



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waruguru v Kenya Biologics Ltd (Cause 49 of 2021)  
[2024] KEELRC 17 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 17 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 49 OF 2021  
DN NDERITU, J  
JANUARY 25, 2024**

**BETWEEN**

**JOYCE WARUGURU NJOROGE ALSO KNOWN AS JOYCE  
WARUGURU ..... CLAIMANT**

**AND**

**KENYA BIOLOGICS LTD ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a memorandum of claim dated 13<sup>th</sup> September, 2021 filed through S.K. Mburu & Co Advocates the claimant prays for: -
  - a. That a declaration be made to the effect that the claimant's constructive dismissal was unfair and unjustified as the same was not within the ambits of the Employment Act 2007, and other employment laws.
  - b. Compensation under Section 49(c) at Kshs.1,136,690.88/=
  - c. Notice Pay at Kshs.94,724.24/=
  - d. General Damages for breach of constitutional right to fair labour practices.
  - e. Exemplary damages for breach of constitutional rights to fair labour practices.
  - f. Housing Allowance at Kshs.873,296,48/=
  - g. Unpaid bonuses and Commission at Kshs.326,003.00/=
  - h. Annual leave pay at Kshs.564,246.82/=
  - i. Certificate of service



j. Costs and interest

Grand total: Kshs.2,994,961.42/=

2. Together with the statement of claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim.
3. On 12<sup>th</sup> October, 2021 the respondent entered appearance through Mckay & Co Advocates and filed a memorandum of response to the claim on 14<sup>th</sup> October, 2021. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits.
4. In addition to the response to the claim the respondent filed a witness statement by Beth Mugwe (RW1) who testified as the only witness for the respondent and a list and bundle of documents on 1<sup>st</sup> December, 2021. Alongside the response to the claim, the respondent filed a notice of preliminary objection (PO) to part of the claim on the basis that it is time-barred. However, in the directions issued by the court on 1<sup>st</sup> December, 2021 the PO was directed to be subsumed as a response and defence to the claim.
5. This cause came up for hearing in open court on 13<sup>th</sup> July, 2022 when the Claimant (CW1) testified partly and further hearing was conducted on 5<sup>th</sup> October, 2022 when the claimant closed her case. The defence was heard on the same date with RW1 testifying and the respondent's case was closed as well.
6. Counsel for the both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Mburu, filed his written submissions on 25<sup>th</sup> January, 2023, while counsel for the respondent, Mr. Mutua, filed on 28<sup>th</sup> March, 2023.

## **II. The Claimant's Case**

7. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the claimant (CW1), and the written submissions by his counsel and the same is summarized as hereunder.
8. In her memorandum of claim, the claimant pleaded that she was engaged by the respondent, a producer and distributor of biological pesticide products, on 13<sup>th</sup> January, 2014 in sales and marketing at a monthly salary of Kshs.24,000/= as evidenced in a written contract dated 9<sup>th</sup> January, 2014.
9. The claimant continued in employment of the respondent in various positions in the marketing and sales department until 31<sup>st</sup> May, 2021 when she resigned, allegedly as a result of the hostile and toxic working environment created by the respondent and the claimant alleges that her resignation amounted to constructive dismissal.
10. As at the time of her alleged constructive dismissal the claimant's last salary is pleaded to have been Kshs.94,724/= following cumulative and gradual increment from the starting salary of Kshs.24,000/= alluded to above.
11. It is alleged that sometimes in 2019 the management of the respondent changed hands from Dutch to French management and ownership and that by 2020 there were deliberate efforts aimed at scuttling the performance of the claimant from the chief executive officer (CEO) and the human resources manager (HR). It is alleged that the respondent mooted the idea of forcefully transferring the claimant to Tanzania without any consultations or consent. She allegedly resisted the relocation and transfer and the idea was purportedly shelved.



12. Further, it is pleaded that, with the sole intention of reducing her earnings in bonuses and commissions, the respondent moved the claimant from the sales department to an interim leader of the Rift Valley region in January, 2021.
13. It is pleaded that on 23<sup>rd</sup> April, 2021 the claimant who was based at Naivasha, Nakuru County, was invited to the Nairobi office for what she assumed was a routine meeting. Upon arriving for the meeting on 24<sup>th</sup> April, 2021 the claimant was served by the HR manager, Ms. Beth, with an undated show-cause letter and allegedly ordered to surrender all company properties in her possession and custody, notwithstanding that the letter indicated that she was to surrender the company properties within the 14 days of suspension. It is pleaded that the respondent took possession of the vehicle but the claimant retained the phone and the I-pad to facilitate in her responding to the show-cause letter. However, it is alleged that the respondent switched off the official phone and closed the official email account to deny the claimant an opportunity to respond to the show-cause letter.
14. The said show-cause letter was in the following terms -

Kenya Biologics Ltd

Registration Number:138311

Physical Address: Makuyu-Kambiti

PO Box 249-01020

Makuyu, Kenya

Personal And Confidential

Ms. Joyce Waruguru Njoroge

Phone number +254 710724629

E-mail: joynjoh@yahoo.com

ID number 23773655

Date of Appointment: 13<sup>th</sup> January 2014

Dear Ms. Joyce Njoroge

Show Cause Letter

This letter is in reference to several complaints about you alleged misconduct by the mistreatment of other employees in the organization. We have received more than one (1) report about situation in which your behavior has been rude, derogatory and threatening to colleagues in the organization with incorporation of inappropriate communication styles. The details of these are well within your knowledge.

Ethics & Humanism – sense of community and respect for others is one of the core values of Kenya Biologics Limited (the “Company”). The Company thus expected all its employees to actively maintain a healthy organizational environment.

Below is the narration of the events that have been construed by the Company to be misconduct on your part.

1. Harassment & Frustration – on 19<sup>th</sup> of March at the premises of Wildfire Roses where you attacked Isaac Guda – Sales Representative in the presence of the



client and tainted the Company's name by saying that the Company can never keep their word on some issues.

2. Use of condescending statements to Isaac Guda and continually frustrating all his work including trials by inciting clients against him.
3. On the 22<sup>nd</sup> of January 2021, you called Isaac Guda and told him that you will "crash him" followed with threats that you should never find him anywhere within one hundred(100) meters near "your farms" as a result of a visit he had made to Rainforest with his colleague Jedidah Akinyi Sales Representative – who was visiting a friend in that firm. You went ahead to inform Isaac Guda that his entire presence in Naivasha was because of you.
4. You have been frustrating Jedidah Akinyi's efforts with clients specifically with Beauty Line when you frustrate her efforts, an example being that you usually send her invoices without local purchase orders (LPOS) and respond to her in condescending language – please refer to the email correspondence of March, 30<sup>th</sup> 2021 between yourself and Jedidah Akinyi.
5. On the 12<sup>th</sup> of November 2020, you verbally attacked Johnstone Gikandi – former Logistics Coordinator by falsely accusing him of attacking your 'personal mechanic' which accusation you later acknowledged was false and withdrew your statement via email.

Some other incidences have also been narrated by your colleagues and subordinates about your rude, combative and aggressive behaviors. These issues consequently inhibit and impact on your colleagues productivity and exploitation of their full potential in their service of the Company in fear of repercussion from you.

As a result of the foregoing, the Company's considers you to be in breach of your contract of employment with the Company and the provisions of the [Employment Act](#), No. 11 of 2007.

You have been verbally warned by both your supervisor and the Company's Chief Executive Officer but no refinement has been observed in your conduct. You have also been awarded opportunities to prove your managerial skills where your colleagues had been complaining of not receiving support from you.

You are hereby requested to submit a written explanation of these situations within seventy-two (72) hours of the receipt of this letter stating reasons as to why disciplinary action should not be taken by the Company against you. You will be temporarily relieved of your duties for a period of fourteen (14) days from the date of this letter to allow you sufficient time to adequately attend to the subject matter of this letter and the Company to consider your response. You will also be required to surrender the Company property and facilities in your possession during this period. Notwithstanding, your salary remuneration and other benefits will continue to be remitted to you by the Company as usual. During this period, should you wish to make any communication with the Company, please do so by email through:

Martin.montbarbon@kenyabiologies.com with a copy to beth.mugwe@kenyabiologiesmcom. Please also communicate your formal response to this letter through this email address.

Yours sincerely



Jean-Marc Moulin Name:

CEO – Kenya Biologics Ltd Signature preceded by the date and handwritten words read and approved.

15. On 29<sup>th</sup> April, 2021 the claimant responded to the show-cause in the following terms –

From: Joyce Wa<joynjoh@yahoo.com

Sent: Thursday, April 29, 2021 10.42 P.M.

To: Beth Mugwebeth.mugwe@kenyabiologics.com

Cc Martin Montbarbon< martinmontbabon@elephant-vert.com> Jean Marc Moulin<jean-marc.moulin@elephantvert.com

Subject: Re: Show Cause Letter

Dear Beth,

In response to the above mail. I hereby wish to express my disappointment in you and Martin in regards to the meeting on Monday, on your mail to have the meeting you had indicated we have the meeting to discuss my current activities in the region which was never the case, you should have clearly indicated it was a disciplinary meeting and the items that you would have wished I surrender to you of which I would have voluntarily brought to you, other than the cruel confiscation of company items that I came with fully unaware of your intentions. That undermines transparency and the values of humanism which is a core company value.

You can therefore send the driver to come and pick the tablet and the phone from me in Naivasha.

In response to the attached show-cause letter, it is as below

1. On the said date in the presence of Wildfire flowers production manager of whom I will request him to write to you in response of the allegations, I assured him of the company not able to supply grandevo to him at the moment as it was what Martin had communicated to the sales team that we are not able to import the production in large quantities and the only client who was to be supplied was Vd Berg.
2. I am not aware of any trial that was in progress with Isack as indicated. Give the name of the specific trial and name of the client for clarity.
3. On this point the Production manager of whom I will ask to write to you in response to this allegation called me on that particular day asking who was in charge of the account as he was not aware of the visit of anybody from the company and that I had not informed him of any changes in the handling of the account. I therefore categorically called and informed Isack not to cause confusion to the clients and he told me that they were visiting a friend in the farm, which I told him am not comfortable with.
4. For the Ipos and invoices they are usually sorted by the office in reference to the respective sales representatives irrespective of who sent.



5. On this point, I am not ware of any ‘personal mechanic’ and the statement that I write to withdraw my complaint was for the sake of my own peace.

On the issue of Isack and I, it would have been fair for both parties if the issues raised were discussed in presence of Isack and I before he left the company.

Regards,

Joyce Njoroge

16. On 1<sup>st</sup> May, 2021 the claimant issued a letter of resignation in the following terms –

Joyce Waruguru

Box 229 Njoro

Date: 01/05/21

The Human Resourcekenya Biologics,

Box 249

Kenol

Ref: Resignation Letter

I hereby wish to submit my resignation from my work, as a sales representative in Kenya Biologics effective on this day of 1/05/2021.

I wish to categorically state that it is in records on my 8 years in the company that I have performed exemplary well in my duties as a sales person and I have several awards given to me as an acknowledgment of merit.

My reasons for resignation is as a result of the continuous frustrations, intimidation, oppression and outright biasness in dealing with any issue that am involved by the management and especially the marketing manager (Martin) to whom I report to. The Human Resource (Beth) whom even at one point wrote a threatening text message to me that I will be facing some peril. These incidences and many more have made my work very difficult, the very recent form of mistreatment being on Monday 26.04.21 where the company car was confiscated without any prior communication for me to surrender it, disabling my mailing system without any proven case against me and switching off my company phone as well.

I hereby give a month notice from this day of 1/05/2021 as required of me by my contract with the company. Upon completion of the notice I expect the company to pay my final dues as stipulated in my contract and the company manuals as below.

1. All accumulated leave days since the beginning of my contract in 2014
2. My 8 years’ service gratuity
3. April sales commission and any other that will accumulate during the serve of my notice
4. My salary for the month of May after serving my notice.
5. 50,000 KSHS. Balance of Q1 quarterly bonus that wasn’t paid accordingly as I have indicated on my mail to Martin and copied Beth.



Yours sincerely,

Joyce Waruguru Njoroge.

Signed

17. It is pleaded that the resignation was neither voluntary nor mutual but it was as a result of alleged harassment, intimidation, threats, oppression, bias, and unfair treatment meted upon the claimant by the respondent and the resultant toxic and uncondusive working environment.
18. It is pleaded that notwithstanding that the respondent agreed and undertook to settle claimant's final dues in the sum of Kshs.359,490/= the respondent subsequently failed, refused, and or neglected to settle the same. It is stated that efforts to reconcile the settlement before the labour officer, Naivasha, were frustrated by the respondent who refused to cooperate.
19. It is pleaded that the disciplinary process as undertaken by the respondent was unfair and unlawful and as such the claimant resigned to avert being subjected to the same and as such it is pleaded that the resignation was not voluntary but amounted to constructive dismissal.
20. The particulars of the alleged constructive dismissal and of fair labour practices are pleaded. It is further pleaded that the claimant was denied house allowance during the entire period of employment and that she was denied a certificate of service upon termination.
21. In her testimony in court the claimant relied on the foregoing pleadings and her filed statement. She produced the documents listed in her bundle as exhibits 1 to 19. She stated that she was hired as a sales and marketing representative on 13<sup>th</sup> January, 2014 and worked in the Mt. Kenya region until Mid-2014 when she was transferred to Naivasha in the Rift Valley region. She signed a new contract in 2021 designating her as the new interim team-leader with effect from 1<sup>st</sup> January, 2021. She pointed out that her last monthly basic salary was Kshs.94,724.24 and insisted that she was neither housed nor paid house allowance during her entire period of employment with the respondent.
22. She claimed that she was denied repair to her official car, barred from taking part in meetings, discriminated, undermined, harassed, and profiled. She stated that when she complained about the foregoing she was threatened with a transfer to Tanzania in September, 2020.
23. She stated that in January, 2021 she was issued with a new contract which was to purportedly place her under probation and reduce her salary but the aim was to frustrate, harass, and force her to resignation. She stated that she was then invited for a meeting to review her performance on 26<sup>th</sup> April, 2021 but instead of the meeting taking that form and direction she was issued with a show-cause letter as alluded to in an earlier part of this judgment, leading to her resignation. She stated that she resigned because the respondent had decided that they were going to dismiss her anyway. She stated that the resignation was thus imposed on her as the same was not voluntary but as a result of the toxic environment created by the conduct of the respondent. She stated that she did not resign to pre-empt the disciplinary process that she was facing and stated that there is no way she was to get a fair hearing in the circumstances.
24. She testified that instead of the respondent settling her terminal dues which it had tabulated, she was demanded to sign a deed of release which according to her contained unfair and unlawful clauses. She therefore declined to sign the same as a result of which the dues were withheld by the respondent.
25. She was categorical that she signed only one contract of service with the respondent and that any other contract produced by the respondent is false and a forgery.



26. In cross-examination, the claimant stated that after the alleged constructive dismissal she located a similar job with another company based at Naivasha, Nakuru County. She denied ever intimidating or harassing any co-worker when she worked for the respondent. She clarified that her last day in employment of the respondent was 31<sup>st</sup> May, 2021 following her resignation letter and notice in her letter of 1<sup>st</sup> May, 2021. She confirmed that as at the time of her resignation she was on suspension. She stated that her tools, including the official car, a phone, and an I-pad, had been taken away and as such she could not continue working after 26<sup>th</sup> April, 2021.
27. She clarified that the respondent had no offices in Nairobi as it operated from Kabiti, Murang'a County, and that the meeting of 26<sup>th</sup> April, 2016 took place in a restaurant at Village Market, Nairobi County. She stated that the offer to transfer her to Tanzania was hollow as it came with no remunerational considerations and facilitation and that the same was only intended to frustrate and push her out. That the transfer was intended to dump her and was made in bad taste and faith. She stated that she had already established clients for the respondent and so the respondent felt that paying her more commissions and bonuses was an unnecessary cost and burden that it could do away with if she was relocated to Tanzania.
28. She stated that she did not go on annual leave during the entire period of employment other than compassionate leave and that the tabulation of the final dues by the respondent was wrong and unacceptable to her. She reiterated that she was not issued with a certificate of service.
29. On examination by the court she stated that she got another job immediately after resigning from the respondent.
30. It is on the basis of the foregoing that the claimant is seeking for the reliefs set out in the introductory part of this judgment. The submissions by her counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the respondent.

### **III. The Respondent's Case**

31. The respondent's case is expressed in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions filed by its counsel. The respondent's case is summarized as hereunder.
32. In the filed response to the claim the respondent denies all the allegations levelled by the claimant and more so that it is liable for the alleged constructive dismissal of the claimant from employment. It is pleaded and admitted that the claimant was an employee of the respondent as an account manager with effect from 13<sup>th</sup> January, 2014 as per the contract dated 16<sup>th</sup> January, 2014.
33. It is pleaded that the salary payable to the claimant included house allowance and that she was entitled to 21 days of annual leave. It is admitted that as at the time of resignation the gross salary for the claimant stood at Kshs.94,724/= which allegedly factored in basic salary and house allowance.
34. It is pleaded that the claimant was insensitive and condescending in her conduct towards her co-workers and that she was allegedly warned of her misconduct earlier on as evidenced in a warning letter dated 15<sup>th</sup> August, 2017. It is vehemently denied that the respondent subjected the claimant to a toxic and inconducive working environment or that she was harassed, discriminated, or forced on a transfer to Tanzania, or in any other manner pushed or forced to resign. The particulars of constructive dismissal are denied in toto.
35. It is pleaded that between November, 2020 and April, 2021 the respondent received various complaints of misconduct against the claimant and it was decided that disciplinary action be commenced against



- her. This formed the basis upon which the show-cause letter of 26<sup>th</sup> April, 2014 was issued against the claimant. It is pleaded that the said show-cause letter was served upon the claimant at Nairobi on even date when she was also requested to surrender the respondent's properties in her custody including the official car, phone, and I-pad. It is alleged that she reluctantly surrendered the car but adamantly refused to surrender the other two items. It is categorically pleaded that the meeting of 26<sup>th</sup> April, 2021 was not a disciplinary hearing but a meeting to hand-in the show-cause letter and inform the claimant of the contents thereof and request her to surrender the company's properties as she was to proceed on suspension till further notice.
36. It is pleaded that while the alleged misconduct of the claimant was under investigation the claimant resigned vide a letter dated 1<sup>st</sup> May, 2021. It is pleaded that the resignation was voluntary and of free-will.
  37. It is pleaded that after the resignation the claimant's final dues were tabulated at Kshs.359,490/= and a certificate of service issued and the claimant invited to collect the same. The claimant allegedly refused to collect the cheque for the said amount and the certificate of service, insisting that she was owed much more, and she filed her complaint with the labour office at Naivasha. It is alleged that the labour office did not reconcile the parties as the claimant is alleged to have become rude, adamant, and aggressive making it impossible to engage in the negotiations.
  38. It is vehemently denied that the claimant was constructively dismissed or at all. It is pleaded that the respondent was ready and willing to settle the matter by paying to the claimant the above sum of money in final dues but the claimant allegedly refused to cooperate and refused to sign the deed of release agreement.
  39. It is denied that the constitutional rights of the claimant of fair labour practices were breached, violated, or threatened. It is stated that the claimant was always paid monthly house allowance as a component in the gross pay.
  40. In her testimony in court RW1, the human resource manager, testified alongside the foregoing pleading and her filed statement. She produced as exhibits 1 to 23 documents filed by the respondent.
  41. She stated that the claimant was not tricked into attending the meeting of 26<sup>th</sup> April, 2021 as the agenda was expressly her conduct in the performance of her duties. It is stated that the respondent had an office at Leges in the Village Market. It is after the meeting that the claimant was requested to surrender the company's properties and proceed on suspension pending the disciplinary process. It is alleged that the phone and the I-pad were to be applied in the investigations and, in any event, the claimant was to remain on suspension for the next 14 days. It is alleged that the claimant reluctantly handed in the car but only handed over the other items after deleting all the information therein.
  42. RW1 stated that the claimant was not subjected to harassment, discrimination, frustration, or any other mistreatment, and that the claimant only raised these issues after she realized that she was to be subjected to disciplinary process upon being served with the show-cause letter.
  43. It is stated that the resignation by the claimant was voluntary, of free-will, and without pressure or threats from the respondent or any person. It was testified that the proposed transfer of the claimant to Tanzania was to be a good deal for the claimant as her remuneration was to improve, in addition to the exposure. It is stated that even after the claimant declined the offer in 2019 she remained in the employ of the respondent based at Naivasha. RW1 was categorical that the claimant resigned to preempt the disciplinary process after she was served with the show-cause letter on 26<sup>th</sup> April, 2014.



44. It is stated that the claimant declined the computation of her dues by the respondent in the sum of Kshs.359,490/= and refused to sign the deed of release agreement or pick her certificate of service. RW1 stated that the claimant was a valuable asset to the respondent and that there was no intention of dismissing or terminating her in any form or manner.
45. In cross-examination by counsel for the claimant RW1 stated that the claimant was initially engaged as an account manager on 13<sup>th</sup> January, 2014. She categorically stated that the only contract between the claimant and the respondent is dated 16<sup>th</sup> January, 2014 and not 9<sup>th</sup> January, 2014 as alleged by the claimant.
46. She admitted that the pay-slips to the claimant did not indicate payment of house allowance. She admitted that the claimant was entitled to 21 days of annual leave but alleged that only 10 days could be carried forward. She alleged that this provision was included in an amendment made in January, 2021 that also designated the claimant as a manager and team-leader. She testified that while the claimant was an excellent individual performer she failed in management and as a team-leader culminating in the show-cause letter which revolved around her failure to manage and relate well with those placed under her.
47. RW1 admitted that after the claimant refused to surrender the I-pad and the phone the same were disabled and her official email account suspended as the claimant was placed on suspension pending disciplinary process. It is stated that the claimant resigned to preempt that disciplinary process.
48. It is on the basis of the foregoing that the respondent is seeking that the cause herein be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

#### **IV. Submissions by Counsel**

49. In his submissions counsel for the claimant reiterated the pleadings and the evidence adduced by the claimant in court alongside the exhibits produced in court. He identified various issues for determination by the court which may be condensed into three – What was the nature of the employment relationship between the claimant and the respondent; Is the claimant entitled to the remedies sought; and, Who meets the costs of the cause.
50. It is submitted that the claimant was engaged in sales and marketing and that she did not do any accounting work as per the contract dated 13<sup>th</sup> January, 2014. In any event, the last position held by the claimant and the last salary are not in dispute.
51. In regard to the dismissal it is submitted that the claimant did not resign voluntarily but left due to the toxic working environment created by the respondent. Counsel has cited *benson Wachira Maina V Prime Steel Mills Limited (2020) eKLR*, *Geoffrey Muriithi Muthee V Xplico Insurance Co. Ltd (2022) eKLR*, and *Wilber Opiyo Ogot V Wells Fargo Limited (2022) eKLR* among many other decisions in demonstrating what amounts to constructive dismissal.
52. It is submitted that cumulatively the conduct of the respondent towards the claimant was unbearable culminating in the involuntary resignation of the claimant which in effect amounted to constructive dismissal.
53. It is submitted that by demanding that the claimant executes the release agreement/deed which in effect restrained the claimant in her trade and profession the respondent violated the rights of the claimant of fair labour practices under Article 41 of *the Constitution*. It is further submitted that the clause in the



deed requiring the claimant to discharge the respondent from all other claims was oppressive, illegal, and unconstitutional in a free market economy.

54. The submissions by counsel for the claimant in regard to the reliefs shall be considered in another part of this judgment below.
55. In his submissions counsel for the respondent identified two major issues for determination – Was the claimant constructively dismissed by the respondent or did she resign voluntarily and of free-will; and, Is the claimant entitled to the reliefs sought.
56. It is submitted that it was upon the claimant to prove that she was indeed constructively dismissed by the respondent. Counsel has cited *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga (2015) eKLR* in delineating the boundaries of what constitutes constructive dismissal. It is emphatically submitted that the claimant failed to satisfy that she was constructively dismissed as no evidence was adduced on what parts or terms of the employment contract were breached by the respondent. It is submitted that no complaints were made by the claimant of any harassment, intimidation, threats, or any other unfavourable treatment until she was served with the show-cause letter and disciplinary proceedings commenced. It is submitted that in her response to the show-cause letter the claimant did not challenge or contest any of the charges against her.
57. It is submitted that the particulars of constructive dismissal were not properly and specifically pleaded and proved to the required standard and counsel has cited *Rem Ogodo Ogana V Kenya Sugar board (2016) eKLR*.
58. Further, it is submitted that commencement of disciplinary action cannot found a basis for constructive dismissal and counsel has cited *Rebecca Ann Maina & 2 Others V Jomo Kenyatta University of Agriculture & Technology (2014) eKLR* in supporting that position. It is stated that no matter how fraudulent or unlawful the claimant (mis)understood the disciplinary process to have been, she ought to have undergone the same, bar any court order, and then take the appropriate legal action to remedy the situation. Counsel has cited *Jared Aimba V Fina bank Limited (2016) eKLR* in firming that position.
59. The court is thus urged to find and hold that the claimant unilaterally, voluntarily, and of free-will resigned from her employment with the respondent and she is therefore not entitled to the reliefs sought. The submissions on the reliefs shall be considered in another part of this judgment below.

## **V. Issues for determination**

60. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the Claimant, CW1, and RW1, and the submissions by counsel for both parties, the court identifies the following issues for determination –
  - a. Was the Claimant constructively or otherwise dismissed by the respondent or did she resign voluntarily and of free will?
  - b. Is the Claimant entitled to the reliefs sought?
  - c. Who meets the costs in this cause?

## **VI. Resignation or dismissal?**

61. The terms of engagement of the Claimant by the Respondent are not in dispute. It is admitted that the claimant was an employee of the respondent from January, 2014 to 31<sup>st</sup> May, 2021. It is also admitted that the last known salary of the claimant was Kshs.94,724/=, but there is a contest as to whether this



was the basic or gross salary inclusive of house allowance. It is also not in contest that the claimant left the employment of the respondent on the basis of a letter of resignation dated 1<sup>st</sup> May, 2014 which took effect from 31<sup>st</sup> May, 2014. The contest on the resignation is whether it was voluntary and of free-will or whether it was induced and caused by alleged intolerable and toxic working environment created by the respondent. The answer to this question should unlock this cause and have a bearing on the reliefs, if any, that may be awardable to the claimant. Was the claimant pushed or did she jump?

62. The circumstances leading to the claimant issuing the letter of resignation and terminating her employment with the respondent are not really contested. On 26<sup>th</sup> April, 2021 the claimant was summoned for a meeting at the respondent's office in Nairobi whereby she met the HR manager, RW1, and the marketing manager of the respondent. As to whether the meeting took place in a restaurant or an office may not be so material in determining the issues in contest. However, the evidence on record is that the claimant thought that she was travelling to Nairobi for a regular performance review but was taken aback when she was informed that the meeting was about disciplinary process against her. She was served with a show-cause letter and placed on suspension and it was demanded that she surrenders company's properties as detailed elsewhere in this judgment.
63. The claimant was purportedly dismayed, frustrated, and disappointed with the turn of events as expressed in her response to the show-cause letter. The claimant sounded bitter, not about the charges, but about the fact that she was not informed of the real agenda of the meeting in advance and the embarrassment that she was subjected to when the respondent demanded that she surrenders company properties on the spot after the meeting. Nonetheless, she laid out her defence to the allegations in her response to the show-cause in readiness to face the disciplinary process.
64. It is imperative to note that up to that point the claimant had not raised any issues of harassment, intimidation, discrimination, bias, or any other ill treatment with the respondent, whether orally or in writing, as there is no evidence of such complaints.
65. It is therefore amazing, and there is no explanation given, as to why the claimant changed heart and decided to resign rather than fight the charges and allegations against her to their logical conclusion. It is the view of this court that with the foregoing background there is no reasonable or plausible explanation offered by the claimant as to why she abandoned her defence to the charges and allegations against her and opted to resign. This is more so as there is no evidence of anything sinister that was done by the respondent between the issuance of the show-cause letter to the claimant and the claimant handing in her resignation letter.
66. The allegations by the claimant that she was subjected to harassment, intimidation, discrimination, bias, violations of her rights, et al, are therefore not supported by evidence. If the claimant had been subjected to such, why had she not complained hitherto service of the show-cause letter? Where is the letter of complained that she wrote, if any, or the particulars of any oral or verbal complaint? Why did she wait until she was served with the show-cause letter, then resign, and thereafter raise the issues above?
67. The issues of harassment, intimidation, threats, discrimination, bias, et al, are not raised in the reply to the show-cause letter and in the considered view of the court they are based on an afterthought intended to strengthen this cause. In any event, even if she did not raise the said issues in her response to the show-cause letter, the claimant had a golden and unhindered opportunity to raise them in the hearing of the pending disciplinary process.
68. The said issues were only raised in the letter of resignation and even then, the claimant did not and had not hitherto requested for an opportunity to raise the said issues with the management and or as



- her defence against the charges and allegations in the show-cause letter. The court has carefully gone through the said letter of resignation and noted that the same is in the language of someone who had consciously and voluntarily decided to quit.
69. Upon issuing the notice of resignation, the claimant lost the opportunity to defend herself against the charges and allegations contained in the show-cause letter. Had the claimant allowed herself to go through the disciplinary process, she could have had proper grounds to challenge the process on substantive and or procedural grounds if she felt that the same was unfair and unlawful. The court cannot speculate on what the outcome of the process could have been.
70. The court has seen a letter via email by the claimant dated 10<sup>th</sup> May, 2021 wherein she alleges ill treatment during the meeting of 26<sup>th</sup> April, 2021 and harassment as company properties were taken and demanded from her unceremoniously. Again, the tone in this letter is of a bitter employee who felt that she had been embarrassingly and begrudgingly dispossessed of company properties to which she was used and placed on suspension. In my view, this does not mean that the claimant had been constructively dismissed because she had the opportunity and was offered the same to defend herself in the disciplinary process. Unfortunately, and probably out of bitterness, the claimant did not wait to be heard.
71. In the circumstances, the court finds that the claimant was not constructively or otherwise dismissed or terminated by the respondent but rather she voluntarily and of free-will resigned. The court is vindicated in that holding by the following reasons. Firstly, there is no evidence whatsoever that the claimant had formally/officially whether orally/verbally or in writing to the respondent complained of any violation of her rights, intimidation, harassment, discrimination, bias, threats, or any other mistreatment prior to being served with the show-cause letter. Secondly, the claimant's invocation of the foregoing alleged mistreatment only surfaced after she was served with the show-cause letter which the court views as an afterthought and escapist. Thirdly, if the claimant truly believed that she was subject of such mishandling by the respondent, then, she blew away the chance to assert her position when she resigned instead of pursuing the disciplinary process to its logical conclusion. Fourthly, no evidence was adduced by the claimant during the hearing of this cause to prove that she was indeed subjected to the alleged mistreatment or that her rights were violated in any other way.
72. The claimant alleged that there was an attempt to transfer her to Tanzania sometimes in 2020 and that the same was intended to harass and destabilize her and deny her an opportunity of earning more bonuses and commissions. She also alleged that she had made an allegation of sexual harassment but the evidence on record is that she withdrew this complaint of her own volition. If the claimant really felt harassed, intimidated, threatened, violated, discriminated, et al, why did she not formally or even verbally lodge a complaint with the management of the respondent?
73. Applying the foregoing facts and circumstances of this cause to the standards and principles set by the Court of Appeal in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga (Supra)*, it is the finding and holding of the court that the claimant failed to prove that she was constructively or otherwise dismissed by the respondent.
74. This court (ELRC) has held in numerous decisions that courts have no business interfering with the human resources management at the workplace. Likewise, the court has no business interfering with the disciplinary mechanisms and processes in the workplace unless moved in cases of unlawful actions by either party. And finally, to state the obvious, the court cannot rewrite or alter the lawful terms in a contract of employment. The claimant has not demonstrated a fundamental breach of the contract by the respondent; an objective evaluation does not disclose misconduct or illegal conduct on the part



of the respondent; and, there is no nexus between the resignation of the claimant and any alleged or proved (mis)conduct of the respondent.

75. The court is persuaded by counsel for the respondent that the claimant resigned voluntarily and of her free-will and volition and all allegations of mistreatment, abuse, or violation made by the claimant are an afterthought to suit and support this cause. The claimant messed it when she denied herself the right to defend herself in the disciplinary process and opted for resignation. If there was misconduct on the part of the respondent, which has however not been proved, the claimant then had waived and or acquiesced to the same and her resignation was clearly and evidently aimed at evading the disciplinary process which commenced in earnest when she was served with the show-cause letter on 26<sup>th</sup> April, 2021.
76. Of course, the respondent embarrassed the claimant in the manner that she was demanded to hand-in company's properties in the meeting of 26<sup>th</sup> April, 2021 and the court does not endorse that kind of treatment of employees as there is a more humane and civil way of delivery of the properties in possession of an employee. However, that of itself does not amount to intolerable or toxic workplace as the claimant purported in this cause.
77. The court has said enough to demonstrate that indeed the claimant of free-will, own volition, voluntarily, consciously, and knowingly resigned from the employment of the respondent vide a letter dated 1<sup>st</sup> May, 2021 which resignation took effect on 31<sup>st</sup> May, 2021. It is so held and declared in answer to issue (a).

## VII. Reliefs

78. Having held that the Claimant voluntarily and of free-will resigned from her employment with the respondent, this court shall now consider each of the reliefs sought as hereunder.
79. It is relevant and important to note and take cognizance of two aspects of this claim. Firstly, that after the claimant resigned the respondent computed what it considered to be the lawful terminal dues and sent the same for execution by the claimant in form of a Deed of Release but the claimant declined to execute the same. The dues were calculated at a net of Kshs.348,642/= after statutory deductions. The said amount comprised of Kshs.240,660/= for accumulated annual leave, Kshs.131,930/= in sales commission, and Kshs.80,000/= in management allowance. The deed also indicated that the claimant was to receive a certificate of service. While the deed was not executed and or accepted by the claimant and it is thus not binding on the parties, it is relevant and an important pointer on what the respondent considered to be due and payable to the claimant as at the time of her resignation.
80. Secondly, it is also paramount to note that under Section 90 of the *Employment Act* (the Act) only remedies in claims falling within three years of the cause of action shall be ordered by court as any relief for a claim outside or beyond that period is statutorily limited and time barred. The cause of action arose on 31<sup>st</sup> May, 2021 upon expiry of the notice of resignation issued by the claimant. Counting backwards from 31<sup>st</sup> May, 2021 this period goes back to 1<sup>st</sup> June, 2018.
81. Prayer (a) is for a declaration that the constructive dismissal of the claimant by the respondent was unfair and unjustified. The straight answer, and the court has found and held so in the foregoing paragraphs of this judgment, is that the claimant was neither constructively nor otherwise dismissed or terminated but she resigned on her own volition and of free-will. In the circumstances, this declaratory relief is denied and in place therefor it is declared that the claimant was not dismissed but rather she resigned on her own volition.



82. Prayer (b) for one month's pay in lieu of notice is hereby denied and dismissed for the same reasons stated in respect of prayer (a) above.
83. Prayer (c) for compensation for unfair and constructive termination is similarly denied and dismissed for the same reasons stated above.
84. Prayer (d) is for unpaid commissions and management allowance amounting to Kshs.326,003/=. As noted above, the respondent, through the unexecuted Release Deed, admitted that some commissions and management fees were unpaid as at the time of the claimant's resignation. The admitted amount is in the sum of Kshs.348,642/= as per the unexecuted deed that was produced as an exhibit by both parties. In the memorandum of claim, as stated above, the claimant is asking for Kshs.326,003/=. The amount payable of Kshs.348,642/= is also admitted and ratified by the respondent in the pay-slip/final balance produced by both parties as an exhibit.
85. The respondent, as the custodian of employment records under Sections 10 & 74 of the Act has not availed documents to dispute and or dislodge the claim by the claimant and in any event the amount prayed for is lower than what is admitted. It is also not denied that once the claimant refused to sign the Release Deed the respondent withheld the money. The claimant is therefore awarded what she considers to be due and payable to her under this head in the sum of Kshs.326,003/=.
86. Prayer (e) is for house allowance for the entire period that the claimant worked for the respondent from January, 2014 to May, 2021. There are two issues that need to be examined here. Firstly, in terms of limitation the court shall only consider the last three years immediately preceding the arising of the cause of action. Secondly, the court has dutifully and carefully considered all the contracts availed by the parties and the pay-slips and none of them provides for or mentions house allowance. It is not enough for an employer, as the respondent herein did, to state that the salary or remuneration paid is gross and that the house allowance payable is subsumed in the gross salary. This is so because Section 31 of the Act is couched in the following mandatory terms –
- Housing. 31.(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in [www.kenyalaw.org](http://www.kenyalaw.org) The *Employment Act*, 2007 41 addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.
- (2) This section shall not apply to an employee whose contract of service—
- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or
- (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).
- (2) The Minister may, on the recommendation of the Board by notice in the Gazette, exclude the application of this section to a category of employees and such category of employee shall be dealt with as shall be specified in the notice.
87. The claimant disowned the contract dated 13<sup>th</sup> January, 2014 that was produced by the respondent as an exhibit. She stated that the same is a forgery. She produced a contract that she executed on 9<sup>th</sup> January,



- 2014 as the authentic and genuine initial contract between her and the respondent. She pointed out that the postal address in the contract produced by the respondent is wrong and fake. She testified that the said contract was manufactured by the respondent with the sole purpose of defeating this claim on house allowance. It is important to note that the two contracts, on the part of the respondent, were allegedly executed by two different officers. The one produced by the respondent was executed by Chris Kolenberg, a director, while that produced by the claimant was executed by Nikolai Van Beek. Neither of the two persons was called as a witness.
88. However, if the contract produced by the respondent is to be believed it should have been backed up with a pay-slip confirming that indeed the house allowance was factored in as alleged. All the pay-slips availed by both parties make no mention of house allowance. Even the Deed of Release prepared by the respondent and the tabulation of the final dues does not account for house allowance payable to the claimant.
89. In the circumstances, and based on the reasonable and logical construction of the evidence availed, the court finds and holds that the respondent failed to pay house allowance to the claimant as required by the law.
90. There is no evidence whatsoever that the respondent complied with the above law and hence the claimant shall be awarded house allowance for the period from 31<sup>st</sup> May, 2021, counting backwards to 1<sup>st</sup> June, 2018. As stated in the foregoing paragraphs there is no record or evidence of payment of house allowance to the claimant at any point in time. From the pleading in the memorandum of claim the house allowance for the period stipulated above amounts to Kshs.444,529.08, based on the calculations in the memorandum of claim. That is the amount that is awarded to the claimant under this head.
91. Prayer (f) is for a sum of Kshs.564,246.82 in accumulated and unpaid annual leave at the rate of 21 days for every year worked. As noted elsewhere in this judgment the claimant can only be awarded for lawful claims falling within a period of three years preceding the date when the cause of action arose. The respondent as the custodian of employment records has not availed records of annual leaves taken by the claimant. In the circumstances and in view of lack of rebuttal from the respondent the evidence by the claimant that she did not take annual leave as pleaded shall be accepted. Further, in the deed of release prepared by the respondent, which was however not executed by the parties, the respondent admitted that indeed there were leave days for which payment was due. The respondent offered to pay Kshs.240,660/= for the same. Of course, this deed is not binding as the claimant rejected the document but it is a pointer that indeed the respondent was aware that the claimant was entitled to compensation for annual leave not taken.
92. The leave forms availed by the respondent as exhibits in its bundle at pages 43 to 50 did not help either. Some of the forms are not signed by the employer and the employee, some do not indicate the number of days taken, none of them indicate that they relate to annual leave, and some of them are outrightly false. For example, the form at page 49, the only one that mentions annual leave, indicates that the claimant went on leave from 24<sup>th</sup> December, 12014(sic!) to 12<sup>th</sup> December, 2014. This makes no sense at all. It is the finding and holding of this court that the said forms were deliberately manufactured to counter this cause. This is a polite way of saying that they are false and a forgery.
93. In the circumstances, the claimant is awarded leave pay for the period between 31<sup>st</sup> May, 2021 to 1<sup>st</sup> June, 2018 based on the basic salary calculated as follows – Kshs.94,724.24 \* 21/30 \* 15/100 \* 3 years = Kshs.29,839/=.
94. A certificate of service is a right of an employee under Section 51 of the Act and the respondent is hereby ordered to unconditionally issue and deliver the same to the claimant within 30 days of this judgment.



95. The alleged threat, violation, and or breach of constitutional rights have not been pleaded and proved to the required standard as held in numerous decisions including Anarita Karimi Njeru V Republic (No. 1) (1979) KLR 154 and Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR.

#### **VIII. Costs**

96. Costs follow the event and therefore the Claimant is awarded costs of this cause. There is no reason for this court departing from this established principle.

#### **IX. Disposal**

97. In final disposal of this cause, this court issues the following orders: -

- a) A declaration be and is hereby issued that the claimant was not constructively or otherwise dismissed by the respondent but rather she resigned voluntarily and of free-will.
- b) The claimant is awarded a total of Kshs.800,371.08 made up as follows –
  - i. Unpaid commissions and bonuses ...Kshs.326,003.00
  - ii. House allowance ..... Kshs.444,529.08
  - iii. Leave pay .....Kshs...29,839.00

Total ..... Kshs.800,371.08
- c) The respondent is hereby ordered to issue and deliver a certificate of service to the claimant within 30 days of this judgment.
- d) Costs of the cause and interest thereon to the claimant.
- e) All the other prayers are denied and dismissed.
- f) The amounts awarded above shall earn interest at court rates from the date of this judgment till payment in full.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**DAVID NDERITU**

**JUDGE**

