



**Muga v Sbc Kenya Limited (Cause 346 of 2019)  
[2025] KEELRC 1391 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1391 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 346 OF 2019  
NJ ABUODHA, J  
MAY 9, 2025**

**BETWEEN**

**PASCAL JUMA MUGA ..... CLAIMANT**

**AND**

**SBC KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant through a Memorandum of Claim dated 9<sup>th</sup> May, 2019 pleaded inter alia: -
  - a. The Claimant averred that by a contract dated 5<sup>th</sup> February 2016, the Respondent employed the Claimant as a Territory Development Manager with effect from 22<sup>nd</sup> February, 2016. That pursuant to clause 11 of the contract the Claimant was stationed in the Eastern Region of the country and was in charge of Machakos, Kitui and Makueni Counties and was assigned a motor vehicle to carry out his duties.
  - b. The Claimant averred he carried out his duties dutifully and managed to increase the Respondent's sales in Eastern region. That in June 2017, the Respondent made a unilateral decision to transfer him from the Eastern Region Office to Respondent's Nairobi Office without prior communication and was still to remain in charge of Machakos, Kitui and Makueni.
  - c. The Claimant averred that he moved to Nairobi in September, 2017 and he was banned by the Respondent's management from travelling to Eastern Region. That the official motor vehicle assigned to him was taken away and Claimant instructed by Mr. Vinod Mishra to monitor his Eastern Region team on phone. That between September 2017 and May, 2018 he made effort to carry out his duties despite the minimal resources.
  - d. The Claimant averred that by a letter dated 1<sup>st</sup> March 2018 the Respondent wrote to the Claimant a letter referenced as the 1<sup>st</sup> warning letter-poor performance alleging that the



Claimant and his team had not been able to achieve targets and directed that the Claimant delivers the set targets by being on the ground and ensure commercial discipline in the team. That the warning letter was handed over to him by the Human Resource Manager who informed him that he did not like the way he was being handled and referred to the treatment as malicious. That the complaints in the letter referred to Machakos region which he had been asked to stay away from.

- e. The Claimant averred that by email dated 21<sup>st</sup> April 2018 he wrote to the Respondent Head of Sales informing him that the direct sales truck in Wote could not go to the market in Makueni due to bad weather. That he informed the Head of Sales that he had directed one Cosmas who was in charge of the truck in Wote to go and work with one Antony who was stationed in Machakos.
- f. The Claimant averred that on 30<sup>th</sup> April 2018, the Respondent wrote to the Claimant a show cause letter alleging that the Claimant showed negligence in his line of duty. That the Claimant was not responsible in his work and sales in his region were low. That many complaints of pricing and indiscipline had been noticed.
- g. The Claimant averred that by email dated 3<sup>rd</sup> May 2018, he responded to the show cause letter raising issues of the vast coverage areas with poor road networks, the company vehicle was taken away, the Claimant was confined to the Nairobi office, the distributors opting out cited lack of support from the Respondent, that the Claimant was not part of the management that set prices and that an isolated case of one week should not have been used to judge his overall performance.
- h. The Claimant averred that on or about mid May 2018, the Respondent's head of sale informed him that a replacement had been hired to take charge of the Claimant's team in Machakos, Kitui and Makueni and informed the Claimant that he would be assigned a new role.
- i. The Claimant averred that between May, 2018 and August 2018 the Claimant did not have any specific role to play at the Respondent's offices in Nairobi and the Claimant was asked to sit in one of the Respondent's board rooms/ meeting rooms until a new role was assigned to him.
- j. The Claimant averred that by email dated 6<sup>th</sup> June 2018 he wrote to the HRM informing her that he would be reporting to the office as he awaited to be assigned a new role as his team had been withdrawn from him and assigned to a different person. That on 27<sup>th</sup> August 2018 the Respondent's HRM issued the Claimant with a letter requiring him to report to Magadi on 28<sup>th</sup> August 2018 as a Direct Sales Man.
- k. The Claimant averred that he informed the HRM that the designation was a demotion and that the Claimant would not take up the position. That on the same day he was issued with another letter by the HRM requiring him to report to Garissa on 28<sup>th</sup> August 2018 as a Direct sales Man which the Claimant equally rejected. That he did not receive a refund of deductions made from his salary despite claiming the same on email of 27<sup>th</sup> August, 2018.
- l. The Claimant averred that on 28<sup>th</sup> August 2018 he was unwell and was issued a 2 days' sick leave by his doctor and informed the HRM who responded to the Claimant's claim of 27<sup>th</sup> August, 2018 on Garissa reporting indicating the reporting date was extended to 3<sup>rd</sup> September 2018. That on 31<sup>st</sup> August, 2018 the Claimant reported to Respondent's head office in Nairobi and found the guards had been instructed not to let him in.



- m. The Claimant averred that he sent various text messages to the HRM and tried to call her without success. That he sent an email to the HRM expressing his frustrations with the management. That on 31<sup>st</sup> August 2018 he requested for his relocation allowance from September 2017 when he got transfer from Machakos to Nairobi.
  - n. The Claimant averred that the Respondent management frustrated his duties under the contract since June 2017 and was finally compelled to resign on 3<sup>rd</sup> September 2018 as a result of Respondent conduct that had made the Claimant's working conditions intolerable that he felt compelled to leave his employment with the Respondent.
  - o. The Claimant averred that by a letter dated 3<sup>rd</sup> September, 2018 the Respondent wrote to him acknowledging and accepting the Claimant's resignation while outlining the Claimant's dues and enclosed Exit Assessment Forms for the Claimant to complete and return to the Respondent. That on 6<sup>th</sup> September 2018 the Respondent asked him to go for clearance in order for the Respondent to process his final dues.
  - p. The Claimant averred that the Respondent unilaterally changing the terms and conditions of his employment were not only breach of section 10(5) of the Employment Act but also an infringement of the Claimant's rights to fair labour practices guaranteed under article 41 of the Constitution.
  - q. The Claimant averred that the Respondent breached his contract of employment by unilaterally changing his job description without giving any notification and reasons thereby frustrating him by transferring him to Magadi and thereafter Garissa in a span of hours. That this forced him to resign which amounted to constructive dismissal by the Respondent.
2. The Claimant in the upshot prayed for the following against the Respondent;
- i. A declaration that the Claimant was constructively dismissed by the Respondent.
  - ii. Payment of the Claimant's dues and compensation amounting to Kshs 2,145,000/= constituting 12 months' salary for unlawful and unfair termination at Kshs 1,980,000- and 1-month's salary (that was withheld from Claimant's terminal dues of Kshs 165,000/=.
3. The Respondent in response filed its Response to the Memorandum of Claim & Counterclaim dated 25<sup>th</sup> June 2019 and averred inter alia:-
- a. The Respondent admitted that the Claimant was its former employee having been initially employed as a Territory Development Manager vide contract of 5<sup>th</sup> February, 2016. That the Claimant's station of Eastern region was not his permanent station as per his contract of employment. That the Contract of employment granted the management of the Respondent Company absolute discretion to transfer the Claimant to any department or work station.
  - b. The Respondent averred that there was no obligation on the Respondent to communicate to the Claimant and consult with him before arriving at a decision to transfer him to a different work station. That neither the law or his contract imposes any obligation on the Respondent to communicate to the Claimant and consult with him before arriving at a decision. That the Respondent after arriving at the decision to transfer the Claimant in June 2017 gave him sufficient time to make the necessary arrangements before moving to Nairobi in September 2017. That it has the absolute discretion to allocate and reallocate motor vehicles to its employees at any time without giving any reasons for that decision.



- c. The Respondent averred that the Claimant was not only performing poorly in the execution of his duties as the Territory Development Manager but also unable to achieve the targets set by the Respondent necessitating the Respondent to issue him with a first warning letter dated 1<sup>st</sup> March 2018 but his performance in the discharge of his duties under employment contract did not improve.
- d. The Respondent averred that it was within its right to issue the Claimant with a Notice to Show Cause why disciplinary action should not be taken against him for negligently, carelessly and improperly performing his duties resulting in poor performance.
- e. The Respondent averred that it was unsatisfied with the response and elected to assign other functions and duties to the Claimant while assigning his duties and roles to another employee. That on 1<sup>st</sup> March 2018 the Respondent issued a warning letter followed by a Notice to Show Cause which was preceded by many oral warnings by the Head of Sales of the Respondent and the Claimant averment that the Respondent did not furnish him with any reasons why a different person had been appointed to take his duties and why he was set to be assigned a different role.
- f. The Respondent averred that he had discretion under Clause 11 of the Employment Contract to transfer the Claimant to any department or work station and there was no indication in the Respondent's letters that the remuneration and benefits payable to the Claimant had been revised to his detriment.
- g. The Respondent averred that the HRM informed the Claimant on 28<sup>th</sup> August that the Respondent had extended the Claimant's reporting date to his new work station in Garissa to assume his position as a Territory Development Manager from 28<sup>th</sup> August 2018 to 3<sup>rd</sup> September 2018 to enable him settle down. That the HRM clarified to the Claimant that his salary would not be revised upon assuming his position.
- h. The Respondent averred that the Claimant's actions amounted to knowingly failing and refusing to obey a lawful and proper command issued by the Respondent through its HRM which command was within the scope of his duty to obey. That the same amounted to gross misconduct and constitutes justifiable and lawful grounds for summary dismissal.
- i. The Respondent averred that the Claimant is not entitled to entry into all work stations operated by the Respondent but only those to which he is stationed. That at all times the Claimant was treated humanely and kindly with all dignity, respect, fairness, courtesy and honesty. That the Respondent had a Human Resource Manual which set out the procedure through which employees could voice out their grievances against the Respondent which he did not utilize to report the alleged frustration he had encountered.
- j. The Respondent averred that it did not violate the Claimant's rights and it strictly abided by the contract and did not seek to vary its terms in any manner. That the Claimant resigned following his dissatisfaction with the Respondent's decision to transfer him to Garissa and to maintain his role as a Territory Development Manager which transfers had been necessitated by his poor performance in the execution of his duties.
- k. The Respondent averred that the Claimant's resignation is unfounded and mere excuses for his inability to discharge duties. That the Claimant did not clear with the Respondent hence not officially released.



4. The Respondent in the upshot prayed as against the Claimant that the Claimant's suit be dismissed with costs to the Respondent, a declaration that the Claimant did not clear with the Respondent as required and should therefore seek and obtain such clearance, Kshs 165,000/= being one month salary in lieu of notice, general damages for breach of Contract and cost of the suit.

### **Evidence**

5. The Claimant's case was heard by Hon. Lady Justice Monica Mbaru on 15<sup>th</sup> November, 2022 where the Claimant herein (CW1) testified and adopted his witness statement dated 20<sup>th</sup> May 2019 together with the pleadings filed in court dated 9<sup>th</sup> May 2019 as his evidence in chief.
6. CW1 testified that he was a salesman at Coca-Cola at Tharaka Nithi. That he was not treated fairly and he resigned. CW1 testified that he was in charge of Machakos, Kitui and Makueni working as a Territory Development Manager and was asked to move to Nairobi and the Respondent thereafter withdrew his official car and he monitored the team on phone which was not easy while still working in Nairobi reporting to the Respondent office in Baba Dogo.
7. CW1 testified that he lost distributors and could not maintain the standard. That he was told he would be replaced in Eastern Region and no reasons given or his new role. That the warning came as a surprise and while at the boardroom his performance was not discussed.
8. CW1 testified that the Respondent's HRM issued the Claimant with a letter requiring him to report to Magadi on 28<sup>th</sup> August 2018 as a Direct Salesman which he rejected and later on 27<sup>th</sup> August 2018 he was issued with another letter requiring him to report to Garissa on 28<sup>th</sup> August 2018 but he was unwell and was given an allowance up to 3/9/2018.
9. CW1 testified that on 31/8/2018 he reported to Baba Dogo and the security at the gate had been directed not to allow him in. That he had a letter sent to the HR who replied and said he had been transferred to Garissa and had no access to Nairobi. He therefore decided to resign. That he had 30 days of leave and Kshs 36,000/= deductions wrongly made to his salary.
10. In cross-examination CW1 testified that in June 2017 the Respondent transferred him to Nairobi from Eastern region and remained in charge at Eastern Region yet his terms remained the same.
11. CW1 testified that in Nairobi he had to move without facilitation and had to make a request and would be approved which delayed him in his work. That before the warning letter there were no discussions on his performance and no action was taken on the warning and his salary was not reduced.
12. CW1 testified that it was wrong to be moved from Nairobi at 5pm to Garissa the next day and without facilitation. That the Respondent had a prerogative to assign a new role but not a demotion for no good reason.
13. CW1 testified that he resigned because of the events prior and that he did not file a notice because he was locked out.
14. In re-examination, CW1 confirmed that the Respondent demoted him from Territory Development Manager and Team Leader Market Development Rep reporting to him and that his new role was 3<sup>rd</sup> below him.
15. The Respondent's case was heard by this court on 29<sup>th</sup> October, 2024 who called one witness, Cynthia Ochuodho, the legal officer of the Respondent who adopted her witness statement dated 7<sup>th</sup> September 2023, the Respondent's documents filed in court dated 25/6/2019 as her evidence in chief.



16. In cross- Examination RW1 testified that when she joined the Claimant had left and relied on HR records. That all employees were trained on the manual and that the employer had no duty to consult the Claimant before transfer and as per paragraph 11 of the employment contract it was governed by the laws of Kenya.
17. RW1 testified that the vehicle was assigned to another employee and the Claimant needed to be facilitated if he had to travel to the region and that she was not aware the Claimant was not facilitated. RW1 testified that she was aware of the circumstances surrounding the warning letter. There was verbal communication as she was informed by the HR. That there was procedure for issuing warning letter in the manual.
18. RW1 testified that there is no warning procedure in the HR and that the warning was sent on 1/3/2018 and on 30/4/2018 the Claimant was issued with NTSC which he responded to. That no disciplinary hearing was done after response to show cause.
19. RW1 testified that the decision to take away Claimant duties and assign him new roles was not subjected to a hearing.
20. RW1 testified that the Claimant was assigned a new role on 27/8/2018 to Magadi and before that he was still assisting in the sales department and was not aware the Claimant used to sit in the Boardroom whole day without being assigned duties.
21. RW1 testified that she did not have anything to show there was a meeting or discussion prior to the transfer and the Claimant rejected the role feeling it was a demotion, the notice was short and he was not consulted. That the Claimant rejected the offer to Garissa for the same reasons.
20. RW1 testified that the Claimant was given 3 months' notice from Eastern to Nairobi and that the short notice to Garissa was due to restructuring and was done in good faith.
21. RW1 testified that the Claimant was not denied access to Nairobi office as he could only access if he had a meeting because he had been transferred. That the transfer letter did not give the reason of poor performance as the reason for transfer. That she was aware of procedure to be used in case of poor performance. That there was a warning letter.
22. RW1 testified that the complaints against the Claimant were because of poor performance and that she had nothing to show the Claimant was responsible for the losses at SBC. That there was performance review of the Claimant which was done verbally. RW1 maintained the counterclaim and that Kshs 165,000/= was deducted from Claimant final dues.
23. In re-examination the RW1 clarified that Clause 11 of the contract on place of work that the Claimant did not object to clause on transfer. That resources were allocated to facilitate employees move around especially those in sales. That the Claimant was given notice of three months to move from Eastern region to Nairobi and he never gave notice of resignation.

### **Claimants' Submissions**

24. The Claimants' Advocates Kogweno & Bubi Advocates LLP filed written submissions dated 10<sup>th</sup> December 2024. On the issue of whether the Claimant was constructively dismissed, counsel relied on the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR and submitted on the principle of constructive dismissal that the burden lies on the employee to prove the conduct of the employer that made the employee feel compelled to resign/ leave employment.



25. Counsel submitted that the Claimant has demonstrated the same in his witness statement and oral hearing including in June 2017 the Respondent made a unilateral decision to transfer the Claimant from Eastern Region to Nairobi with no prior communication and reason, he was banned from travelling to Eastern Region and instructed to monitor his team by phone and the official motor vehicle was withdrawn.
26. Counsel submitted that the transfer without prior consultation was a breach of the Claimant's contract of employment since clause 19 of the contract expressly stated that the contract was to be performed, governed and construed in accordance with the laws of Kenya. Further Section 10(5) of the Employment Act provides that the Respondent was required to consult with the Claimant before effecting changes on his job description and place of work prior to notifying him of the transfer from Eastern to Nairobi.
27. Counsel relied on the case of Wachanga v Revere Technologies Limited ( Cause E1024 of 2021)[2024] KEELRC (KLR) and submitted that section 10(5) of the Employment Act requires the employer to consult the employee and revise the contract to reflect the change.
28. Counsel submitted that the Respondent did not provide any evidence of consultations with the Claimant in June 2017 prior to transfer to Nairobi. That the Respondent relied on clause 11 of the Claimant employment contract and asserted that the Respondent had discretion to transfer the Claimant to any department or base station or assign additional functions at the discretion of the management of the Respondent.
29. Counsel submitted that although the employer has a discretion to transfer an employee and assign additional duties such discretion must be exercised reasonably. Counsel relied on the case of Henry Ochido v NGO Co-ordination Board [2015] eKLR and submitted that the right to transfer must be exercised reasonably and not arbitrarily. That the Respondent exercised this discretion unreasonably and amounted to unfair labour practice against the Claimant.
30. Counsel submitted that the Claimant between September 2017 and May 2018 made every effort to carry out his duties but was constantly frustrated by the Respondent. That whenever the Claimant requested for a vehicle or facilitation in Nairobi the Claimant would be assigned a vehicle very late past 12pm and was required to return it by 6pm the very day. That it was impossible to monitor the Eastern region physically when he was banned from travelling there and the motor vehicle withdrawn.
31. Counsel submitted that on 1<sup>st</sup> March 2018 he was issued with the 1<sup>st</sup> warning letter and that it was unfair for the Respondent to expect him to meet the targets set for Eastern and Nairobi Region when the Respondent had banned him from travelling to the Eastern Region and allocated resources late in Nairobi to monitor the team.
32. Counsel submitted that the Respondent witness was unable to explain to court the circumstances surrounding the issuance of the warning letter and confirmed that the Human Resource Manual did not contain a provision entitling the Respondent to issue warning letters to employees. That there was no record that any hearing or explanation was issued to the Claimant prior to the warning letter being issued.
33. Counsel relied on the case of Kenya Ports Authority v Munyao & 4 others [2023] KESC 112(KLR) and submitted that due procedure is not adhered to when the disciplinary measures taken by an employer are not anchored in law nor in the disciplinary handbook.
34. Counsel submitted that the Respondent issued the Claimant with a Notice to Show Cause on 30<sup>th</sup> April, 2018 which the Claimant responded to. That the Respondent's witness in cross examination



- confirmed that no hearing was held before or after issuance of the Notice to show cause and the response that was sent by the Claimant.
35. Counsel submitted that in mid May 2018, the Claimant was verbally informed that a replacement had been hired to take charge of his Eastern region team and that he would be assigned a new role yet no reasons were given. Counsel relied on the case of *James Ang'awa Atanda & 10 others v Judicial Service Commission* [2017] eKLR and submitted that unilateral variation of employment contract is unlawful and amounts to repudiation or breach of contract.
  36. Counsel submitted that the Claimant was informed that there was a restructuring going on in the Respondent's company and he was instructed by the head of sales and the HRM to report to the Respondent's offices daily and sit in the boardroom which he did and no work was assigned to him for over 3 months but his salary was paid. Counsel submitted that the Respondent's Sales Manager (whom the Claimant reported to) consistently demanded that the Claimant resign in almost all daily meetings and phone calls.
  37. Counsel submitted that the behavior of the Respondent between 28<sup>th</sup> August 2018 to 3<sup>rd</sup> September 2018 was unreasonable and aimed at forcing the Claimant to resign. That the witness who testified was not present when the conversations were done and nothing prevented the Respondent from calling the Head of sales as a witness to rebut those assertions of his demand to resign. Counsel relied on the case of *Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited* [2019] eKLR on a party leading evidence on its possession.
  38. On the happenings of 8 days from 27<sup>th</sup> August, 2018 counsel submitted that the behavior of the Respondent was unreasonable and aimed at forcing the Claimant to resign. Counsel relied on among others the case of *Michael Muriuki Muturi v Water Resources Management Authority* [2022] eKLR and submitted that the discretion to transfer the Claimant ought to be exercised reasonably and fairly. Counsel also relied on among others the case of *Mwangi v Tangaza College (The Catholic University of Eastern Africa)* [2023] KEELRC 2503 (KLR) and submitted that the Claimant's redeployment did not amount to termination but amounted to demotion and unfair labor practice under article 41 of *the Constitution*.
  39. Counsel submitted that the Respondent did not provide any evidence of consultations or minutes of meetings held prior to the issuance of letters of 27<sup>th</sup> August 2018 transferring him to Magadi and then Garissa and also demoting him to the position of Direct salesman. That the warning letter and notice to show cause made no mention of transfers in light of alleged poor performance. That the Respondent did not follow the performance review procedure set out in its manual.
  40. On the issue of whether the Claimant is entitled to the reliefs sought counsel submitted that he has satisfied the test for constructive dismissal set out by the Court of Appeal in *Coca Cola* case above. Counsel submitted the Claimant has demonstrated that the Respondent's conduct amounted to a repudiatory breach of his contract of employment and that the Claimant is entitled to the remedies set out in section 49 of the *Employment Act* and relied on among others the case of *Mwinyihaji v David Livingstone Limited t/a Mara River Lodge & another* [2024] KEELRC 2238(KLR) in submitting that 12 months compensation is appropriate.
  41. Counsel submitted that the Respondent for the period of June 2017 to August 2018 was callous but deliberately carried out to frustrate the Claimant to resign and that and thus the Claimant merits the maximum compensation. Counsel relied on the case of *Coca Cola* case above and submitted that in the event of constructive dismissal an employee is entitled to leave at the instant without giving any notice.



42. On the issue of whether the Respondent was entitled to reliefs sought counsel submitted that the Respondent prayed for one month notice pay of Kshs 165,000/= despite in cross-examination admitting that they had withheld/deducted the said amount from the Claimant's terminal dues hence not entitled to the same as it would amount to unjust enrichment.

### **Respondent's Submissions**

43. The Respondent's Advocates Ngeri, Omiti & Bush Advocates LLP filed written submissions dated 5<sup>th</sup> February 2025. On the issue of whether the Claimant was constructively dismissed from employment, counsel relied on among others the case of Milton M Isanya v Aga Khan Hospital Kisumu [2017] eKLR and submitted that constructive dismissal is the desire to resign by employee due to hostile working environment or treatment by the employer. Counsel relied on the case of Coca Cola East Africa Limited v Maria Kagai Ligaga [2015] eKLR and submitted on the principles for determining constructive dismissal. Counsel further submitted that the Claimant's employment with the Respondent was governed by the Employer Contract dated 5<sup>th</sup> February 2016 whose introductory paragraph stated that the contract shall continue unless otherwise terminated under law or the letter of employment. That Clause 11 of the Employment contract provided that the claimant was liable to be transferred to any department or base or station within the Company or to be assigned other functions in addition to those that pertain to his position at the discretion of the Management of the Company.
44. Counsel submitted that Clause 18 of the employment contract provided for the review and amendment of the contract. That Clause 13 of employment contract provided for Company's grievance settlement and disciplinary procedure to be processed within the Company's Staff Regulations. That the Claimant's allegations that he was subjected to cruelty in the hands of the Head of Sales Mr. Vinod Mishra were without basis and were an afterthought with the sole purpose of libelling the Head of Sales and that the Claimant did not call a witness to confirm the complaints.
45. Counsel submitted that the Claimant knew he did not have any right of entry at the Nairobi Office without a proper reason or appointment. That the Claimant realized he had disobeyed lawful instructions by the Respondent and chose to resign.
46. On the issue of whether the Claimant is entitled to the reliefs sought, Counsel submitted that given the termination was not unfair, compensation under section 49(1) of the Employment Act does not arise. Counsel relied on the case of Engineer Francis N. Gachuri v Energy Regulatory Commission (2013) eKLR and submitted that there is no provision for payment of damages to the date of retirement.
47. On the issue of whether the Respondent is entitled to reliefs sought in the counterclaim, counsel submitted that the Claimant's resignation from employment was without the sufficient notice required by law and the Respondent was therefore entitled to payment of the 1 month's salary in lieu of notice.

### **Determination**

48. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The Court has also considered authorities relied on by counsels and is of the view that the issues for determination are;
- a) Whether the Claimant was constructively dismissed by the Respondent.
  - b) Whether the parties are entitled to the reliefs sought.



### **Whether the Claimant was constructively dismissed by the Respondent.**

49. As to whether the Claimant's employment was constructively dismissed, counsel adopted opposing positions with the Respondent's counsel submitting that the circumstances in this case were not those of constructive dismissal but rather the Claimant disobeying lawful instructions by the Respondent and choosing to resign.
50. It was the Claimant's case on the other hand that the Respondent management frustrated his duties under the contract since June 2017 and was finally compelled to resign on the 3<sup>rd</sup> of September 2018 as a result of Respondent conduct.
51. It was the Claimant case that the Respondent unilaterally changed the terms and condition of his job description without any notifications, the Respondent issued him with transfer letters to Magadi and Garissa which were demotions from his position as Territory Development Manager to Direct Salesman.
52. The Respondent employed the Claimant under a written contract of service with clear terms particularly among others the contested clause 11 of the employment contract which allowed the respondent to transfer the claimant to any department or work station and clause 18 on the review and amendment of the contract.
53. On Clause 11, this court appreciates that an employer has the prerogative to transfer/deploy its employees. However, that prerogative should be exercised reasonably and not arbitrarily.
54. The Claimant's case was that:
  - a. On June 2017, the Respondent decided to transfer him from the Eastern Region to Nairobi but still required him to oversee the Eastern Region without additional facilitation.
  - b. The Claimant's responsibilities were reassigned to another employee without a formal hearing or explanation.
  - c. The Claimant received a letter from HR on August 28, 2018, requiring him to report to Magadi as a Direct Salesman. He rejected this transfer.
  - d. The Claimant received another letter transferring him to Garissa, effective August 28, 2018 and was later granted an extension until September 3, 2018, for him to settle down.
55. It was the Claimant's case that on August 31, 2018, the Claimant attempted to report to work, but security had been instructed not to allow him in.
56. The Court requires to makes a determination as whether the Respondent's actions were malicious and only meant to force the claimant to resign hence amounted to constructive dismissal or not.
57. The concept of constructive dismissal was aptly articulated by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 as follows;

“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.”



58. The court is also guided by the case of *Nathan Ogada Atiagaga v David Engineering Ltd* [2015] eKLR, where the court stated as follows;

“Constructive dismissal occurs when an employee resigns because their employer’s behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”

59. Parties relied on the case of *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (supra), the Court of Appeal adopted the contractual approach test of constructive dismissal and enunciated the guiding principles including fundamental terms of the contract, causal link between the resignation and the employer’s conduct, resignation within reasonable time and absence of acquiescence, waiver or estoppel among others.

60. The basic ingredients in constructive dismissal are:-

- a. The employer must be in breach of the contract of employment;
- b. The breach must be fundamental as to be considered a repudiatory breach;
- c. The employee must resign in response to that breach; and
- d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”

61. From the facts at hand, the Respondent had the prerogative to transfer the claimant. In *Henry Ochido v NGO Co-ordination Board* [2015] eKLR the Court held:

“In this regard therefore, a transfer of an employee is one such prerogative of an employer subject to sufficient and reasonable notice to enable the subject employee report to the new station of transfer with the requisite facilitation. It is therefore not in the choice of an employee to dictate where they wish to work, once work has been created, and in the view of the employer they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee’s role is to ensure their work performance in the allocated station....For the employer to thus enjoy this prerogative, there is the duty not to act arbitrarily and ensure the employee is duly notified of the transfer and where the employee seeks a variation, such must be put into account in a manner that entails hearing what the employee has to say with regard to the transfer. This could be extension of time; facilitation; review of job requirement and any other reasonable terms that may arise...”

62. In other words, the discretion to transfer ought to be exercised reasonably and fairly and in consideration of the logistical concerns involved. Section 10(5) of the *Employment Act*, 2007 provides that;

Where any matter stipulated in sub-section (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.



63. Thus, in law, the Respondent could not unilaterally vary the Claimant’s employment contract without consultation. In Kenya County Government Workers Union v Wajir County Government & another (2020) eKLR, the court held that;

“ Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and breach of contract and the statutory requirement to consult with an employee where there is any variation to the employment contract and more specifically, to an essential term such as the duration of remuneration where the employee would be adversely affected are ingredients and are subsumed in the fair labour practices principles.”

64. The court from the circumstances of this case and in the light of caselaw in the area, is persuaded that the Respondent breached the claimant’s employment contract by changing the terms of appointment without giving reasons and consulting him over the same.

65. The Court also finds that whereas the Respondent gave the Claimant three months to move from Eastern region to Nairobi the same did not apply to the transfers done in August 2018 first to Magadi then Garissa. The Respondent’s allegations of poor performance could not be substantiated when it banned the claimant from travelling to that region concerned and resources were limited. The Claimant was to remain in charge of both Eastern Region and Nairobi yet they expected him to perform optimally.

66. The actions of the Respondent from June 2017 therefore amounted to unfair labour practice and caused the claimant to resign as the only reasonable response in the circumstances. This amounted in law to constructive dismissal.

**Whether the parties are entitled to reliefs sought.**

67. Having established that the Claimant was constructively dismissed and unfairly, he is entitled to compensation for unfair termination of service. The claimant had worked for the Respondent from 2016 to 2019 which was roughly three years. He had hoped to work for the respondent longer of course subject to termination clause in the contract and other vagaries of life that could bring the contract to an end. An award of 6 months’ salary would be reasonable compensation in the circumstances.

68. On the prayer for 1 month’s salary that was withheld from claimant’s terminal dues, the court finds that the Respondent withheld the same from his terminal dues as pay in lieu of notice. The claimant has been successful in proving his termination was unfair hence is entitled to be paid in lieu of notice.

69. In conclusion the Claimant’s claim is hereby allowed with costs as follows;

- i. 6 months’ salary as compensation for unfair termination of employment.....Kshs. 990,000/=.
  - ii. 1 month’s salary (that was withheld from the Claimant’s terminal dues) .....Kshs 165,000/  
=
  - iii. Costs and Interests of the suit
- TOTAL.....KSHS 1,155,000/=.

70. It is so ordered.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2025**

**DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF MAY, 2025**



**ABUODHA NELSON JORUM**  
**PRESIDING JUDGE-APPEALS DIVISION**

