



**Kabiro v Kartasi Products Limited (Cause E558 of 2024)
[2025] KEELRC 2319 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E558 OF 2024**

**SC RUTTO, J
JULY 31, 2025**

BETWEEN

ESTHER KABIRO CLAIMANT

AND

KARTASI PRODUCTS LIMITED RESPONDENT

RULING

1. Through a Memorandum of Claim dated 19th July 2024, the Claimant avers that she was employed by the Respondent in the position of Finance Manager with effect from 1st February 2024.
2. It is the Claimant's case that her period of employment with the Respondent was characterized by unfair labour practices, cruel and demeaning conduct directed towards her, and an unsafe and uncondusive work environment.
3. According to the Claimant, the working conditions compelled her to tender her resignation with immediate effect on 1st July 2024 after only 5 months of working with the Respondent.
4. It is on the basis of the foregoing that the Claimant seeks the following reliefs against the Respondent:
 - a. Kshs. 9,000,000 being 12 months' salary for constructive termination of the Claimant's employment;
 - b. Kshs.1,000,000 being general damages for unfair labour practices;
 - c. Kshs 1,000,000 being general damages for breach of the Claimant's right to a clean and safe work environment and the right to protection from second-hand smoke as guaranteed by section 32 of the *Tobacco Control Act*;
 - d. Kshs 165,865.38 being the equivalent of 5.75 accrued but untaken leave days;
 - e. The Claimant be forthwith issued with a Certificate of Service.



- f. Costs of the suit.
 - g. Interest on (a) to (d) above from the date of judgment until payment in full.
5. The Respondent countered the Claim by filing a Memorandum of Response together with a Counterclaim dated 30th September 2024. In its Response, the Respondent has averred that it was never formally notified of any complaints by the Claimant.
 6. According to the Respondent, the Claimant is trying to manipulate the narrative that she was constructively dismissed when the facts are clear that she resigned out of her own volition and not due to breach of contract by the Respondent. The Respondent further avers that the Claimant is not entitled to the payments contained in the Memorandum of Claim. To this end, the Respondent has asked the Court to dismiss the Claim with costs.
 7. With respect to the Counterclaim, the Respondent avers that at the time of her resignation, the Claimant had worked for 5 months and was still under probation.
 8. The Respondent further avers that the employment contract provided that if the Claimant left the Respondent company within 6 months of employment, she was obligated to refund all costs incurred by the Respondent in the recruitment process, which she failed to pay at the time of her resignation.
 9. The Respondent further avers that the Claimant was required to give 7 days' notice before resignation. That as the Claimant only had 5.75 accrued leave days, which were offset against the notice period, she remains liable for the equivalent of 1.25 days of undeserved notice. According to the Respondent, it is entitled to payment of 1.25 days' salary in lieu of notice in the sum of Kshs 31,250/=.
 10. Consequently, the Respondent seeks the following reliefs against the Claimant in the Counterclaim:
 - a. Kshs 750,000/- being the amount incurred by the Respondent to recruit the Claimant;
 - b. Kshs 31,250/= being salary in lieu of 1.25 days' notice payable by the Claimant to the Respondent;
 - c. Interest on (a) and (b) above from 1/7/2024 until the date of full payment.
 - d. Costs of the suit.
 11. The Claimant filed a Response to the Respondent's Memorandum of Response and Counterclaim. The Claimant has reiterated the contents of the Memorandum of Claim. She further avers that having been constructively terminated, she was not obligated to issue a 7-day resignation notice. According to the Claimant, the issues raised in her resignation letter and which were acknowledged by the Respondent, entitled her to consider herself as constructively terminated.
 12. As to the Counterclaim, the Claimant avers that she was at all times recruited directly by the Respondent and is not aware of any intermediary in the process. She further contends that having been constructively terminated, the Respondent is not entitled to a refund of the purported recruitment costs. That further, she was entitled to resign with immediate effect as she did and as such, she denies the claim for payment of the equivalent 1.25 days. To this end, the Claimant prays that her claim be allowed as prayed and the Respondent's Counterclaim be dismissed with costs.
 13. During the hearing on 2nd April 2025, both parties called oral evidence.



Claimant's Case

14. The Claimant testified in support of her case, and at the outset, she sought to adopt her witness statement, the initial list and bundle of documents, as well as the supplementary list and bundle of documents filed on her behalf, to constitute her evidence in chief.
15. It was the Claimant's evidence that the entire period of her employment with the Respondent was characterized by unfair labour practices, cruel and demeaning conduct directed towards her, and an unsafe and uncondusive work environment.
16. The Claimant averred that despite being entitled to leave days as required by law, she was compelled to continue working when on leave and on public holidays. That she applied for, and took, leave on the 24th and 25th of June 2024 and a fellow employee, Winnie Adika, was designated as her reliever for the period she was to be away. However, she was inundated with work-related requests and demands, forcing her to work remotely for the period of the said leave.
17. The Claimant further averred that on the 1st of May, despite it being a public holiday, she was forced to work through the day.
18. That further, despite her contract of employment explicitly providing that she would only work a total of 51 hours per week, she was regularly compelled to work more than the 51 hours without compensation.
19. It was the Claimant's further assertion that the Respondent imposed a 30-minute lunch break and required her to spend the lunch break exclusively within its premises.
20. According to the Claimant, she was physically prevented from leaving the premises during lunch breaks except with a gate pass duly signed by the Managing Director or the Human Resources Manager. In the Claimant's view, this amounted to servitude and false imprisonment.
21. The Claimant further stated that on various occasions, she was subjected to disparaging and demeaning comments made by the Respondent's Managing Director both in private and in the presence of fellow employees, including employees who were junior to her.
22. The Claimant further averred that the Respondent's premises were unsafe and uncondusive to work in, as the Respondent's Managing Director is a regular smoker and often smoked cigarettes in his office, which was next to hers and the smoke always wafted into her office, thereby affecting her greatly. The Claimant added that the Respondent's Managing Director often smoked during meetings at which she was present.
23. It was the Claimant's evidence that the foregoing working conditions compelled her to tender her resignation with immediate effect on the 1st of July 2024, after only 5 months of working with the Respondent.
24. In her resignation letter, she made it clear that her resignation was not voluntary but was necessitated by the unfair labour practices meted out against her in her short stint with the Respondent organization. That she specifically enumerated a section of the instances of unfair labour practices that forced her to resign from her position.
25. The Claimant further stated that vide a letter dated 1st July 2024, the Respondent's Human Resources Manager accepted her resignation and while she alleged, in the said letter, that she was unaware of the said grievances, the said Human Resources Manager implicitly admitted that the Respondent's workplace environment was wanting.



26. According to the Claimant, the assertion by the Respondent's Human Resources Manager that she was unaware of her grievances is false. In this regard, the Claimant contended that she consistently raised all these issues with the Respondent's Human Resource Manager throughout her period of employment with the Respondent.
27. That immediately upon joining the Respondent organization, she reported verbally to the Human Resources Manager that she was uncomfortable and was affected by the smoking by the Respondent's Managing Director within the confines of the office and at meetings.
28. The Claimant averred that on 25th April 2024, she sent to the Respondent's Human Resources Manager a WhatsApp message complaining of the Managing Director's habit of smoking at meetings.
29. Regarding the insults and degrading treatment visited upon her by the Respondent's Managing Director, the Claimant averred that following a meeting of 29th May 2024, when the Managing Director remarked to her that "there is a difference between being stupid and being absolutely stupid", she complained to the Respondent's Group Commercial Director, Mr. Vincent Mbalu, who promised to speak with the Managing Director on the issue.
30. On the same day, at 6.45 pm, she called the Respondent's Human Resources Manager to complain about the said incident, but she indicated that she had already left the office for the day.
31. She then called her the next morning on 30th May 2024, at 7.40 am and they spoke for 17 minutes during which she complained to the Human Resource Manager about the Managing Director's conduct at the meeting on 29th May 2024 and generally about the degrading manner in which she was being treated in the workplace.
32. The Claimant averred that despite making the complaints, there was no change in the work environment, prompting her to call the Human Resources Manager on Friday the 28th of June 2024 at 6.14 pm to further voice her frustrations and inform her that she was unable to continue working in the Respondent's work environment in view of the failure to take into consideration, and deal with, her concerns.
33. The following Monday, 1st July 2024, she duly handed in her resignation letter and at 10.11 am, the Respondent's Manager called her and during the call, she acknowledged that she now saw the magnitude of the problems she had been complaining about.
34. The Claimant further stated in evidence that despite fully and properly clearing with the Respondent, the Respondent has failed and/or refused to issue her with a Certificate of Service.

Respondent's Case

35. The Respondent called oral evidence through Anne Karanja and Winnie Otege, who testified as RW1 and RW2, respectively. Ms. Karanja, who was the first to go, identified herself as the Respondent's Human Resource Manager. Similarly, Ms. Karanja adopted her witness statement to constitute her evidence in chief. She further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before Court.
36. It was RW1's evidence that it was the agreement of the parties that the Claimant's employment was under a 6-month probationary contract, during which her performance was to be reviewed prior to confirmation. That at the time of her resignation, the Claimant was still on probation and had not been confirmed in her position.



37. RW1 further averred that the Claimant's role as Finance Manager was crucial to the operations of the Respondent, and she was provided with a job description on 21st March 2024, which she signed after reviewing. Her responsibilities included providing financial information to aid decision-making, ensuring tax compliance, managing budgeting and forecasting processes, and handling relationships with key stakeholders such as banks and suppliers. Before the Claimant's resignation, the Respondent was working on her PPKRA to better document her day-to-day duties.
38. RW1 further averred that as Finance Manager, the Claimant's performance was average and that she encountered challenges in meeting deadlines and following through on assignments from the Managing Director. RW1, citing one occasion, averred that the Claimant failed to file instalment tax and PAYE on time, resulting in penalties for the company. According to RW1, this was one of the significant lapses in her duties.
39. Regarding the company's gate pass system, RW1 averred that the same is designed for the safety and security of employees, visitors, and goods entering or leaving the facility. She averred that employees are free to leave the premises during working hours, and no gate pass request has ever been denied. That while the company provides lunch due to the limited options near the facility, there is no obligation for employees to have lunch on-site.
40. RW1 further averred that she was unaware of any instance where the Claimant was compelled to work during public holidays or while on leave. According to RW1, the Claimant took leave on 24th and 25th June 2024.
41. That prior to her leave, the Claimant committed to submitting the updated Fixed Asset Register by close of business on 21st June 2024, which was essential for processing an insurance claim following the severe flooding earlier in the year. However, despite her commitment, she did not submit the Fixed Asset Register before going on leave. Due to the urgency of the matter and the need for this document during a scheduled meeting with the insurance company, the Managing Director had no choice but to contact her during her leave.
42. In her testimony, RW1 denied that the Claimant was ever compelled to work more than the 51 hours per week specified in her contract. According to her, if the Claimant worked beyond these hours, it was of her own volition and not at the direction of the Respondent.
43. RW1 further averred that they had a personal relationship with the Claimant and often discussed both work and personal matters. That as ladies in management, they relied on each other for support on the hard days they encountered at work.
44. That the Claimant would frequently call or text to vent about various work frustrations, but these were informal, personal conversations. That at no time did she raise these concerns through formal Human Resource grievance channels.
45. According to RW1, she did not treat these interactions as formal complaints, and as a Human Resource professional with extensive experience, she is adept at distinguishing between casual discussions and formal grievances.
46. RW1 averred that had the Claimant formally lodged her concerns, she would have promptly addressed them according to the company's Human Resource protocols. According to RW1, the absence of any formal complaint meant that the Respondent had no opportunity to investigate or resolve the Claimant's concerns.



47. RW1 further averred that as per the Claimant's probationary contract, she was required to give 7 days' notice before resigning. However, she tendered her resignation with immediate effect on 1st July 2024 without providing the required notice or handing over her responsibilities. That given her managerial role, this abrupt resignation left several key responsibilities incomplete.
48. That while the Claimant claims 5.75 days of earned leave, these days were offset against the required notice period, leaving her with a balance of 1.25 days of unserved notice, which the Respondent is entitled to recover.
49. RW1 further averred that she also invited the Claimant to clear from the Company and to collect her certificate of service, but has never shown up for clearance or collection of the certificate from her office.
50. RW1 added that the Claimant's contract requires her to refund all recruitment costs incurred by the company if she were to leave within 6 months of employment, which the Respondent now seeks to recover.
51. It was RW1's testimony that the Claimant voluntarily resigned from her position and is now attempting to manipulate the facts to support a claim of constructive dismissal.
52. Ms. Winnie Otege, who testified as RW2, equally adopted her witness statement to constitute her evidence in chief.
53. RW2 averred that she is an employee of the Respondent and that she served as a Senior Executive-Finance, reporting directly to the Claimant.
54. That following the Claimant's departure, she (RW2) was appointed Acting Finance Manager and has continued to oversee the department's operations. She interacted with both the Claimant and the Managing Director, Mr. Rajan Malde, in her day-to-day work.
55. RW2 averred that throughout her time at the Respondent company, she has found the company to uphold a professional and supportive work environment.
56. According to RW2, there are well-defined structures for raising concerns, whether through Human Resources, Heads of Departments, or directly with senior management. That employees are encouraged to document grievances formally through written communication, such as emails or official letters, allowing for proper resolution and accountability.
57. RW2 further averred that she worked closely with the Claimant and attended several meetings where both she and Mr. Rajan were present. According to RW2, at no point did she witness the behaviour that the Claimant has alleged in her claim. That specifically, she never observed Mr. Rajan smoking in their presence, nor did he hear him use disparaging or unprofessional language toward the Claimant or any other employee.
58. RW2 added that while Mr. Rajan is a demanding leader who expects high performance, his feedback is always work-related and measured. That like any senior manager, he critiques work when necessary, but his criticism is always professional and intended to improve performance rather than demean employees.
59. RW2 added that the flooding crisis affected everyone at the Respondent company and during this period, all of them were required to put in extra hours and assist wherever necessary to ensure the company recovered.
60. According to RW2, the expectation to go beyond normal working hours was not unique to the Claimant. Rather, it was a collective effort involving the entire team.



61. RW2 further averred that as Finance Manager, the Claimant played a central role in the insurance claims process. She was responsible for managing costs, maintaining the Fixed Asset Register and ensuring the necessary documentation was provided for claims.
62. The company relied heavily on the Claimant's expertise to lead the finance team during this period. Given the urgency of the situation, all employees, including senior management, were required to go above and beyond their usual responsibilities to ensure the company's survival. That naturally, there were moments of frustration and heightened emotions, but the environment was not hostile or abusive as suggested in her claim.
63. RW2 further disagreed that the Claimant was ever required to work during her leave, except in situations where she had made prior commitments that she failed to complete or delegate before going on leave. That one such instance was when she had promised to submit the Fixed Asset Register by 21st June 2024 and when she failed to submit it, the Managing Director had no choice but to contact her while she was on leave.
64. In RW2's view, this was a reasonable action, and it was not unique to the Claimant as everyone in the company, including Mr. Rajan himself, was putting in extra effort to ensure that the Respondent recovers from the disaster.
65. RW2 stated that having worked directly under Mr. Rajan and continuing to do so in her current role, she has personally witnessed his commitment to fostering a professional and supportive workplace.
66. RW2 further averred that on multiple occasions, he has gone out of his way to assist employees in navigating challenges. That Mr. Rajan's leadership style is firm yet fair, and he holds his team accountable while also providing guidance and support when needed. She has never experienced, nor has she observed, any inappropriate or unprofessional behaviour from him toward any employee.
67. RW2 further stated that while she is aware that Mr. Rajan used to smoke, she confirms that she has never witnessed him smoking in shared workspaces or meetings. To her recollection, he only smoked alone in his private office, which is enclosed and well-ventilated and at no point has any of her colleagues raised concerns about his smoking because it never affected them or interfered with their ability to work comfortably. That had this been an issue, there were clear procedures for raising workplace concerns.
68. RW2 further averred that the Claimant never formally raised any of these issues with the Human Resources or through any other official channels. According to RW2, the company has well-established grievance resolution mechanisms, and if the Claimant had filed a complaint, appropriate action would have been taken. Since she did not follow this process, the company was never given an opportunity to resolve any of the grievances she now raises.
69. In RW2's view, the Claimant's resignation was voluntary and came as a surprise to all of them, as there were no formal complaints raised to suggest any form of constructive dismissal or a hostile work environment.

Submissions

70. The Claimant submitted that the only inference that can be drawn from the Respondent's decision not to call the individuals she had named as being present at the meetings where the Respondent's Managing Director subjected her to abusive and undignified insults, is that their testimony would have corroborated her testimony and would be adverse to the Respondent. In support of this argument, the Claimant placed reliance on the cases of Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii &



14 others [2012] eKLR and *Nzilu v Inter-Religious Council of Kenya & another* [2025] KEELRC 931 (KLR).

71. It was further submitted by the Claimant that the Respondent's Managing Director smoked in the workplace to her detriment and her right to a smoke-free workplace as guaranteed by the *Tobacco Control Act* and the regulations thereunder was more than enough reason for her to resign as she did.
72. The Claimant further submitted that she had presented uncontroverted evidence that she was made to work on 1st May 2024, which was a Public Holiday. On this score, the Claimant posited that forcing an employee to work on such a day, contrary to the terms of their employment contract, amounts to an unfair labour practice entitling her to resign as she did.
73. According to the Claimant, the foregoing instances are sufficient grounds entitling her to immediately resign and be deemed as constructively terminated in line with the principles of constructive dismissal set out in the case *Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga* [2015] eKLR.
74. On its part, the Respondent submitted that the Claimant's complaints were never raised during the currency of employment and that no grievance procedure was invoked, hence no opportunity was given to the Respondent to investigate or address any of the allegations. In the Respondent's view, the resignation was voluntary, and the claim for constructive dismissal is an afterthought.
75. With respect to the claim that the Claimant worked during her leave and public holidays, the Respondent submitted that this is not the sort of conduct that goes to the root of the contract and is not hostile or intolerable. In the Respondent's view, it is certainly not constructive dismissal.
76. As to the Claimant's claim that she worked for excessive hours, the Respondent posited that the Claimant was a Finance Manager in a crisis-affected business and if there were moments of intensity or longer hours, they were not exceptional.
77. On the allegation of verbal abuse, the Respondent submitted that the comments alleged were not made. According to the Respondent, any feedback issued was within the bounds of professional supervision, particularly during a period when the business was facing serious operational challenges.
78. Referencing the case of *Bosch v JDG Group (Pty)Ltd and Others (JR578/14) (2021) ZALCJHB 171*, the Respondent argued that the Claimant has failed to demonstrate that the management style at the Respondent company crossed the line into unlawfulness. In the Respondent's view, no reasonable person holding a managerial position, and expected to endure corporate pressure in crisis, would have found the conduct so intolerable as to warrant resignation.
79. The Respondent, in further submission, stated that the Claimant's allegation that the Managing Director smoked in her presence during meetings is legally unsound, factually unsubstantiated, and demonstrably exaggerated.
80. In the same vein, the Respondent submitted that the Managing Director never smoked in meetings and only smoked in the confines of his private office, which is a fully enclosed space with top-to-bottom walls, ventilation systems, and openable windows.
81. According to the Respondent, there is no evidence visual, medical or testimonial that any smoke ever left that space or entered the Claimant's working area.
82. Still on this issue, the Respondent further submitted that the Managing Director's office complies with the specifications of Section 35 of the *Tobacco Control Act* and therefore does not violate the law. That the Claimant did not demonstrate otherwise.



83. It was the Respondent's further submission that the Claimant failed to establish any causal connection between the alleged smoking and harm suffered. That the Claimant did not produce a single medical report, complaint letter, or witness statement to demonstrate either exposure or injury.
84. The Respondent further submitted that not every irritation or discomfort at the workplace amounts to a breach of contract. According to the Respondent, an allegation must be plausible, supported by evidence and legally actionable.
85. Referencing the case of *Feroz Ali Omar v ECU Worldwide Limited* [2018] eKLR, it was the Respondent's position that the Claimant deliberately bypassed a clear, accessible, and reasonable grievance mechanism. That in doing so, she denied the Respondent the opportunity to respond to her allegations and attempt a resolution. In the Respondent's view, the Claimant's resignation was not the culmination of unresolved grievances; it was the first and only formal act she undertook.

Analysis and Determination

86. Flowing from the record, the Court has singled out the following issues for determination;
 - a. Whether the Claimant has proved that she was constructively dismissed from employment;
 - b. Whether the Counterclaim has merit; and
 - c. Whether the Claimant is entitled to the reliefs sought in the Claim.

Constructive dismissal?

87. It is the Claimant's case that her employment with the Respondent was characterized by unfair labour practices, cruel and demeaning conduct directed towards her, and an unsafe and uncondusive work environment. According to the Claimant, the working conditions in the Respondent company compelled her to tender her resignation with immediate effect, 5 months into the employment relationship.
88. In her letter of resignation dated 1st July 2024, the Claimant stated that the working environment had become increasingly toxic and detrimental to her well-being. That despite her efforts to navigate and mitigate the challenges within the workplace, it had become evident that the culture and dynamics within the organization were not conducive to a healthy and productive work environment. To this end, the Claimant proceeded to highlight instances she stated had created an untenable work environment and violated her rights as an employee:
 - i. On various occasions, she had been subjected to disparaging comments from the Managing Director both in private and in front of colleagues-even her juniors, including statements such as "You are not thinking" and "You are a robot." On the evening of May 29, 2024, the Managing Director made a dehumanizing remark in a meeting where some members of management were present, referring to her by saying, "There is a difference between being stupid and being absolutely stupid."
 - ii. She had endured exposure to secondhand smoke during several meetings, as the Managing Director smoked in her presence.
 - iii. She had been compelled to work long hours beyond the 51 hours stipulated in her contract and was also required to work during her leave, which constitutes



a breach of contract and a violation of labor laws regarding reasonable working hours.

89. Refuting the claim for constructive dismissal, the Respondent has contended that the Claimant voluntarily resigned from her position and is now attempting to manipulate the facts to support a claim of constructive dismissal.
90. In view of the rival positions taken by both parties, this Court must now determine whether the Claimant was constructively dismissed.
91. The Black's Law Dictionary (10th Edition p. 561) 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.”
92. Fundamentally, 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. In essence, constructive dismissal is a legal remedy designed for extreme situations, where the workplace has become hostile, toxic and intolerable.
93. What constitutes a hostile work environment or intolerable working conditions is a question of fact. This may include 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.
94. In the present case, one of the instances cited by the Claimant as constituting an unfair labour practice prompting her resignation was the Respondent's Managing Director's alleged conduct. According to the Claimant, the said Managing Director, whom she termed as a regular cigarette smoker, would often smoke in his office, which was next to hers and the smoke always wafted into her office, thereby affecting her greatly. The Claimant further stated that the Respondent's Managing Director often smoked during meetings at which she was present.
95. According to the Claimant, she consistently raised all issues with the Respondent's Human Resource Manager throughout her period of employment, hence she (Human Resource Manager) was aware of her grievances.
96. In support of her case, the Claimant exhibited an extract of a WhatsApp message she sent the Respondent's Human Resources Manager (RW1) on 25th April 2024, in which she stated as follows: "Tunafanya cash flow na Rajan akismoke." In response to the Claimant's message, RW1 stated "pole".
97. In as much as the Respondent was categorical that its Managing Director's smoking was confined to his own private working space, it is apparent that in her response to the Claimant's message sent on 25th April 2024, RW1 did not seem surprised or taken aback that the Managing Director was smoking in the Claimant's presence during an official assignment. Needless to say, despite the brevity of RW1's response to the Claimant's message, the same spoke volumes.
98. By all means, smoking in the presence of a colleague while working in an office setting is not normal conduct. Indeed, such conduct is incompatible with the work environment. What can therefore be inferred from RW1's casual response to the Claimant's message regarding the claim that the Managing



- Director was smoking while they were undertaking an official assignment in the office is that it was a normal occurrence and was nothing out of the ordinary.
99. Consequently, the Court has no reason to doubt the Claimant's assertions that the Managing Director smoked during meetings at which she was present. As such, I am persuaded that the Claimant had a genuine complaint with respect to the smoking by the Respondent's Managing Director in the workplace.
 100. All employees have a fundamental right to a safe and healthy working environment.
 101. Indeed, pursuant to Section 6(1) of the *Occupational Safety and Health Act*, the Respondent, being an employer, had a duty to ensure the safety, health and welfare at work of all persons working in its workplace.
 102. Further, it is worth mentioning that the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, was amended on 11th June 2022 by adding as a fifth principle and right, a safe and healthy working environment.
 103. In addition to the foregoing, Section 32 of the *Tobacco Control Act* guarantees every person the right to a smoke-free environment. Further, Section 33 (1) and (2) of the *Tobacco Control Act* prohibit smoking in any public place, including offices and workplaces.
 104. In light of the foregoing statutory provisions and the ILO Declaration (1998 as amended in 2022), it goes without saying that the Respondent was enjoined to ensure that the working environment was smoke-free hence safe, healthy and conducive for all its employees.
 105. Therefore, just as the Respondent's Managing Director had a right to his personal habits, the Claimant had a right to work in a safe, healthy and conducive environment that was smoke-free.
 106. In her testimony before Court, RW1 stated that they had a personal relationship with the Claimant and often discussed both work and personal matters. That the Claimant would frequently call or text to vent about various work frustrations, but according to her, these were informal, personal conversations.
 107. In this regard, RW1 was categorical that at no time did the Claimant raise any of her concerns through formal Human Resource grievance channels and that had she (Claimant) formally lodged her concerns, the same would have been promptly addressed according to the company's Human Resource protocols. Indeed, RW1 indicated as much in her response to the Claimant's resignation letter.
 108. As stated herein, the Respondent had a statutory duty under the *Occupational Safety and Health Act* to ensure the safety, health and welfare at work of all persons working in its workplace. Similarly, it had a statutory duty under the *Tobacco Control Act* to ensure that its premises were smoke-free.
 109. Therefore, RW1, having been notified by the Claimant that the Respondent's Managing Director was smoking while they were undertaking an official assignment, had a statutory duty to investigate the issue and take remedial action. She did not require a formal complaint for her to address an issue that was potentially a violation of statutory provisions relating to a safe and healthy working environment.
 110. I must also add that the Respondent's assertion that the Managing Director only smoked in his office with his door closed does not help matters either. This is for the reason that the Respondent was enjoined under Section 35 of the *Tobacco Control Act* to specially designate smoking areas within the office being a prohibited smoking area. Indeed, there is no indication, let alone a suggestion, that the Managing Director's office was a designated smoking area.



111. I say so, bearing in mind that by virtue of his position, the Managing Director's office was accessible to other employees, including the Claimant. Therefore, it is highly probable that they were still at risk of exposure to secondhand smoke.
112. In the South African case of *Naude v Stealth Marine* (2004) 25 ILJ 2402 (BCA), an employee successfully sued her employer for constructive dismissal on the basis that the employer had failed to implement antismoking legislation in the workplace and that the employer's premises had no designated smoking areas.
113. Borrowing from the above persuasive precedent, the Court finds that by failing to ensure a safe and healthy working environment that was smoke-free, as required under the *Occupational Safety and Health Act*, the *Tobacco Control Act* and the ILO 1998 Declaration on Fundamental Principles and Rights at Work, the Respondent had made the Claimant's continued employment intolerable and unconducive.
114. Therefore, the Claimant was entitled to leave the Respondent's employment on that basis with or without notice.

Counterclaim?

115. The Respondent seeks to recover the sum of Kshs 750,000/= from the Claimant being recruitment fees in the event of early departure, as well as the sum of Kshs 31,250/- being salary in lieu of 1.25 days' notice.
116. As the Court has found that the Claimant was entitled to leave the Respondent's employment on the basis of an intolerable and unconducive working environment, the counterclaim is disallowed.

Reliefs?

117. As the Claimant's claim for constructive dismissal has succeeded, the Court awards her compensatory damages equivalent to four (4) months of her salary.
118. In issuing this award, the Court has taken into account the length of the employment relationship, which was relatively short, as well as the circumstances leading to the termination of employment.
119. The claim for Kshs 165,865.38 being untaken accrued leave days is declined for the reason that in her letter of resignation, the Claimant willfully forfeited her accrued leave days. As such, she cannot turn back and lay a claim to the same.
120. The Claimant is entitled to a Certificate of Service as the employment relationship is admitted.
121. The other reliefs with respect to general damages are disallowed.

Orders

122. Against this background, the Court makes the following final orders:
 - a. The claim for constructive dismissal succeeds and the Claimant is awarded the sum of Kshs 3,000,000.00 being compensatory damages equivalent to four (4) months of her gross salary.
 - b. Interest on the amount in (a) at Court rates from the date of Judgment until payment in full.
 - c. ' The Counterclaim is disallowed.
 - d. The Respondent shall bear the costs of the Claim and Counterclaim.



- e. The Respondent shall issue the Claimant with a Certificate of Service, within 30 days from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2025.

.....
STELLA RUTTO
JUDGE

In the presence of:

For the Claimant Mr. Omino

For the Respondent Ms. Wanjiku instructed by Ms. Wayua

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

