



**Mutiga v Proto Energy Limited (Cause E939 of 2023)
[2025] KEELRC 1747 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1747 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E939 OF 2023**

**SC RUTTO, J
JUNE 13, 2025**

BETWEEN

FRANCISCA MAKENA MUTIGA CLAIMANT

AND

PROTO ENERGY LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers that she was employed by the Respondent as a Customer Care Coordinator. That on 19th January 2021, she was promoted to the position of Administration Officer with new terms of engagement. Consequently, her salary rose from Kshs 70,000/= to Kshs 100,000/=. That on 17th June 2021, she was once again promoted to the position of Administration Officer/Executive Personal Assistant, earning a gross monthly salary of Kshs 110,000/=.
2. According to the Claimant, she worked faithfully, diligently and with utmost dedication that the Respondent retained her after the six (6) months' probation period. She avers that no complaint was ever documented regarding her performance.
3. The Claimant avers that all hell broke loose when she became pregnant and applied for maternity leave from the Respondent. She contends that the Respondent started frustrating her, discriminating and engaging in unfair labour practices to her detriment. That the Respondent made her working environment and conditions deplorable, unconducive and as such, she had no choice but to resign at the earliest time possible. On account of the foregoing, the Claimant has prayed for the following reliefs against the Respondent;
 - a. A declaration that the Respondents conduct in handling the Claimant's employment period amounted to unfair, unlawful and constructive dismissal and in breach of the Employment Act and principles of employment law.



- b. Damages for unfair and constructive dismissal from employment equivalent to twelve (12) months gross salary totaling to Kshs. 1,320,000/= with interest thereon at Court rates from the date of Award until payment thereof in full.
 - c. Unpaid pending leave days
 - d. General damages for discrimination on account of pregnancy.
 - e. General damages for discrimination at work place.
 - f. Certificate of Service.
 - g. Cost of the suit plus interest thereon from the date of award.
 - h. Any other relief that this Honourable court may deem fit to and just to grant in the circumstances.
4. Putting the Claimant to strict proof, the Respondent has denied the Claimant's averments that the working environment was harsh and deplorable. According to the Respondent, the Claimant resigned to escape the consequences of her actions as per the company's policy.
 5. It is the Respondent's contention that the Claimant resigned voluntarily with immediate effect and did not serve the notice period hence the Respondent does not owe any terminal dues as alleged.
 6. The Respondent further lodged a Counterclaim against the Claimant for the sum of Kshs. 131,000/= being one month's salary in lieu of notice and outstanding deductions.
 7. Consequently, the Respondent prays that the Claim be dismissed with costs and the Counterclaim and Set Off be allowed with costs.
 8. In her Reply to the Statement of Response and Defence to the Counterclaim, the Claimant has denied the Respondent's averments and reiterated the contents of the Memorandum of Claim. The Claimant contends that the resignation clearly gives reasons which all point towards a harsh and deplorable working environment by the Respondent. She further avers that the Respondent witch-hunted to oust her and replace her with Ms. Njoki by hurriedly reviewing her contract without the HoD input.
 9. In her Defence to the Counterclaim, the Claimant has contended that she forfeited her November salary in lieu of notice hence the Respondent's prayer is misplaced. That further, she was not paid for her remaining leave days for the month of December 2022 and she is pleading for the same.
 10. The matter proceeded for hearing on 20th November 2024 and 20th February 2025, during which both parties called oral evidence.

Claimant's Case

11. The Claimant testified in support of her case and at the outset, she sought to adopt her witness statement to constitute her evidence in chief. She further produced the bundle of documents filed alongside her Memorandum of Claim as her exhibits before Court.
12. It was the Claimant's evidence that her problems with the Respondent started when she became pregnant. That the Respondent started discriminating, frustrating and engaging in unfair labour practices, for instance; giving and forcing her to work while away on maternity leave; pawning her duties on somebody else; giving bonus to other staff and leaving her out; extreme pressure with countless threats of being terminated if she did not meet the targets; profanities left right and center; orchestrating malicious charges and investigations against her while away on maternity leave; not being



- accorded a fair hearing, when she was served with a notice to show cause letter on the charges; subjecting her to embarrassment by giving her duties to a junior staff; subjecting her to uncondusive and harsh working conditions that she could not breastfeed her baby; and being denied proper maternity leave.
13. The Claimant further averred that while she was on maternity leave, criminal charges were orchestrated against her by the Respondent's personnel, the same personnel who were frustrating her and who wrote her a Notice to Show Cause.
 14. She further averred that the frustrations by the Respondent were too much that, as a result, she lost breast milk and could not breastfeed. She had to use baby formula to breastfeed.
 15. That due to the frustrations, discrimination and unfair labour practices by the Respondent, she decided to resign at the earliest possible moment through an email sent on 19th November 2022.
 16. The Respondent accepted her resignation on 28th November, 2022 admitting that the disciplinary process on the allegation of theft against her was not conclusive as it had not been started yet the investigations were just concluded by the very personnel of the employee who raised the allegation against her, wrote her a Notice to Show Cause and were frustrating her job.
 17. The Claimant averred that the Respondent by admitting that the disciplinary process was not conducted, is evidence that she was terminated without being accorded a hearing.
 18. That she has never been summoned, warned, cautioned or even attended any disciplinary proceedings concerning her work with the Respondent.
 19. The Claimant maintained that her resignation was as a result of frustration, discrimination and unfair labour practices by the Respondent. She added that the Respondent has refused to pay her terminal dues.

Respondent's Case

20. The Respondent called oral evidence through its Chief Legal Officer, Ms. Wambui Maina who testified as RW1. Similarly, she adopted her witness statement and the bundle of documents filed on behalf of the Respondent to constitute her evidence in chief.
21. It was RW1's evidence that during the Claimant's employment, she proceeded on three (3) months' maternity leave. While she was on leave, it was discovered that on diverse dates, she was engaged in some improprieties of using the Respondent's employees for personal errands and receiving or otherwise procuring goods from the Company's kitchen in breach of the Company's operating procedures and policies.
22. RW1 averred that the Claimant abused her office by using Company staff for her personal gain while on maternity leave and further engaging the employer's staff in running her personal errands.
23. That investigations were carried out and the Claimant was one of the persons identified as having participated in the misconduct. The Claimant met the security team that was carrying out the investigations, but resigned soon thereafter before any disciplinary action could be taken.
24. RW1 further averred that the Claimant admitted in her resignation email that she was involved in buying stuff from various Company suppliers while on leave and argued that other staff members were also involved in trading with Company suppliers and doing irregular business during office hours.
25. According to RW1, this was not a proper explanation because the Claimant was in a senior position and was expected to flag this conduct with the management instead of participating in the misconduct.



26. RW1 further denied the Claimant's assertions of discrimination. That further, the Claimant has produced evidence that she was not the only person singled out for the misconduct and there was in fact disciplinary action initiated against the other participants in the scheme.
27. RW1 further averred that it is not true that a junior employee was promoted in the Claimant's place. That it is also not true that the Claimant used to work during her entire maternity period.
28. According to RW1, the position of an administrative officer is critical for a company and work needed to be done even during the Claimant's maternity leave. That when the Claimant went on maternity leave, other team members held her fort during the three (3) months of her leave and there was no need to outsource a temporary employee to fill the vacancy.
29. RW1 added that the Claimant's role was undertaken by her colleagues who held her fort during maternity leave and they worked diligently and competently, and there was no need to ask the Claimant to work remotely as she has alleged.
30. RW1 further averred that the Claimant resigned voluntarily in a bid to escape the consequences of her actions as per the Company's policy.
31. That the Claimant resigned at the culmination of investigations into her conduct and did not wait for any show cause letter to be issued to her or the disciplinary hearing to take place, so that she could have the opportunity to be heard and give her written and oral representations on the charges against her.
32. RW1 further stated that the Company has a grievance procedure in place, which the Claimant was aware of. That if she had a genuine grievance, she should have registered the same for determination. Instead, she first raised the same in her resignation email, coincidentally when the investigations into legitimate misconduct concerns on her activities were underway.
33. According to RW1, the grievances raised in the Claimant's resignation email was an attempt to deflect from the legitimate misconduct investigations being carried out against her.
34. RW1 further stated that the Claimant was not forced out of the company. She voluntarily availed herself of a resignation letter out of her own free will.
35. RW1 further averred that the Claimant's contract of employment provided for one (1) months' notice from either party in case of an intention to terminate the contract.
36. That the Claimant resigned with immediate effect, did not serve notice, or pay in lieu of notice as per the contract and therefore owes the Respondent the sum of Kshs. 131,000.00 being payment in lieu of notice and the applicable statutory deductions paid on her behalf.

Submissions

37. It was the Claimant's submission that she was constructively dismissed from her services and is thus entitled to damages for wrongful dismissal. In support of this position, the Claimant placed reliance on the cases of *Enid Nkirote v New Year Book Editorial Board (2022) eKLR*, *Benjamin Muriuki Selestino v Cobra Security Company Limited (2019) eKLR* and *Milton Isanya v Aga Khan Hospital Kisumu (2017) eKLR*.
38. The Claimant further argued that the actions and omissions of the Respondent go to the root of the contract of employment she had with the Respondent and amounted to total breach of trust between her and the Respondent.



39. Referencing the case of *Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023)* (2023) KESC 112 (KLR) (Civ) (28 December) (judgement), the Claimant submitted that she was never subjected to a hearing, thereby confirming her pleas on unfair labour practices.
40. According to the Claimant, she has shown that she was subjected to unfair labour practices during her employment with the Respondent and after the termination of her employment.
41. It was the Claimant's further submission that she has established a prima facie case that she was discriminated against on the ground of her pregnancy. In support of this position, the Claimant placed reliance on the case of *G.M.V v Bank of Africa Kenya Limited* (2013) eKLR.
42. The Claimant further submitted that the Respondent has failed to discharge its burden of proof and the Court should find and hold that she was discriminated upon on account of pregnancy.
43. With respect to the Respondent's Counterclaim and Set Off, the Claimant posited that the same is not merited and ought to be dismissed with costs. On this issue, the Claimant submitted that he who alleges must prove. That the Respondent did not produce any evidence to contradict her figure. To this end, she urged the Court to consider her evidence as uncontroverted.
44. On the other hand, the Respondent submitted that the Claimant has made the allegations relating to discrimination without an iota of evidence contrary to the principle "(s)he who alleges must prove" codified in Section 107 (1) of the *Evidence Act*. In support of this position, the Respondent placed reliance on the case of *SOO & another v ESI (Suing on behalf of EJZ (Minor))* (Civil Appeal 19 of 2018) [2020] KEHC 931 (KLR).
45. The Respondent further posited that there was no discrimination against the Claimant on account of her pregnancy or any other ground as alleged or at all.
46. Referencing the case of the *Kenya Women Microfinance Limited v Angore* (Appeal E009 of 2023) [2023] KEELRC 2556 (KLR), the Respondent further submitted that the Claimant voluntarily resigned from employment, having pre-empted disciplinary action by the Respondent under the guise of fabricated allegations regarding the workplace.
47. It was the Respondent's further submission that the Claimant is simply claiming constructive dismissal as an afterthought to attempt to cure her decision to resign from employment after she wrongly pre-empted the Respondent's action.
48. Citing the case of *Wanjala v Majid Al-Futaim Limited* (Cause E675 of 2022) [2024] KEELRC 780 (KLR), the Respondent further submitted that it was exercising its managerial prerogative to investigate the breach of its policies as set out in the HR Manual. That this included an interview with the Claimant who was involved in and admitted to the said breach.
49. In the Respondent's view, the Claimant has not established that there is any conduct attributable to the Respondent that led her to resign from employment. In support of this position, the case of *Kangethe v Monarch Insurance Company Limited* (Cause E959 of 2021) [2024] KEELRC 990 (KLR) was referenced.

Analysis and Determination

50. Flowing from the pleading filed by both parties, the evidence on record, as well as the rival submissions, the following issues are isolated for determination:

SUBPARA i.



Whether the Claimant was constructively dismissed from employment;

- ii. Whether there is a case of discrimination;
- iii. Whether the Claimant is entitled to the reliefs sought;
- iv. Whether the Respondent has proved its Counterclaim;

Constructive dismissal?

51. It is the Claimant's case that she was forced to resign at the earliest time possible as the Respondent made her working environment and conditions deplorable and uncondusive. To this end, she has cited the Respondent for constructive dismissal.
52. The Respondent holds otherwise and contends that the Claimant resigned out of her own free will to avoid potential disciplinary action that was to be taken against her.
53. The key question that this Court must now answer is whether the Claimant was constructively dismissed.
54. I find it imperative to first start by considering what the term constructive dismissal refers to. Whereas the *Employment Act* 2007 has not defined the term constructive dismissal, the concept has been the subject of many decisions emanating from this Court and the Court of Appeal. In the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal had this to say:

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. 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 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.”

55. And further, the Black's Law Dictionary (10th Edition) defines the term constructive dismissal to mean:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

56. Simply put, constructive dismissal occurs when an employee resigns due to intolerable working conditions created by their employer, making the resignation effectively involuntary. Notwithstanding such a resignation, the employee can bring a claim against the employer for wrongful termination of employment.
57. In such a case where an employee leaves a job owing to a hostile work environment or intolerable working conditions, there is said to be a constructive dismissal.
58. What constitutes a hostile work environment is a question of fact and includes but not limited to, reduction in compensation and benefits, demotion, harassment and discrimination, unreasonable



transfers or changes in working location, ignoring working environment complaints, excessive changes in shifts and hours etc.

59. Further to the foregoing, unilateral breach of fundamental terms of an employment contract can be considered as a repudiatory breach, which makes the employee entitled to hold that he or she is no longer bound by the contract.
60. Back to this case, the Claimant resigned vide an email dated 19th November 2022, in which she stated as follows:

“ Hello,

I hereby tender my resignation as the admin/executive PA, effective immediately.

My decision has been driven by a number of factors including the recent false theft allegations. Just so you know, we’ve been buying stuff from various company suppliers the same way and it has never been an issue, the reason I don’t understand why it became an issue for me alone. Clearly, this has been done out of malice. Anyways, I gave the security head all the evidence and I believe that’s sufficient to clear my name of the allegations. However, we have employees who also do business in the office by selling stuff to other employees during working hours. It begs the question why has this conflict of interest never come up?

Secondly, a lot has happened since I went on maternity leave. For instance, I have worked during the entire period in a bid to support my team and ensure tasks run smoothly (evidence attached). I feel some things were done to affect my job negatively. This includes the promotion of my assistant, including doubling her salary as well as change of title and roles as mine (office manager is same as admin officer in all aspects) and reporting line. I wasn’t consulted in any of this as her immediate supervisor.

Also, I was assigned the roles of administration department head. However, I have not been included in the HoDs meeting at any time. In addition, I haven’t received a single bonus for the reason am a HoD, my medical cover does not reflect that of other HoDs, even after pushing for it, among other things.

I have served the company diligently and professionally for the 3 years but feel that what has been happening recently is enough proof that am not wanted back in the company and is fine with me.

Thank you for giving me the opportunity to work with Proto Energy Limited and I wish you all the best for the future.

Regards,

Francisca”

61. It is essential to note that the Claimant’s resignation was accepted on 28th November 2022 by the Respondent’s Chief Executive Officer, in which she stated in part:

“ We had not yet initiated the disciplinary process concerning the theft allegations. As you are aware, investigations on the theft allegations were concluded but the disciplinary process had not yet started. What you stated in your resignation letter should have been submitted as your response to a show cause letter which had yet to be issued by the time you resigned. Since a decision on culpability had not yet been reached on the theft allegations, the theft allegations cannot be said to be basis of your resignation.



The matters you raised regarding actions done to that allegedly affect your job negatively, were first raised by your email of 19th November 2022. Had you raised these issues before, the same would have been acted upon or responded to accordingly. We believe these issues are being raised as an afterthought and as an attempt to justify your resignation...”

62. Thus, the question is whether the Claimant’s resignation was actuated by circumstances that can be construed as amounting to constructive dismissal.
63. Applying the dicta in *Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga* (supra), and in light of the definition of the term constructive dismissal, the Claimant ought to demonstrate that the Respondent created a hostile working environment that was so intolerable that she had no option but to resign.
64. The first issue raised by the Claimant as being the basis for her resignation is what she termed as false theft allegations. From the record, the Respondent undertook investigations on what was referred to as “Suspected impropriety at Kabati Kitchen”.
65. According to the investigation report, which was prepared by David Opiyo, the Claimant was among seven (7) employees who were interviewed during the investigation.
66. It is notable that the Claimant tendered her resignation after the conclusion of the investigation and prior to any disciplinary action being taken against her. Indeed, at the time of the resignation, no adverse action had been taken against the Claimant.
67. It is this Court’s considered view that an employer has the right to carry out investigations into any matter that arises within the context of the employment relationship. In addition, the employer reserves the right, subject to adherence to fair procedure, to commence a disciplinary process against an employee in instances where the employee’s conduct violates the employer’s policy, procedures or the contract of employment.
68. In the instant case, there were allegations that the Claimant had purchased beef and milk from the Respondent’s suppliers and used the Respondent’s resources (drivers and vehicles) to have the same delivered to her while she was on maternity leave. Therefore, the Respondent was well within its right to undertake investigations into the issue in the event it was of the view that the Claimant’s actions were in breach of its policy.
69. The fact that the Claimant was undergoing an investigation on an issue she felt she was blameless, did not amount to constructive dismissal. In the event the Claimant was displeased with any aspect of the investigation process, she could have lodged her complaint with the Respondent within the established channels. By all means, bolting out after an investigation through resignation does not amount to constructive dismissal in my respectful view.
70. On this issue, I agree with the sentiments expressed by the Court in the case of *Stella W. Muraguri vs Edward Kamau Muriu & 4 others* [2022] eKLR, thus:

“44. To my mind, not every involuntary resignation amounts to constructive dismissal. The threshold for constructive dismissal is achieved where the involuntary resignation has a direct causal link with the employer’s conduct, which may reasonably be described as intolerable. It cannot be said to be constructive dismissal, when an employee resigns to get out of a tight spot.”
Underlined for emphasis



71. The second issue raised by the Claimant in her letter of resignation is that she worked during her maternity leave in a bid to support her team and ensure tasks ran smoothly. Despite the Claimant's assertions, she did not exhibit any evidence in court to this effect. Similarly, there was no evidence to support the Claimant's assertions that her assistant was promoted to be at par with her and her salary doubled.
72. The Claimant further stated in her resignation email that she was assigned the roles of the administration department head but was not included in the HoDs meeting. That further, she had not received a single bonus and her medical cover did not reflect that of other HoDs.
73. During the hearing, the Claimant exhibited a letter dated 17th June 2021 titled "Change of Title and Salary Review". As per the said letter, the Claimant was informed that her title had changed to Admin Officer/CEO's PA. There is no indication or suggestion in the said letter that the Claimant was designated as the head of the administration department. If anything, the letter is explicit that she was to report to the Head of Commercial.
74. The total sum of my consideration is that the Claimant has not proved on a balance of probabilities that the Respondent had created a hostile work environment or intolerable working conditions, leaving her with no option but to resign. Put differently, the Claimant has not proved that she was constructively dismissed hence unfairly and unlawfully terminated from employment.

Discrimination?

75. The Claimant has averred that she was discriminated against on account of her pregnancy. In this regard, the Claimant avers that she was replaced with her assistant and her salary increased. Still on this issue, the Claimant has cited the investigations undertaken by the Respondent during her maternity leave.
76. As stated herein, the Claimant did not tender any evidence to support her assertions that her assistant replaced her. As such, this was a bald assertion.
77. In any event, since the Claimant was away on maternity leave, it was reasonably expected that her duties would continue to be performed by another officer during her absence.
78. If I may say, the Claimant's assertions are at variance with her claim that she was forced to work during her maternity leave.
79. By dint of Section 5(7) of the *Employment Act*, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that Section.
80. This notwithstanding, the Claimant was first required to establish a prima facie case for discrimination in order for the burden to shift.
81. On the whole, the Court finds that the Claimant has not established a prima facie case of discrimination on the basis of pregnancy for the burden to shift to the Respondent.

Reliefs?

82. As the Court has found that the Claimant was not constructively dismissed, the declaratory reliefs and claim for compensation for unfair termination do not lie.



Counterclaim?

83. The Respondent's Counterclaim is for the sum of Kshs 131,000/= being one (1) month's salary in lieu of notice and outstanding deductions.
84. As can be discerned from the record, the Claimant's resignation was with immediate effect.
85. Revisiting the Claimant's Contract of Employment, it is apparent that under Clause 10, either party could terminate the contract by giving the other party one (1) months' notice or paying salary equivalent to one (1) month in lieu of such notice.
86. It is therefore apparent that the Claimant was required to issue the Respondent with a notice period of one (1) month and in lieu thereof, pay salary equivalent to the notice period.
87. Since the Claimant's resignation was with immediate effect, the Court finds that the same was contrary to Clause 10 of the contract of employment.
88. Therefore, the Respondent is entitled to recover from the Claimant, salary equivalent to the notice period being one (1) month.
89. It is also notable that the Respondent informed the Claimant through the letter dated 28th November 2022, that her final dues would include salary for the days worked up to 19th November 2022 and accrued and unutilized leave days which were indicated as five (5). Therefore, it is only fair and just that these payments be set off against the amount awarded to the Respondent as notice pay.

Orders

90. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.
91. The Counterclaim is allowed in the sum of Kshs 110,000.00, being one (1) month's salary in lieu of notice. The Claimant's November salary for 19 days and outstanding leave days (5), which total the sum of Kshs 90,385.54 shall be set off against the sum of Kshs 110,000.00 awarded in the Counterclaim. Therefore, the sum due to the Respondent in the Counterclaim is Kshs 19,614.46. There will be no orders as to costs with respect to the Counterclaim.
92. The Respondent shall issue the Claimant with a certificate of service in line with Section 51(1) of the Employment Act, within 7 days from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Ochieng

For the Respondent Ms. Wataka

Court assistant Millicent

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 had 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.

STELLA RUTTO

JUDGE

