



**Khan v MFI Document Solutions Limited (Cause E005 of 2025)
[2025] KEELRC 1525 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1525 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E005 OF 2025**

**JK GAKERI, J
MAY 27, 2025**

BETWEEN

NASEEM KHAN CLAIMANT

AND

MFI DOCUMENT SOLUTIONS LIMITED RESPONDENT

JUDGMENT

1. The claimant commenced the instant suit by a Memorandum of Claim dated 7th February, 2025 and filed on even date alleging constructive dismissal by the respondent on 30th January, 2024.
2. The claimant's case is that a series of events and changes implemented by the respondent created an untenable work environment forcing her to resign from employment having worked for 23 years.
3. The claimant prays for:
 - i. General damages for wrongful/unlawful termination/constructive dismissal equivalent to 12 months salary Kshs.1,320,324.
 - ii. Two months salary in lieu of notice.
 - iii. Accrued unpaid leave days.
 - iv. Aggravated damages and general damages for pain suffering mental anguish anxiety and humiliation.
 - v. Certificate of service.
 - vi. Costs of this suit.
 - vii. Any other relief the court may deem fit and just to award.



Respondent's case

4. The respondent admitted that the claimant was its former employee and averred that she resigned on her own volition on 30th January, 2024, conducted a disciplinary hearing, transferred the claimant administratively and it was not a demotion and computed her terminal dues.
5. According to the respondent, investigations commenced in good faith but the claimant was not patient and sought to evade adverse outcome of the investigation and possible disciplinary action.
6. The claimant's response to the respondent's defence merely reiterated the earlier averments in the Memorandum of Claim.
7. On cross-examination, the claimant confirmed that she was the respondent's Branch Manager for Kisumu reporting to Mr. Rajesh, the General Manager and her salary was reviewed upwards severally. The witness admitted having received another notice to show cause and the letter of transfer stated that she was being transferred on the same terms but did not report to Nairobi, her new station nor collect her dues from the County Labour Office.
8. On re-examination, the claimant testified that she had been transferred to the Sales Department in Nairobi.

Respondent's evidence

9. RWI, Mr. Julius Omedo confirmed that the claimant was employed by the respondent on 9th June, 2000 and worked for 23 years earning Kshs.112,317.00 by the time she resigned.
10. The witness stated that Mr. Wanyonyi was not forced to sign the letter. He confirmed that the claimant was summoned to Nairobi on 20th November, 2023 and responded to the notice to show cause and there was no warning letter or disciplinary hearing after the disciplinary hearing.
11. That the claimant recorded a statement with the police but the witness did not have a copy of the statement but testified that it related to the transfer of stock to the Kisii Branch and the claimant was not charged with a criminal offence, and after the second hearing, the claimant was transferred to Nairobi vide letter dated 9th December, 2023 and was consulted before the transfer.
12. RWI also confirmed that the respondent received the claimant's resignation letter which explained the reasons for resignation.
13. He also confirmed that the claimants transfer was not a demotion as the Head of Sales was the General Manager and the claimant required time before the transfer.
14. Finally, RWI confirmed that the respondent withheld the claimant's salary for November and December 2023 and January 2024.
15. On re-examination, RWI testified that the claimant's transfer was not a demotion and she did not request for time before moving.

Claimant's submissions

16. As to whether the claimant was constructively dismissed, counsel for the claimant relied on the sentiments of this court in Nathan Ogadd Atiagaga V Daving Engineering Co. Ltd [2015] eKLR and those of the Court of Appeal in Maria Kagai Ligaga V Coca Cola East and Central Africa Ltd [2017], to urge the definition and elements and submit that the claimant was constructively dismissed.



17. Counsel invited the court to apply the test in *Eggae Egaal V Phillip Tilley & others* Petition NO. 90 of 2012, where the court relied on the sentiments of Wagner J in *David Potter V New Brunswick Legal Aid Services Commission*, Supreme Court of Canada [2015] SCC 10 on the test of constructive dismissal, namely; the express or implied term of the contract breached by the employer and whether the breach was sufficiently serious to constitute constructive dismissal.
18. Reliance was also placed on the sentiments of the court in *Kenneth Kimani Mburu & another V Kibe Muigai Ltd* [2014] eKLR, on the concept of constructive dismissal to submit that the claimant had proved her case against the respondent.

Respondent's submission

19. As to whether the claimant was constructively dismissed, the respondent's counsel argued that she was not as she had no complaint about her salary and it was reviewed upwards and did not call Paul Wanyonyi as a witness on the allegedly forced confession and reporting the matter to the police was not intended to intimidate her since the respondent could make a complaint to the police, if it had reason to do so.
20. Reliance was placed on the sentiments of Ndolo J in *Wenlaus Oduki Odinga V Kenya National Hospital Board* [2013] KEELRC 395 (KLR) on the options available to the employer in case of an acquittal in a criminal case.
21. Counsel submitted that the matter was still under investigation and no disciplinary hearing had been conducted and the respondent had the right to transfer the claimant as its employee and the respondent acted reasonably as held in *Henry Ochido V NGO Co-ordination Board* [2015] eKLR, and the claimant did not seek a review of the transfer nor time to comply.
22. Reliance was placed on the decision in *Anne Wairimu Kimani V Kenya Agricultural Livestock Research Organisation (KALRO)* [2017] eKLR.
23. On the alleged demotion, counsel submitted that it was not a demotion as all Branch Managers of the respondent were in Sales department and reported to the General Manager and she would be reporting to him in the department.
24. Counsel submitted that according to the respondent the claimant resigned to evade the outcome of the investigation and cited the sentiments of the court in *Herbert Wafula Waswa V Kenya Wildlife Services* [2020] eKLR as well as *Milton M. Isanya V Agha Khan Hospital (Kisumu)* [2017] eKLR.
25. On reliefs, counsel submitted that save for pay lieu of notice and certificate of service, the claimant was not entitled to any other relief and had not proved entitlement to aggravated and general damages, which are not awardable under the *Employment Act*, 2007.

Analysis and determination

26. I have considered the respective cases of the parties and submissions.
27. The issues for determination are:
 - i. Whether the claimant was constructively dismissed by the respondent.
 - ii. Whether the claimant is entitled to the reliefs sought.
28. As to whether the claimant was constructively dismissed by the respondent, parties have adopted contrasting positions.



29. While the respondent submitted that the claimant was not constructively dismissed but resigned to evade the outcome of the investigation, the claimant's counsel's submissions comprised the claimant's case and the principle of constructive dismissal as articulated by court decisions.
30. It is trite law that although the provisions of the Employment Act do not expressly recognize the principle of constructive dismissal, it is now part of our jurisprudence in termination of employment.
31. The locus classicus rendition of the principle are the sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* [1978] ICR 221 where the Judge stated: -
32. 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 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. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
33. In Kenya, the principle of constructive dismissal was explained and domesticated by the Court of Appeal in *Maria Kagai Ligaga V Coca Cola East & Central Africa Ltd* (supra) as follows:
- "The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour 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. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment..."
34. The Court of Appeal went further and enumerated the principles applicable in determining whether a constructive dismissal has taken place such as, the fundamental and essential terms of the contract of employment, whether a repudiatory breach of contract has taken place, causal link between the employers conduct and the reason for terminating the contract, no evidence of acceptance waiver, acquiescence or conduct implicating estoppel, leaving within a reasonable time, and prove of constructive dismissal.
35. The gravamen of constructive dismissal is the burden of proof. The employee is required to adduce evidence to demonstrate that the employer committed a repudiatory breach of contract of employment by acts or omissions whose effect is to render the continued subsistence of the employer/employee relationship untenable to the employee.



36. That the employer's conduct has made it practically impossible for the employee to perform his or her part of the contract of employment and leave.
37. Inevitably the principle of constructive dismissal hinges on the employer's conduct.
38. See *Benuel Manesa V Awand Enterprises Ltd*, *Nathan Ogada Atiagaga V Daving Engineering Co. Ltd* [2015] eKLR, *Emanuel Mutisya Solomon V Agility Logistics and Sophie Muthoni Nyaga V Rift Valley Railways (Kenya) Ltd* [2020] eKLR.
39. In the instant case it is common ground that the stock audit carried at the Kisii Branch heralded the sequence of events culminating in the claimant's resignation as it revealed certain irregularities and by the following day, one Paul Wanyonyi had signed a statement implicating the claimant in wrong doing involving transfer of stock to Kisii and as a consequence the respondent locked the claimant out of the sage-system and could not re-check the stock.
40. The claimant denied having given Mr. Paul Wanyonyi authority to transfer items to the Kisii Branch as per the documents.
41. The respondent did not deny that Mr. Paul Wanyonyi resigned on 16th November, 2023 and did not honour an invitation to the Nairobi office.
42. The claimant testified that, on invitation, she attended a meeting in Nairobi on 20th November, 2023 and the meeting was attended by the Managing Director (Mr. Sajith Shanker), Finance Officer (Mr. Sachin), the General Manager (Mr. Kasu) and the Human Resource (Ruth) and was asked about Mr. Paul Wanyonyi's confession. It was here evidence that she queried why she was not invited to confront Mr. Wanyonyi, being barred from the sage-system and all approvals for stock were done by Nairobi on email and Mr. Paul Wanyonyi had the keys to the store.
43. The claimant was summoned by the police on 29th November, 2023 and recorded a statement on the alleged transfer of stock to the Kisii Branch.
44. The claimant was issued with a notice to show cause on 20th November, 2023. The letter identified 20 items allegedly missing and a response was required in 7 days and responded vide letter dated 23rd November, 2023.
45. Due to inability to access the sage system, the claimant could not account for 32 items and sought access or the auditors to retake the stock. The claimant denied having given Paul Wanyonyi written authority to transfer items.
46. Contrary to the respondent's witness's testimony in court and counsel's submission that no disciplinary hearing had been conducted, the claimant testified that she attended a meeting on 8th December, 2023 and the respondent availed a copy of an invitation to the claimant to attend a disciplinary hearing slated for 1st December, 2023 at 10:00am and was requested to have a representative of her choice and the claimant attended with her sister on 8th December, 2023 and in attendance were the Managing Director Finance Officer, Human Resource, the claimant and her sister.
47. The claimant was notified that the response to the Notice to show cause was unsatisfactory.
48. The invitation notice was similar to the notice to show cause and the number of items was identical.
49. Relatedly, the respondent availed incomplete disciplinary documentation showing that the meeting took place on 8th December, 2023 at 1:00pm.



50. From the record, it is clear that the respondent conducted a hearing on 8th December, 2023 but did not conclude the process and the next action was the claimant's transfer to Nairobi effective 1st February, 2024. The claimant did not report to the new station as she resigned prior to the reporting date.
51. From the records, the respondent did not find the claimant culpable for any loss and appear to have left the investigations to the police. This is discernible from the absence of a termination letter or warning letter and the transfer to Nairobi.
52. The respondent's submission that the claimant's resignation was intended to evade an adverse outcome of investigations is not borne by evidence as the respondent adduced no scintilla of evidence to show that investigations were on-going.
53. It is common knowledge that Police investigate alleged criminal acts on behalf of the public and prosecution is by the state whether one is an employee or not.
54. In the court's view, nothing turns on the transfer of the claimant to Nairobi as it was neither a demotion nor intended to frustrate the claimant. The claimant tendered no evidence that indeed it was a demotion.
55. Evidence of the position she ought to have occupied in Nairobi but for the alleged demotion would have established that indeed there was a demotion.
56. The letter dated 11th January, 2024 was explicit that the claimant's terms and conditions would remain as per her appointment letter and would continue reporting to the Head of Sales. In the court's view, the only change the claimant would have endured would have been not being a Branch Manager.
57. More significantly, transfer of employees is the employer's prerogative and unless it is demonstrably vindictive, unreasonable, made in bad faith or other reasons not informed by exigencies of the employer's organization or business a court of law will seldom join that arena.
58. In this case the respondent accorded the claimant 20 days notice.
60. Regrettably and as correctly argued by the respondent, the claimant did not request for a review of the transfer and/or provide reasons for the respondent to consider.
61. Although having served the respondent for 23 years was creditable it did not accord the claimant the privilege not be transferred out of Kisumu.
62. The court is in agreement with the sentiments of the court in *Henry Ochido V NGO Co-ordination Baord (supra)* and *Anne Wairimu Kimani V Kenya Agricultural Livestock Research Organization (KALRO)* on transfer of employees.
63. As regards the complaint to the police by the respondent and summoning of the claimant to the Kisumu Police Station and recording of a statement, the respondent's action may not in this instance be characterised as malicious or ill-motivated. It had received the alleged confession by one Mr. Paul Wafula on questionable transfer of stock to the Kisii Branch and wanted the police to investigate and ascertain whether a criminal offence may have been committed and take the necessary action. The respondent's duty was to report the complaint. Needless to state, the claimant was not charged.
64. Equally, the claimant's argument that the respondent failed or refused to consider raising her salary owing to the cost of living in Nairobi lacks persuasion on account that the claimant did not adduce evidence to show that Branch Manager's position in Nairobi was entitled to higher remuneration.



65. Finally, the only potent reason cited for the resignation by the claimant is the fact that the respondent failed, refused and/or neglected to pay the claimant's salary for November and December, 2023 and January, 2024.
66. The respondent's witness Mr. Julius Omedo tendered neither reason nor justification why the claimant's salary was not paid in November and December 2023 in particular, and January 2024. He indeed admitted on cross-examination that the respondent withheld the claimant's salary for no reason thereby violating the provisions of the *Employment Act*.
67. Section 17(1) of the *Employment Act* provides that:
1. Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract or service directly in the currency of Kenya..."
68. Under Section 17(10) of the *Employment Act*, failure pay an employee's salary or wages is a criminal offence and the employer is liable to a fine not exceeding Kshs.100,000 or imprisonment for a term not exceeding 2 years or both.
69. These provisions underscore the centrality of wages or salary in an employment relationship as underlined by the definition of the term "employee" which means "a person employed for wages or a salary".
70. Payment of salary or wage is one of the fundamental terms of the contract of employment and runs to the root of the contract as envisioned by Lord Denning MR in his rendition in *Western Excavating (ECC) Ltd V Sharp* (supra) cited elsewhere in this judgment.
71. In *Geoffrey Alan Tolo V Tobias O. Otieno & another* [2022] eKLR the court held that:
- "For constructive dismissal to be inferred, the employee must have resigned within a reasonable time from his employment with or without notice as a result of the employer's hostile working conditions at his work place".
72. Similarly, in *Karimi V Katheri Farmers Co-operative Society Ltd* [2024] KEELRC 2195 (KLR), Onesmus Makau J. held that:
- "In this case, I am satisfied that failure to pay an employee salary for six consecutive months is one of the grounds upon which the court can infer constructive dismissal..."
73. In the instant case, the claimant resigned for non-payment of salary for 3 months without any explanation and the respondent tendered no evidence to demonstrate that the claimant had waived acquiesced or accepted the non-payment of salary or was by conduct estopped from demanding her salary.
74. In the court's view, although reasonable time is a question of fact dependent on the peculiarity of the individual circumstances of a case, three months is within reasonable time for an employee to exercise his or her right to treat the employer's conduct as a repudiatory breach of the terms of a contract of employment, as the claimant did in this instance.

Appropriate reliefs

75. Having found that as above, the court is satisfied that claimant is entitled to the following reliefs:
- i. Compensation



Since a constructive dismissal of an employee from employment constitutes an unlawful termination of employment, the claimant is entitled to compensation in accordance with the provisions of Section 149(1)(c) of the Employment Act.

I have considered that the claimant served the respondent diligently for 23 years, had no recorded warnings or disciplinary hearings, and was not to blame for the constructive dismissal.

I have further considered that the claimant did not express her wish to remain in respondent's employment.

In the circumstances the court is satisfied that the equivalent of five (5) months gross salary is fair compensation, Kshs.561,585.00.

- ii. Two months salary in lieu of notice

Neither the claimant's witness statement nor the oral evidence adduced in court justify the claim for two (2) months salary in lieu of one (1) month.

The claimant is awarded one (1) month's gross salary in lieu of notice, Kshs.112,317

- iii. Accrued unpaid leave days

Although the claimant's witness statement is silent on the number of leave days, the respondent had already computed the sum of Kshs.54,723.00 which the court hereby awards.

- iv. Aggravated damages and general damages

The claimant adduced no evidence to demonstrate that entitlement to either aggravated or general damages for the respondent's conduct.

The prayer is dismissed.

- v. Certificate of service

The claimant is entitled to a certificate of service by dint of Section 51 of the Employment Act.

- vi. The claimant shall be paid the unpaid salary for November and December 2023 and January, 2024.

76. The upshot of the foregoing is that judgment is entered in favour of the claimant against the respondent in the following terms:

- a. Equivalent of five (5) months salary Kshs.561,585.00.
- b. One (1) month's salary in lieu of notice Kshs.112,317.00.
- c. Accrued leave Kshs.54,723.00.
- d. Unpaid salary for November and December 2023 and January 2024 Kshs.332,371.00.
Total Kshs.1,060,996.00.
- e. Certificate of service.
- f. Costs of this suit.

It is so Ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF MAY, 2025.



DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

