



REPUBLIC OF KENYA



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**Kwamboka v Symbio Healthcare Limited (Cause E215 of 2022)  
[2025] KEELRC 1721 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1721 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E215 OF 2022**

**JW KELI, J  
JUNE 12, 2025**

**BETWEEN**

**MAUREEN KWAMBOKA ..... CLAIMANT**

**AND**

**SYMBIO HEALTHCARE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant resigned from employment on the 10<sup>th</sup> September 2021 and vide memorandum of claim dated 5<sup>th</sup> April 2022 and received in court on 6<sup>th</sup> April 2022 sued the respondent and sought the following Orders:-
  - a) ) A declaration that the resignation by the claimant was constructive dismissal which is unfair termination therefore illegal and unlawful.
  - b) A declaration that the Claimant's right to fair labour practices has been breached
  - c) A declaration that the Claimants right to fair administrative action has been breached
  - d) A declaration that the Claimants right to a fair hearing has been breached
  - e) The claimant be paid the unpaid salary as calculated and tabulated below;
    - i. Salary for the 52 months' balance not yet paid..KSH 13, 519,740
    - ii. Mileage unpaid allowance...KSH 450,000
    - iii. Airtime allowance not paid....KSH 108,000
    - iv. Fuel allowance.KSH 520,000
    - v. Money being deducted for car loan..KSH 1,502,423



Total...KSH 16, 100, 163

- f) General damages for pain and suffering
  - g) Interest in relation to (e) and (f) above
  - h) Costs of this suit.
  - i) Any other order that the Honourable Court may deem fit to grant in the circumstances
2. The claimant in support of the claim filed her witness statement dated 5<sup>th</sup> April 2022 and list of documents of even date and the bundle of documents.
  3. The Respondent entered appearance through the law firm of Nyongesa Nafula & Company Advocates and filed a statement of response dated 31/10/2023 denying the allegations in the Memorandum of Claim. In support of the response the respondent filed its list of witnesses of even date, witness statement of Stephen Njoroge dated 20<sup>th</sup> February 2024 and of Mercy Mburu of even date together with the respondent's list of documents dated 31<sup>st</sup> October 2023 and the bundle of documents.

### **Hearing and evidence**

4. The claimant's case was heard on the 28<sup>th</sup> January 2025 where she testified on oath, adopted her witness statement filed in court and produced the documents under the list dated 5<sup>th</sup> April 2022. She was cross-examined by counsel for the respondent, Pepela Advocate and re-examined by her counsel, Isoe.
5. The respondent was heard on even date with Stephen Njoroge as RW1. He testified on oath, adopted his witness statement dated 20<sup>th</sup> February 2020 as his evidence in chief and produced documents under the list of documents by respondent dated 31<sup>st</sup> October 2023 and the further list dated 19<sup>th</sup> July 2024 as respondent's evidence in chief. He was cross-examined by counsel for the claimant Ms. Isoe and re-examined by his counsel. The respondent's case was closed, and the parties took directions on the filing of written submissions.
6. Both parties filed written submissions.

### **The Claimant's case in summary**

7. The Claimant herein was employed by the Respondent as a Clinical Education & Training Consultant as per the employment contract dated 5/05/2017 and she was supposed to begin her role on 1/06/2017. The Claimant's remuneration as per the employment contract was KES. 284,995/= which was the gross salary. The Claimant was also entitled to allowances. The Claimant was however, subjected to piecemeal salary payment of KES. 25,000/= instead of the KES. 284,995/= as per the employment contract for an unbearable period. She subsequently resigned due to frustration as she could not support herself to continue working for the Respondent. At the point of resignation, the Respondent owed the Claimant salary arrears amounting to KES. 8,534,308/= as per the resignation letter dated 10/09/2021. The Respondent refused and or neglected to pay the Claimant the said salary arrears thus necessitating this suit.

### **Respondent's case in brief**

8. Vide her Statement of Claim dated 5th April 2022, the Claimant commenced her proceedings against the Respondent alleging Constructive dismissal. The Respondent, in its Response to Statement of Claim dated 31st October 2023 denied the allegations of underpayment of the Claimant, and that of constructive dismissal, and averred that the Claimant voluntarily resigned from employment, forfeiting



1 month's salary in lieu of notice. The Claimant confirmed that all through her employment, the Respondent consistently paid her a gross salary of Ksh. 25,000 and that at no point did she ever receive the Ksh. 284,995.00 as allegedly agreed. She confirmed to having been aware of formal channels of communication in the Respondent's place and even confirmed that she made various communications via email to the Respondent's staff, that even her resignation was in writing, but could not adduce any instance where she ever complained about her underpayment all through the 1 to 4 years she was in employment. The Claimant further acknowledged that her mileage allowance was channelled towards the repayment of a car loan, and upon completion, the car of registration no. KCL 438L was transferred from the Respondent to her name.

9. The Respondent through its Director adopted his witness statement and their filed documents. He provided clarification that the rightful contract, wherein, the terms stipulated that the Claimant would be entitled to a gross salary of Ksh. 25,000 and the under-listed allowances. He also corroborated the fact that these payments were made on time from the onset of the Claimant's employment, and no complaint whatsoever was ever made as to the amounts. He further brought out the fact that the reduction in allowances only started taking place in the midst of the unprecedented Covid-19 Pandemic which ravaged all business across the country. Thus, the reductions were only geared to the sustainability of the Respondent.

## **Determination**

### **Issues for determination**

10. The claimant identified the following as the issues for determination in dispute:-
  - i. Whether the Claimant was constructively dismissed from her employment?
  - ii. Whether the Claimant procured their employment contract fraudulently?
  - iii. Whether the Claimant is entitled to the Reliefs Sought?
  - iv. Who should bear costs of the Claim.
11. The respondent identified the following issues for determination in the dispute:-
  - i. What was the actual agreed salary between the Claimant and the Respondent, and whether the Claimant committed fraud and forgery in altering the contract?
  - ii. Whether the Claimant was constructively dismissed from employment?
  - iii. Whether the Claimant is entitled to the reliefs sought?
12. The court found the parties were in agreement on the issues for determination in the appeal, which the court formulates as follows:-
  - a. Which was the valid contract?
  - b. Whether the Claimant was constructively dismissed from her employment?
  - c. Whether the Claimant is entitled to the Reliefs Sought?



## Which was the valid contract?

### The Claimant's submissions

13. Whether the employment contract produced before the Court by the Claimant was fraudulently procured? The Claimant asserted that her employment contract dated 5/05/2017 produced before this court in her list of documents, was not fraudulently altered and that the Respondent has failed to discharge the legal burden of proving fraud. The Respondent's reliance on a conflicting contract and allegation of forgery are unsubstantiated, contradicted by their own conduct and unsupported by any evidence. In the contract produced by the Claimant, clause 4 of the said contract indicates that the Claimant's gross salary is KES. 284,995/= and other allowances while the Respondent has produced a second employment contract purporting that the Claimant's salary was KES. 25,000/=.
14. Fraud is a serious allegation requiring strict proof and must be specifically pleaded. As was held in *Koinange & 13 others v Charles Karuga Koinange* [1986] KEHC 3 (KLR), the court emphasized; "Allegations of fraud must be specifically pleaded, particularized, and strictly proved...mere suspicion is insufficient" The Respondent has not met this standard. Their defense hinges on producing a contradictory employment contract and alleging forgery yet no evidence such as forensic analysis, witness testimony or admission has been adduced to prove that the Claimant altered the terms of remuneration. The mere existence of two contracts does not in itself prove fraud. Further, the Respondent's conduct is inconsistent with their claim of fraud. The resignation letter from the Claimant explicitly acknowledges her salary as KES. 284,995/= and in the said letter, the Claimant goes ahead to indicate that the same can be deducted from the salary in arrears owed to her by the Respondent. If the Respondent truly believed that the Claimant's salary was KES. 25,000/=, they would have immediately disputed the figures in the resignation letter. The failure by the Respondent to do so confirms that the contract produced by the Claimant is genuine. The Respondent's acknowledgement of the Claimant's resignation letter which expressly references the salary of KES. 284,995/= is inconsistent with their fraud allegations. As was held in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [2009] KEHC 4030 (KLR); "A party cannot approbate and reprobate..... Conduct inconsistent with a claim estops them from asserting it." By accepting the resignation letter referencing the salary of KES. 284,995/=, the Respondent ratified the terms of the Claimant's contract. Their belated challenge to the said amount is an afterthought. The Respondent purportedly reported the matter to the police yet no charges nor convictions ensued. The produced OB from Industrial Area Police has not resulted in any charges or investigations against the Claimant. That the allegation of criminal conduct in civil proceedings in the absence of prosecution or conviction carry minimal probative value. The absence of criminal proceedings against the Claimant further weakens the Respondent's claim of fraud. The Respondent has not demonstrated that the Claimant altered the employment contract, specifically the remuneration clause. Conversely, the Claimant's resignation letter corroborates her version of the salary terms.

### Respondent's submissions

15. What was the actual agreed salary between the claimant and the respondent and whether he claimant committed fraud and forgery by altering the contract? Before the court are two employment contracts both dated 5th May 2017, and both seemingly executed by both parties and bearing similar clauses with respect to the employment terms, save for the remuneration and allowances. In her employment contract the Claimant has alleged that she was entitled to a gross monthly salary of Ksh. 284,995/- and a couple of allowances being millage allowance of Ksh. 50,000, fuel allowance of Ksh. 25,000, Out of station allowance of Ksh. 4,500 and phone allowance of Ksh. 3 500. The Respondent has denied this



being the true contract agreed between the parties, and on the contrary, adduced the agreed contract indicating the Claimant's gross salary as Ksh. 25,000.00, mileage allowance up to a maximum of Ksh. 50,000, Fuel allowance up to a maximum of Ksh. 25,000, Phone allowance of Ksh. 3,000 and bonus payment of 1%.

16. That from the two contracts the main contradicting figures the court is invited to determine are the gross salary and the airtime allowance agreed between the parties. Before the Respondent belabours on the agreed gross salary, it should not be lost to this Court that the claimant confirmed both in her pleadings, (specifically paragraph (I) of her Statement of Claim and paragraph 12 of her witness statement) and her oral testimony that she would receive her allowances in good time up to and until March 2020 when the Respondent stopped remitting Ksh 3,500. The respondent contended that if indeed the Claimant was receiving a monthly airtime allowance of Kshs. 3,500 for over three years consistently, would it not be reasonable to expect her to produce at least some form of proof of such receipt, be it bank statements, M-Pesa records, receipts, or even correspondence acknowledging such payments? The Respondent has outright denied ever remitting this amount, yet the Claimant has come empty-handed, offering nothing but bare assertions. If this allowance truly existed, where is the evidence?" . Section 109 of the Evidence Act further stipulates that "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof shall lie on any particular person" The non-production of such proof can only be construed to mean that the same, if produced, would be averse her claim. Reliance is placed in the case of Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others (2012] eKLR where the court held that "Section 112 of the Evidence Act Chapter 80 of the laws of Kenya provides:- ..... where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced , it would be adverse to such a party'.
17. The central claim on this matter is pegged on the underpayment of Ksh. 284,995.00 as contractually agreed. During the hearing, the Claimant confirmed that there were formal communication channels between employees and the Respondent. She confirmed her email address being maureen.kwamboka12@gmail.com. She confirmed to have had correspondences with the Respondent on the said email address. She even acknowledged that her resignation was in writing. The respondent contended that, strangely, however, despite alleged underpayment of more than Ksh. 250,000.00 every month for 4 years being a serious issue, she never even once raised it formally or in writing. There is no record of complaint, request, or follow-up. This undermines the credibility of her claim. Simply put, she has nothing to show for it, as there has never been such a thing as underpayment. That notwithstanding, the Claimant has now hopped onto the assertion that since she tendered her resignation, which resignation was received by the Respondent and stamped on, it serves as a confirmation that the Respondent acknowledged the contents of the letter, to wit, her salary being Ksh. 284,995.00. That this Court should not be misled that by merely stamping a document upon receipt, a party has fully accepted its contents. If that were the case, then every court registry that stamps pleadings would be deemed to have endorsed the merits of each case before it. Would that be a reasonable proposition? Certainly not! The Respondent submits that stamping a document is a procedural act, not a substantive agreement. It signifies only that the document has been delivered and received, not that it has been scrutinized, consented to, or agreed upon. Thus, the Respondent's act of stamping the resignation letter was nothing more than an administrative acknowledgement of receipt, and it would be a legal absurdity to stretch that simple act into an admission of the Claimant's allegations. The courts have often construed stamps on documents as acknowledgements of receipt of documents rather than admission of the contents. This can be demonstrated in China Road & Bridge Corporation Kenya v Econite Mining Company Limited & 6 others [2016] eKLR and Woolworths



Limited V Nakumatt Holdings Limited & 2 Others [2012]eKLR where the courts relied on the stamps acknowledging receipt to determine that the parties were served, rather than "admitted the contents of the pleadings" by stamping on the documents. Further to the foregoing, it is the Respondent's case that what was contractually agreed between the parties as gross salary is Ksh. 25,000. To this extent, the Respondent adduced a written contract indicating the said sums, an email correspondence with the Claimant confirming these figures, an internal memo, and a copy of an OB extract in support of its averment. The Respondent confirms to have dutifully remitted the Ksh. 25,000 from the onset of her employment with no fail. On the issue of fraud, investigations take their own course, and the decision on whether and when to charge an individual lies solely with the relevant authorities. Moreover, Justice E. Maina in *Assets Recovery Agency v Ndungi (Civil Application E012 of 2021 & Anti-Corruption and Economic Crimes Civil Suit E030 of 2021 (Consolidated))* (2024) KEH C 2773 (KLR) (Anti-Corruption and Economic Crimes) (14 March 2024) (Judgment) ...reaffirmed the settled position that there is no statutory time limit for prosecuting criminal offenses such as forgery. The Claimant cannot seek refuge in mere delays in charging to escape accountability for her fraudulent actions. She simply stated. 'my finding on the issue is that as the *Limitation of Actions Act* does not apply to criminal acts this case is not time barred" Thus, in the foregoing, the Respondent submits that it was contractually agreed between the parties that the Claimant would be entitled to inter alia, a gross monthly salary of Ksh 25,000 and airtime allowance of Ksh 3,000 and that the contract adduced by the Claimant indicating a gross salary of Ksh. 284,000 is a result of forgery, aimed to mislead this Honourable Court into unjustly enriching the Claimant.

## Decision

18. The court was faced with two contracts of employment of equal date and signed by the parties. The contention is over the monthly salary and airtime allowance. The claimant stated her contract provided for Kshs.. 284,995/= as monthly salary and airtime of Kshs. 3500 plus other allowances and produced a copy of the contract. Conversely, the respondent produced a contract of even date with monthly salary of Kshs. 25000 and airtime of Kshs. 3000 and other allowances as in the contract produced by the claimant. On the airtime the Respondent contended that it paid the 3000 upto March 2020 when the same was stopped due to Coivid 19 effects. In the email dated 24<sup>th</sup> October 2023, the claimant wrote an email to employer email subject being unpaid leave. The claimant stated that in a meeting, they had agreed to suspend the salary of Ksh. 74500 but pay the money on the payroll inclusive of NSSF, NHIF and PAYE, which is Kshs. 25000. She hoped the business would gradually get back to normal. Besides the Kshs. 25000 payroll salary, the claimant was paid extra for marketing services at Kshs. 74500.
19. The claimant at the hearing admitted she was paid the salary of 25000 without fail on all days she worked. The claimant acknowledged there were formal channels of communication between the employer and employees and even communicated in her email(supra). The court noted in the email the claimant acknowledged her monthly payslip salary was Kshs. 25000. The claimant also confirmed she wrote the email confirming her payroll salary was Kshs. 25000. The claimant relied on the resignation letter dated 10<sup>th</sup> September 2021 stated: "N/B my resignation purely based on my unlawful be withheld(\*sic) salary arrears." She stated her notice was Kshs. 284995 to be offset from salary arrears. The claimant submitted that the stated resignation letter stating the arrears having been received by the employer, the employer was estopped from challenging the salary. The court found this contention to be without any legal basis. Receipt of a document is not equivalent to admission of its content. It can only be evidence of delivery by the sender. The Respondent stated the claimant's letter of contract was fraud and produced Occurrence Book Report No. 93/07/11/2023 by RW1 at Industrial Area Police for forgery. The court agreed that once a citizen reports a crime to the police it is upto to the state to conduct investigations and /or prosecute. The court upheld the decision in Justice



E. Maina in *Assets Recovery Agency v Ndungi (Civil Application E012 of 2021 & Anti-Corruption and Economic Crimes Civil Suit E030 of 2021 (Consolidated))* (2024) KEH C 2773 (KLR) (Anti-Corruption and Economic Crimes) (14 March 2024) (Judgment) who reaffirmed the settled position that there is no statutory time limit for prosecuting criminal offenses such as forgery. The court is a civil court and applied the standard of proof of balance of probabilities. The burden to keep employee's record is with the employer and to this extend the respondent produced letter of employment which is contested, communication during employment being the email, and schedule of payment of wages for all employees all to effect of monthly salary payment of Kshs. 25000 to the claimant. The court noted that the claimant was further paid extra salary for marketing. The claimant admitted that during her entire employment she was paid monthly salary of 25000 and never once complained.

20. The court on balance of probabilities found it was more probable than not that the monthly salary payable to the claimant was Kshs. 25000. Having so held the court finds that the valid employment contract was one produced by the respondent and consequently also finds the airtime allowance was Kshs. 3000.

## ii. Whether the Claimant was constructively dismissed from employment

21. The claimant submitted as follows:- The Black's Law Dictionary (9th Edition) defines constructive dismissal as: "A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave" The concept of constructive dismissal is however not expressly provided for in the *Employment Act*. The Act does not even give any guide as to what would constitute constructive dismissal. The concept has however received sufficient attention in our courts as reflected in the rich jurisprudence in the decided cases, setting out what can fairly be considered as general guidelines on what would constitute the subject. In Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported], the Court held that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.
22. 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. In the case of Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR Rika J. expressed himself on the concept as follows: The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African *Labour Relations Act* Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists. if the facts of this case fall under the ambit of constructive dismissal."
23. The Claimant was employed by the Respondent vide the employment letter dated 5/05/2017, and clause 4 of the said agreement produced by the Claimant provided for the remuneration the Claimant was entitled to. Clause 4 of the said employment contract was a fundamental provision of the employment contract as it defined the consideration exchanged for the employee's services. The



decision on whether or not to enter the Respondent's employment was highly influenced by this. The Claimant submits that salary or compensation for work done; the amount and frequency of payment is a fundamental part of an employment contract. S.17 (1) of the *Employment Act*, 2007 demands that an employer must pay an employee the full amount of wages for work done under the contract for service. As indicated under clause 4 of the employment contract and supported by the provisions of Section 17 (1) of the *Employment Act*, 2007, the clause on salary was an essential term of the contract of employment between the Claimant and the Respondent

24. The Claimant submits that she was subjected to a piecemeal of her salary as instead of being paid the amount provided for under clause 4 of the employment contract, the claimant was being paid KES. 25,000/= and the same was unbearable thus a breach of the fundamental term of her employment contract. Therefore, the amount being paid to her was a frustration to the Claimant which subsequently led to her resignation as per the resignation letter dated 10/09/2021. In the letter dated 10/09/2021 the Claimant indicates that she is resigning from as a Clinical Medical Consultant at the Respondent's and at the tail end of the said letter, the Claimant indicates that the purpose of resignation is because of withheld salary arrears. The claimant submitted that the tone used in the said resignation letter by the Claimant is clearly by someone who was being frustrated due to salary arrears and the Claimant even goes on to inform the Respondent that since she had not issued the one-month notice as required in the employment contract, the Claimant requested the Respondent to deduct her monthly remuneration from the salary arrears the Respondent owed to her. The Claimant did want to continue even for a single minute to continue working for the Respondent. Subjecting the Claimant to a piecemeal salary to the extent that the Claimant was owed KES. 8,543,308/= as per the resignation letter was a clear indication that the Respondent no longer wished to be bound by the terms of the employment contract; specifically, on the payment of the Claimant's salary as provided for under clause 4 of the employment contract. As held in *Coca Cola East and Central Africa Limited versus Maria Kagai ligaga*, (2015) eKLR, there must be a casual link between the employer's conduct and the reason for the employee terminating the contract. That as clearly indicated in the resignation letter by the Claimant, the reason for resignation is as a result of the salary arrears that made it difficult for the Claimant to continue working for the Respondent. It had become apparent to the Claimant that she would never be subjected to the remuneration terms agreed upon at the time of employment due to the highlighted conduct of the Respondent. The claimant was left with no other option but to resign; asking the Respondent to clear all her outstanding arrears which was the reason for her resignation. Premised on the principles outlined in *Coca Cola East and Central Africa Limited versus Maria Kagai ligaga*, (2015) eKLR, the Claimant submitted that this Honorable Court should establish that the Claimant was constructively dismissed from employment and proceed to award compensation.

### **The Respondent's submissions**

25. Section 47 (5) of the *Employment Act*, 2007 provides thus; "(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer." In *Kenya Union of Sugarcane Plantation and Allied Workers v Othira* (KEELRC 843 (KLR) (18 April 2024) (Judgment) where the court extensively discussed the concept of constructive dismissal. The court stated that the first element that must be present for constructive dismissal to be construed is that the employee has to have resigned from the service of the employer, and the resignation must be by reason of the employer creating working conditions that leave the employee with no option but to resign. From the hearing it is not really certain as to the resignation status of the Claimant who led us in circles-first asserting the existence of a resignation letter, only to later deny it and assert that she sent another resignation letter on 15th September 2021, which letter the court nor the Respondent



were not privy to. Her shifting testimony not only contradicts the allegation of constructive dismissal, but leaves us with more questions than answers. Be that as it may, reliance will be placed upon the resignation letter before court, for the purpose of buttressing the fact that her resignation was in fact, voluntary, and in breach of her employment contract. Having proven that the Claimant was paid Kshs. 25,000 every month as had been contractually agreed pursuant to the contract adduced by the Respondent and which document, the Claimant did not deny signing, her claim for underpayment with respect to a fictitious Ksh. 284,995.00 fails. A contrary finding would amount to rewriting the contract, against which exists a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd* (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal at page 507 stated as follows: - ‘ A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.’ The Respondent further submits that the Claimant’s conduct through the 4 years of her employment, when she never raised any compliant as to the alleged underpayment, further helps to buttress the fact that by conduct, she is estopped from now turning around and alleging that from the onset, she was being underpaid. In *Serah Njeri Warobi vs. John Kimani Njoroge* (2013) eKLR as quoted in the case of *George Muckoya v Arya Samaj Education Board & another* [2022] eKLR pronounced itself on the applicability of this doctrine by stating that: 71 Page “The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. The Claimant’s 4-years prolonged acquiescence to receiving a salary of Ksh 25,000.00 which she now claims was an underpayment not only undermines the credibility of her current claim but also suggests a tacit acknowledgment of fair compensation. To entertain the retrospective grievance now would be to overlook her implicit concurrence over those years.

26. Further reliance is placed in the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* (2014) eKLR where the court quoted the following passage from *Snell’s Equity* by John MC Ghee Q.C. (31st Edition) at page 99: “The court of equity always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. ...” The Respondent submits that there were no salary arrears pending as at the time the Claimant resigned, and as such her claim for constructive dismissal fails.
27. On their Notice of Objection, the respondent’s submitted without prejudice to the foregoing, the Respondent submits that should the court be inclined to entertain the Claimant’s assertion of underpayment, the Respondent would invite the court to down its tools on a point of law being that the Claim is statutorily time barred in light of Section 90 of the *Employment Act* which limits claims related to employment to 3 years after the cause of action arises. The Claimant has alleged that she was employed in May 2017, and the underpayments were right from the onset of her employment, that is, in June 2017. The Claimant, very aware of the alleged breach sat on this right for more than 4 years and only brought this cause of action in 2022, almost 5 years after the breach of the contract of service. The respondent relied on the decision in *John Kiiru Njiri v University of Nairobi* [2021] eKLR where it was held that: Section 90 of the Act is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years. This Court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose. The limitation period is never extended in matters based on an employment contract.

## Decision

28. Constructive dismissal is non-voluntary termination of employment by the employee on account of the conduct of the employer, which conduct is tantamount to repudiation of contract. The leading



decision on issue of constructive dismissal is decision relied on by the claimant in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR where the Court of Appeal set out the legal principles to determine constructive dismissal as follows:- ‘The legal principles relevant to determining constructive dismissal include the following:-

- a. What are the fundamental or essential terms of the contract of employment?
  - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
  - c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
  - d. An objective test is to be applied in evaluating the employer’s conduct.
  - e. There must be a causal link between the employer’s conduct and the reason for employee terminating the contract i.e. causation must be proved.
  - f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
  - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
  - h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
  - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”
29. The gist of the claim of contractive dismissal is found in the following submissions of the claimant;- That as clearly indicated in the resignation letter by the Claimant, the reason for resignation is as a result of the salary arrears that made it difficult for the Claimant to continue working for the Respondent. It had become apparent to the Claimant that she would never be subjected to the remuneration terms agreed upon at the time of employment due to the highlighted conduct of the Respondent. The claimant was left with no other option but to resign; asking the Respondent to clear all her outstanding salary arrears which was the reason for her resignation.
30. The court found that the valid letter of employment was the salary of Kshs. 25000 which the claimant had accepted since employment and acknowledged in email dated 24<sup>th</sup> October 2023. The claimant admitted she was paid monthly without failure the entire Ksh. 25000 during employment. The salary payment being the gist of the claim of constructive dismissal, the court then finds that the claimant ‘s resignation did not amount to constructive dismissal as the Respondent was not guilty of repudiatory breach of contract having paid the said salary of Kshs. 25000 monthly and the claimant by conduct acquiesced and accepted payment of salary of Kshs. 25000 during the entire contract. (Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR). The court found this was not a case of constructive dismissal.

## **Whether the claimant was entitled to Reliefs sought**

### **Claimant’s submissions**

31. It is the Claimants Submission that having proved she was constructively dismissed due to the Respondent’s failure to pay her salary as per the contractual terms, she is entitled to the reliefs sought



in the Memorandum of Claim. The *Employment Act*, 2007 provides that an employee who is unfairly terminated is entitled to remedies including compensation. Section 49 (1) (c) of the *Employment Act* empowers the Court to award compensation for unfair termination, up to a maximum of twelve months' salary. In *Kenfreight (E.A) Limited v. Benson K Nguti* (2016) eKLR, the Court of Appeal affirmed that where an employer's conduct forces an employee to resign, the employee is deemed to have been unfairly terminated and is entitled to compensation. The Claimant further submits that she is entitled to salary arrears and any other contractual benefits due to her under the terms of employment. The Respondent cannot be allowed to benefit from its unlawful actions by withholding the Claimant's rightful earnings. The general rule is that costs shall follow the vents and such, a successful litigant should ordinarily be awarded costs unless for good reason the court directs otherwise. The Claimant has been able to prove that her claims against the Respondent have merit and hence should be awarded the costs in these proceedings.

### **The Respondent's submissions**

32. Having already established that the Claimant was receiving a monthly salary of Ksh. 25,000 consistent with her employment contract, the claim for underpayment does not suffice. The Claimant has equally not met the onus of proof for underpayment, as she has not demonstrated any attempts of seeking clarification for underpayment, for over 4 years working at the Respondent. On the claim for unpaid Allowances, it was apparent, both in the Claimant's pleadings, her testimony, and the Respondent's testimony that the Respondent dutifully honoured its contractual obligation to remit salary and allowances to the Claimant from June 2017 when her salary was first due, and kept the end of bargain for the 3 years until the global Covid-19 pandemic kicked in. The reductions in allowances implemented were not arbitrary but rather a necessary and strategic measure aimed at keeping the business afloat during the challenging economic period. The Claimant, in her email of 22nd May 2020 acknowledged that a meeting had been held with the Respondent where it had been discussed that there would be cuts until the Covid-19 pandemic stabilizes, save that she would still be receiving her gross monthly salary of Ksh. 25,000 inclusive of NSSF, NHIF and PAYE, with no expectations of the allowances, having considered the tough financial times in the pandemic. The respondent relied on the decision in *Aketch -V- Rusinga Schools* {2022} KEELRC 13320 {KLR} where the court found reductions in salaries and allowances in the face of Covid-19 as fair, rational and responsible. It was held that: "I Page ". The Respondent opted to retain the staff on adjusted salaries, rather ..... many employers opted to go-declare redundancies or shut down their business altogether. The court is persuaded that the Respondent acted fairly, rationally and responsibly, and did not constructively dismiss the Claimant ...;-:. Salary reduction was a temporary measure taken by the Respondent, to address the financial constraints caused by Covid-19. It was not an ordinary review of salary, resulting in contractual reduction of salaries ...". The Respondent shall equally borrow the wisdom of Justice Gakeri in *Wachanga v Revere Technologies Limited* (Cause E1024 of 2021) [2024] KEELRC 2135 (KLR) (29 July 2024) (Judgment) where the good judge empathized with companies' which were grappling meeting their contractual obligations in the midst of a global pandemic. He proceeded to state that: "For the above reasons, the court is not persuaded that the salary reduction effected by the Respondent pursuant to its email of 12th May, 2020 was unlawful or illegal or was in any way intended to frustrate the Claimant as it inter alia affected all employees of the Respondent". Taking into consideration the Respondent's previous conduct of religiously remitting all allowances for 3 years without fail, and only beginning to stutter at the onset of the global pandemic, the fact that the Respondent still made effort to remit more than half of these allowances additional to full payment of salary, the Respondent submits that the reductions in allowance during the pandemic should not be construed as deliberate breach, rather, frustration of contract under force majeure.



33. On the claim for 9 Months' Unpaid Mileage Allowance- The Claimant has pleaded that she is yet to receive 9 months of unpaid mileage, amounting to Ksh. 450,000, having accrued from January 2021 to September 2021. The Claimant confidently asserted ownership of the car of registration number KCL 438L, yet she could not confirm when she completed payment of the loan or when the vehicle was transferred to her name. Devoid of that information, how can the Court be expected to determine what was owed when the very person making the claim withholds the crucial information that could settle the matter? The case of Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR in light of these circumstances held that: "Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party." On the contrary, the Respondent confirmed that as per the mutual agreement, the loan repayment period would be 4 years, but due to the unforeseen global pandemic that led to restructuring of remittances of allowances, the loan repayment period was extended to August 2021 when the Respondent fully recovered the full sum of the car loan payments. The Claimant resigned with immediate effect in September thus no claim for mileage had accrued for the month of September. As such, the Respondent submits that the Claimant is not entitled to mileage allowance as the same went towards the purchase of her car, and to grant the said award would be tantamount to double compensation and unjust enrichment.
34. On the claim for unpaid Airtime Allowance - The Claimant in her statement alleged that from March 2020, there was a reduction of her airtime allowance from Ksh. 3,500 to Ksh. 1,500. The Respondent, in response referred to the contract of employment, indicating that the Claimant was entitled to an airtime allowance of Ksh. 3,000. This sum was paid religiously from the onset of the Claimant's employment, up to March 2020 when, due to Covid-19 pandemic, some reduction of allowances to ensure sustainability was owing to financial challenges. 60. That the amount of airtime allowance payable to the Claimant was set on variable terms, and only capped to a maximum of 3000. That this should be construed that the Respondent reducing the same to 2000 as a contingency measure of staying afloat in light of the Covid-19 pandemic did not breach the contractual agreement but to sustain the institution, encountered with a public health situation not contemplated in the contract. Be that as it may, the Respondent reiterates that the financial difficulties occasioned by the global pandemic and lockdown occasioned the need for some allowance reduction and thus persuades this Honourable Court to find that the same was not arbitrary but occasioned by circumstances beyond its control. That in the event that the court is not persuaded to extend grace to the Respondent at that period of financial difficulty, it should not be lost to the court that the Claimant's airtime allowance was only short by Ksh. 1000. The period between March 2020 to August 2021 denotes 17 months which, contrary to the Claimant's assertion, would only lead to a cumulative sum of Kshs. 17,000.00, rather than the pleaded Ksh. 108,000.00.
35. On the claim for unpaid Fuel Allowance - The Claimant similarly confirmed that prior to March 2020, fuel allowance was remitted to her without fail, every single month. That with the restricted movements during lockdown, the Claimant did not spend any fuel during that period. It was only deciphered as a financial decision to reduce the said allowance, to mitigate costs and keep the Respondent afloat during that period. 64. That as per the contract, the amount of fuel allowance payable to the Claimant was on variable terms, and only capped to a maximum of 25,000.00. That this should be construed that the Respondent reducing the same to 15,000 as a contingency measure of staying afloat in light of the Covid-19 pandemic did not breach the contractual agreement. Equally on this claim, the Respondent submits that in the event that the court is persuaded to award the Claimant unpaid fuel allowance during the Covid-19 lockdown, the same has been sinisterly computed. The period constituting of 17 months only, where the reduction of fuel allowance was to a difference of Ksh. 10,000, the Claimant should then have pleaded Ksh. 170,000.00 but instead, can be seen pleading



Ksh. 520,000.00 money being deducted for car loan. That the claimant's demand for reimbursement of her car loan is nothing short of an attempt at unjust enrichment. She openly acknowledged that she is in possession of the vehicle of registration no. KCL 438L which was transferred from the Respondent to her own name, yet she still seeks to recover the funds used to acquire it. This claim is not rooted in fairness or entitlement but in sheer opportunism, as she wishes to benefit twice from the same transaction at the expense of the respondent and that casts serious doubt on the credibility of her claim.

## Decision

36. The claim of underpayment and unfair termination of employment compensation cannot lie as the court found the claimant during entire period of employment was paid the contractual amount of Kshs. 25000 as a monthly salary and there was no case of constructive dismissal.
37. On the claim for airtime, the court established the contractual airtime was Kshs. 3000. The court noted in the email of 22<sup>nd</sup> May 2020 the claimant referred to a discussion held on 20<sup>th</sup> May 2020 where it was agreed the claimant could only get the payroll salary of Kshs. 25000 due to Covid 19 effects. The court took judicial notice that at time of the airtime and fuel allowance cuts to 1500 and 15000 respectively, the Covid 19 pandemic was at all time high and there was minimum work and movement across the country. The court finds that airtime and fuel allowances are to facilitate work. The court was persuaded by the decision in *Aketch -V- Rusinga Schools* {2022} KEELRC 13320 {KLR} where the court found reductions in salaries and allowances in the face of Covid-19 as fair, rational and responsible. It was held that: 9I Page "The Respondent opted to retain the staff on adjusted salaries, rather than let go the staff as many employers opted to go-declare redundancies or shut down their business altogether. The court is persuaded that the Respondent acted fairly, rationally and responsibly, and did not constructively dismiss the Claimant. Salary reduction was a temporary measure taken by the Respondent to address the financial constraints caused by Covid-19. It was not an ordinary review of salary, resulting in a contractual reduction of salaries." Similarly, in *Wachanga v Revere Technologies Limited*(Cause E1024 of 2021) [2024] KEELRC 2135 (KLR) (29 July 2024) (Judgment) the Judge empathised with companies which were grappling to meet their contractual obligations in the midst of a global pandemic. He proceeded to state that: "For the above reasons, the court is not persuaded that the salary reduction effected by the Respondent pursuant to its email of 12th May, 2020 was unlawful or illegal or was in any way intended to frustrate the Claimant as it inter alia affected all employees of the Respondent." The court found that the allowances related to facilitation of work which was reduced due to the pandemic and that the cuts were a necessity to keep the business afloat and the employees in employment. The court read the claimant's email of May 2020 to mean admission that the company scaled down operations and had discussed with her.
38. On mileage and loan claims , the court found that the claimant admitted she had a loan from the respondent to buy her car. That she had fully repaid the loan. That the loan period of 4 years was extended due to the Covid 19 pandemic. The claimant told the court that she claimed to be repaid the Kshs. 1.5M loan for the car as it was in the contract. On being asked to indicate to the court the part of the contract, she answered it was not so provided in the contract. The court found no basis of the claim the claimant having acknowledged she received the loan, paid for it and the car transferred to her was bought by the Respondent. The claimant's mileage was utilised towards the car loan and by time of leaving employment the claimant was in possession and the owner of the car. The court finds no basis of the claim for the mileage as well as the money deducted for the car loan.
39. In the upshot the claim is held to be without merit and is dismissed. Taking into account the court's findings on the allowance cuts the court orders each party to bear own costs in the suit. The file is marked as closed.



40. It so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Claimant : -absent

Respondent: Ms. Nyongesa

