 2017 to 13<sup>th</sup> October 2017 were not justified save for irregular net pay of 244700 paid to the claimant in December 2016. The court then awarded the underpayment as follows :- Kshs. 120000 basic pay plus 18000 house allowance less paid basic salary of Kshs. 52000 and house allowance of Kshs.7800 (total 78000). Thus Kshs. 78000 x 8 months plus 13/30 days x Kshs. 78000(33800) total Kshs. 657800 less 244700 total payable underpayment of Kshs.413,100.
- e. Withheld interest as set out in Paragraph 13 above, being Kshs. 39,325/-. Disallowed.
  - f. Unpaid service pay set as out in Paragraph 13 above, being Kshs. 315,000/-.
20. Service is not an automatic right of the employee. The court upholds the finding in the case of the claimant's colleague, Willis, in *Arodi v Kobian (Kenya) Limited (Cause 987 of 2018) [2024] KEELRC 809 (KLR) (17 April 2024) (Judgment) Neutral citation: [2024] KEELRC 809 (KLR) that :- "Service pay is a statutory right under Section 35(5) of the Employment Act , 2007. The Claimant, as adverted to elsewhere in this judgement provided no evidence to demonstrate that he was entitled to service pay. The prayer is dismissed."* In the same breath, there was no evidence of the Claimant's entitlement to service pay. The claimant was under NSSF just like his former colleague. The court upholds the decision in Arodi case to dismiss the prayer.
- g. Costs of this suit and interest at Court rates from the date of filing suit.



21. The court held that was a case of unjustified deduction of wages. The claimant is entitled to interest at court rates from date of filing suit.

### **Whether the respondent is entitled to the counterclaim prayers**

22. The claimant denied the counterclaim stating there was evidence of paid increments to other employees not being at the same rates and that there was no policy on the increments. Evidence before the court proved that staff were given varied rates of increments. The court found nothing untoward in the increments given to the claimant as they were comparable with those other staff. The court only identified one case of irregular double salary payment of December 2016. RW4, Patel, confirmed to the court there was no policy in place on salary increments and that they gave increments only in January every year and these were authorized by himself, his brother and his nephew.
23. On the counterclaim in *Arodi v Kobian (Kenya) Limited (Cause 987 of 2018) [2024] KEELRC 809 (KLR) (17 April 2024) (Judgment)* Neutral citation: [2024] KEELRC 809 (KLR) where the claimant was Willis who was alleged to have colluded with the claimant on irregular increments, and the report by PKF dated 11<sup>th</sup> February 2019 produced as R- supplementary list of document dated 14<sup>th</sup> February 2019, the court, Justice Dr Gakeri presiding, on the counterclaim observed :-

“ Respondent is claiming the sum of Kshs.4,643,024/= being the salary the Claimant overpaid himself from 2011 to 2016. It contends that the Claimant’s salary rose from 30,000/= to 146,000/= within 5 years which per se does not implicate wrongfulness on the part of the Claimant as salaries and increments are inter alia determined by the employer. To buttress its case, the Respondent availed a copy of Forensic Investigation Report by PKF for the period 1st January, 2013 to 31st December, 2017 dated 11th February, 2019. According to the report produced by RWIV, Mr. Peter Kahi, the amount attributable to the Claimant is Kshs.3,979,194.00 from 2012 to 2017 as the total sum. In his evidence, RWIV was unambiguous that the Claimant’s salary increment was for the most part below the average except in 2017 and he was not the highest beneficiary of the increments. It is common ground that the Respondent had no documented policy on salary increments and RWV confirmed as much. The Claimant confirmed that while his responsibility was to input data into the AREN Payroll System, approval was the responsibility of Mr. Charan Patel and who approved all the salary increments. Notably, all the salary increments complained of were approved by Mr. Charan Patel on behalf of the Board of Directors, and paid to employees. Strangely, Mr. Charan Patel admitted on cross-examination that he was required to verify the payroll but did not do so as the Claimant’s supervisor. The witness admitted that he approved and transferred all the increments in question as he trusted the Claimant. According to RWI, the directors of the company made decisions on the annual increment of individual employees jointly but adduced no evidence of any meeting having been held from 2012 – 2017 or record of any annual increase of any employee’s salary yet they received increments variously. From the evidence on record and as adverted to elsewhere in this judgment, the alleged salary increments were below the general average save for 2017 and all were approved by Charan Patel. In a nutshell, the Respondent has failed to demonstrate that the salary increments to the Claimant or any other employee had not been authorised...”

24. The Court finds no basis to divert from the position taken on similar facts by Justice Dr. Gakeri. The Court upholds the decision to dismiss the counterclaim save for the double salary proved of Kshs. 244,700 paid in December 2016. Each party to bear own costs in the counterclaim



**Conclusion.**

25. The court held that the deductions from February 2017 to 13<sup>th</sup> October 2017 unjustified save for irregular net pay of Kshs.244,700 paid to the claimant in December 2016.
26. The court enters judgment for the claimant against the respondent as follows:-
  - a. Refund of deducted salary of Kshs.413,100 less statutory deduction of PAYE.
  - b. Interest is awarded on (a ) above at court rates from date of filing suit until payment full.
27. On the counterclaim the same was only successful on the Kshs. 244,700(extra payment in December 2016). The amount is deductible and is already deducted from the total underpayments as above.
28. The Court orders each party to bear own costs in both the claim and the counterclaim as they were both partially successful.
29. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**JEMIMAH KELL,  
JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Claimant:- Nguma h/b Mwinzi

Respondent: Muteti h/b Gathu

