Mwongera v Compassion International Kenya (Cause 1489 of 2018)
[2024] KEELRC 1226 (KLR) (22 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 1226 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1489 OF 2018

NZIOKI WA MAKAU, J

JANUARY 22, 2024

BETWEEN

NKATHA MWONGERA ..... CLAIMANT

AND

COMPASSION INTERNATIONAL KENYA ..... RESPONDENT

JUDGMENT

1. The Claimant's claim against the Respondent was for declaratory orders that termination of her employment was unfair and unlawful, that the Respondent discriminated against her during its restructuring process and in redeployment, and that it also subjected her to unfair labour practices. She further prayed that this Court enters judgment in her favour and as against the Respondent for damages: for the unfair and unlawful termination of employment at 12 months' gross salary, for discrimination and loss of career opportunity, and for unfair labour practices. In addition, she sought interest on any sums awarded by the Court at court rates at 12% p.a. from date of filing this suit until payment in full, costs of the suit and interest thereon and any other relief the Court may deem fit. The Claimant averred that the Respondent employed her in the capacity of Sponsor & Donor Ministry (SDM) Associate. That the terms in her Letter of Appointment dated 22nd December 2005 inter alia provided for her employment to commence on 4th January 2006 at a gross monthly salary of Kshs. 34,970/-. Further, she was to be on probation for six (6) months, three of which would be spent on orientation and that her employment would be confirmed upon successful completion of the probation period. She further averred that she was confirmed on a permanent basis to the position of SDM Associate by a letter dated 29th August 2006 and later promoted to the position of Complementary Interventions (CIV) Administrator effective from 16th February 2010, at a gross salary of Kshs. 86,335/-. The Claimant asserted that her last position at the Respondent was as a CIV Team Leader, which appointment was made on or about 1st December 2014 and that her role was enlarged to include performance management, leave management and other day-to-day supervision of the CIV Administrator. It was her averment that following her hard work, assiduity and commitment to the

Respondent organization, she was rewarded with various salary increments in the years between 2006 and 2016.

2. The Claimant's case was that while on her maternity leave, she received a letter dated 29th March 2016 from the Respondent purporting to redeploy her to the position of Training Specialist within its Program Implementation (PI) Department effective 1st April 2016, but without proper notice and/or consultation. The said letter expressed that the decision to redeploy her was made following detailed deliberations by the management and affirmed that she would undergo an on-job training for six (6) months before evaluation of her performance, suggesting she was being placed on probation. The Claimant averred that she was never afforded any chance to discuss and determine the suitability of the new position to her career progression or interests or explore any possible suitable positions in the Respondent's new employee structure. She believed that the aforesaid new position offered to her was a demotion both in terms of job description and scope and would have significantly and severely compromised her status, professional standing, future job prospects and career growth.

3. The Claimant noted that the position of CIV Team Leader that was taken up by someone else, was not declared redundant at the time she was being redeployed and that the Respondent's unilateral decision and actions blatantly discriminated against her and were unlawful. She particularised the discrimination to include the Respondent effecting the decision to redeploy her during her maternity leave in disregard of her physical and mental state and with the intention of depriving her the right to appeal the said decision. Additionally, that the Respondent deliberately neglected to discuss her work performance for 2016 with her even upon her resuming work after maternity leave. She also asserted that the redeployment was a breach of her constitutional right to fair labour practices as it firstly purported to convert her employment terms from permanent and pensionable to probationary yet her employment had been confirmed in 2006. Secondly, as a nursing mother, she would not be able to manage the lots of travelling that came with the new position, which was contrary to clause 5.5(c) of the Respondent's Employee Handbook on working hours for nursing mothers. Finally, that the redeployment was tantamount to a demotion.

4. The Claimant further averred that she issued the Respondent with a demand letter dated 12th May 2016 extensively outlining how the said redeployment was not reasonably suitable and favourable to her and seeking reinstatement to her previous role of CIV Administrator Team Leader. That subsequently, an exchange of correspondence between hers and the Respondent's appointed advocates ensued on diverse dates between 26th May 2016 and 29th July 2016 but which did not yield any solution to the aforementioned dispute. The Claimant contended that the Respondent's aforementioned actions accordingly amounted to constructive dismissal. This she particularised to include the Respondent compelling her to carry out a handover by 30th June 2016 despite the then ongoing correspondence between their advocates and the unilateral change in her employment contract, which she further contended was singly sufficient to amount to constructive dismissal. The Claimant stated that she was ultimately forced to tender her resignation letter on 29th July 2016 after over 10 years of service and which letter the Respondent accepted on 1st August 2016. That as evidenced in her last payslip for August 2016, she was earning a gross salary of Kshs. 220,564/- at the time of the resignation. She also notified the Court that the Respondent had failed, refused and/or ignored to honour a demand she had written to them through a letter dated 10th July 2018 thus necessitating this suit.

5. Respondent's Case

In its Reply to Memorandum of Claim, the Respondent averred that all the positions the Claimant served in were subject to terms and conditions of deployment thereto in so far as they were not inconsistent with her primary employment contract. It denied the assertion that it never afforded the

Claimant an opportunity to discuss the said redeployment and or purportedly demoted her as alleged. According to the Respondent, the Claimant's allegations disclosed no reasonable cause of action in law against it as her deployment to the various positions and her last position of Training Specialist were consistent with her Contract of Employment, the Respondent's Employee Manual Policy and all the relevant laws. It further averred that the Claimant was estopped from belatedly objecting to the six (6) months' probation provided in her last position as she had previously accepted and acquiesced herself to the previous deployments she was now pleading as promotions and all of which had 6 months' probation. It noted that its global and national modus of operandi, custom or course of business is that any new position or change of job description it effected would place the affected employee on 6 months' probation for training and or assessment of job suitability or adaptability before confirmation and was not alteration of the employee's employment contract.

6. In further reply, the Respondent stated that the Claimant had agreed to clause 2 of her Employment Contract that the Respondent reserved the right to require her to change her job description and or perform a different job consistent with her status and that any such change constituted the terms and conditions of her Employment Contract thereof. That her redeployment to the position of Training Specialist was therefore in good faith consequent to proper consultations and careful considerations of the various staffing requirements. Further, its management had found the Claimant to be the best suited person for the said position based on her skill and experience from her previous position of CIV Administrator Team Leader.

7. The Respondent maintained that the Claimant was consulted at all material times and knew of the creation of and or the need to have the Training Specialist position in furtherance of the Global, Regional and Country agenda even before she proceeded on maternity leave. That contrary to the assertion that she was demoted, the said new position was to enable the Claimant effectively use her skills and job description on the Respondent's Global Restructuring Project that was a priority at the time. That the Claimant in fact squandered or failed to utilise the opportunity to discuss her suitability for the job with her immediate supervisor and instead became un-co-operative, unresponsive, defiant and failed to discharge her obligations as per her Contract. That the Claimant is thus estopped from alleging that she was not given notice or opportunity to object to the redeployment which she did not object to when the redeployment letter was delivered to her on 8th April 2016. The Respondent also noted that when the Claimant resumed work after maternity leave, on 16th May 2016 during morning devotion at the Respondent's office she announced to her colleagues, including the Respondent's management, that she was looking forward to her new position of Training Specialist. That the Claimant then reported to her new work station and commenced job training without raising any objections or reservations on the same either to her supervisor or through the conflict resolution mechanism as set out in her Contract and in the Employee Manual respectively.

8. The Respondent's position was that the Claimant's skills throughout her employment in the various positions she served the Respondent were as a result of on-job training, review and performance assessment on suitability and adaptability by the Respondent at all material times. That the Claimant's academic qualifications and specialization at the point of her entry into the Respondent organisation was not CIV Administrator or any of the positions she served in and that the Respondent chose to give priority to willing internal workforce as opposed to outsourcing. The Respondent averred that the position of CIV Team Leader was only retained on a temporary basis pending full implementation of the new global organisational design that focused on Youth Training Development. That the said global organisational design created the position of Program Support Specialist (PSS) that took effect on 1st January 2018 and eliminated all lead positions, including the impugned CIV Team Leader. That the Claimant was fully aware of the aforementioned facts prior to her proceeding for her leave and that if she were to remain the same position, she would be PSS-CIV and not CIV Team Leader.

9. The Respondent also denied that it discriminated against the Claimant and or breached her constitutional rights to equality and fair labour practice as alleged. It maintained that the restructuring or redeployment in issue was bona fide and considerate of the key priority areas and did not only affect the Claimant but two (2) other employees in the same rank as the Claimant who, compared to the Claimant, were co-operative on job training, raised and discussed their concerns, were assisted and acclimatised to their new positions. Moreover, the Respondent asserted that it was the Claimant who frustrated the performance review for October 2015/July 2016 as she engaged external lawyers to demand for reinstatement to the CIV position in breach of its internal conflict resolution mechanism and made it difficult for the Respondent to initiate or complete her review. That the belated claim was thus vexatious and an abuse of legal and court process. The Respondent averred that although the new position took effect in April 2016, it never recalled to work or terminated the Claimant's maternity leave and that it accepted her back in May 2016 without victimizing her or altering her working hours or the benefits attendant to nursing mothers. Ultimately, the Respondent denied that it constructively dismissed the Claimant as particularised in the Claim. It stated that the Claimant voluntarily resigned from employment to avoid disciplinary action for failing to obey lawful authority of her supervisor and to submit regular reports among other contractual obligations upon resuming work from maternity leave. The Respondent thus prayed that the suit herein be dismissed with costs.

10. In a witness statement made on 20th March 2019, the Respondent's Mr. Justus Muinde noted that before moving to the position of CIV Administrator, the Claimant had also served as SDM Services Associate with effect from 1st July 2007 and had executed a Contract of Employment dated 3rd July 2007. While admitting that someone was redeployed to the said position of CIV Team Leader, Mr. Muinde asserted that the same was effected temporarily pending full re-organization of the Respondent and not as a promotion and that the alleged person was not given better terms than the Claimant.

11. Evidence

    At the hearing, the Claimant testified that she neither applied for the position of Training Specialist nor showed any interest in the position. That the Respondent did not observe the protocol that required the need to consult global and local teams before redeployment and that she neither signed any job description nor trained for the role of Training Specialist. She argued that the redeployment was a demotion since as team lead, she had a budget and people that she supervised whereas in the new role, she had no budget and no one to supervise. That the Training Specialist was five (5) notches from the top position of County Director and she was going back 10 years compared to CIV Team Lead that was a few tiers to the County Director position. That the Training Specialist was not in her career whereas the CIV Team Lead was a finance position. She further testified that section 3.5 of the Respondent's Manual provides that if there is redeployment, there is probation and then assessment after the probation period. The Claimant asserted that she was compelled to resign and that she neither disobeyed the management or the supervisors nor abdicate her duties.

12. The Claimant stated during cross-examination that she has a Masters Degree, a Bachelors degree in Communication and post-graduate diploma in Information Technology. That she had a Masters Degree in 2010 prior to being admitted to the position of CIV Administrator but did not present the certification of the said Masters Degree. She acknowledged that clauses 15 and 16 of the Contract provided for grievance procedure and discipline procedure respectively and that clause 4 of the Respondent's Manual (page 73 of the Respondent's Bundle) provided a step by step guide on presenting grievance. The Claimant maintained that she said at the morning devotion that she did not accept the redeployment. In reference to page 51 of the Respondent's Bundle, the Claimant stated that when she communicated with the County Director that she could not take up the role, he responded

that unless there was a court order, the deployment stood. That she did not have the skills for the job of Training Specialist and was not able to go for orientation as she was on leave and only resumed on 6th May but proceeded on sick leave from 9th to 13th May for post-natal depression. It was the Claimant's testimony in re-examination that the Training Specialist role required that she take training in Marsabit and Baringo and since she was a lactating mother, she knew she could not manage.

13. The Respondent's witness, Mr. Justus Muinde (RW1) testified that it is the practice of the Respondent that when anyone moves from one position to another, they are put under 6 months training called on-the-job training. That the practice gives employees time to be fully prepared to undertake the position and the expectations. He argued that the Claimant was not demoted and that her case was a transfer of responsibility and a lateral movement from one position to the next on the same grade. RW1 explained that whenever an employee had an issue, they were to raise the same with HR Country Director and if not working, the issue is then raised with the US and internal investigations undertaken before feedback is given. His stance was that the Claimant's grievance was not brought to the Respondent as per the directives as she opted to use her appointed lawyers to issue letters to the Respondent and the issue could not thus be dealt with internally. Mr. Muinde further testified that the CIV position was phased out effective 31st December 2017. That the Respondent's policy is that nursing mothers come late (9.00am) and leave early (4.00pm) and that the Claimant was not expected to travel outside Nairobi with all travel being negotiated between the employee and supervisor. Under cross-examination, RW1 stated that training for the position was in Nairobi and the communication did not say that the Claimant would travel to Marsabit because for all practical purposes she had a child and considering she was to work between 9am and 4pm, she could not travel. RW1 reiterated in re-examination that when the Claimant went on maternity leave, she handed over to Mr. Ndung'u and that the conversation of reassignment of roles was already in motion.

14. Claimant's Submissions

According to the Claimant, the following were the issues for determination by this Court:

a. Whether the Claimant was constructively dismissed from the Respondent's service;

b. Whether the Claimant was discriminated against;

c. Whether the Claimant was subjected to unfair labour practices contrary to Article 41(1) of *the Constitution* of Kenya 2010; and

d. Whether the Claimant is entitled to the reliefs sought in the Claim.

15. The Claimant submitted that the Black's Law Dictionary [Tenth Edition] defines constructive dismissal or discharge as:

> "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."

16. The Claimant further submitted that the concept of constructive dismissal is underpinned on the notions, inter alia that: (a) there is implied in a contract of employment, a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee; (b) breach of that trust and confidence will entitle the employee to treat himself as constructively dismissed; and (c) employers do not have carte blanche to change the employment

relationship. The Claimant cited the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR wherein the Court of Appeal developed the test in proving a claim of constructive dismissal as follows:

a. the employer must be in breach of the contract of employment;

b. the breach must be fundamental as to be considered a repudiatory breach;

c. the employee must leave employment in response to that breach;

d. there must be a causal link between the employer's conduct and the reason for employee leaving employment; and

e. an employee could leave with or without notice if the employer's conduct was the effective reason for the termination.

17. It was the Claimant's submission that the redeployment occurred well before the conclusion of her statutory-sanctioned three-month maternity leave that was scheduled to end on 6th May 2016. That the Respondent thus blatantly disregarded the Respondent's Employee Handbook, and contravened section 29(1) and (2) of the *Employment Act* providing that a female employee is entitled to three months of maternity leave with full pay. She was also guaranteed the right to return to her previous job or a reasonably suitable one on terms and conditions not less favourable than those applicable prior to her maternity leave. She submitted that the Respondent's untimely notification during a crucial period of personal and professional adjustment underscored a lack of consideration for her overall well-being. That it further created an impediment to her ability to engage with and address the circumstances surrounding her redeployment in a manner that would have been more conducive to a fair and just resolution. Further, the Claimant argued that the unilateral redeployment substantially altered the essential terms of her employment contract and that any reasonable person faced with the same facts would have arrived at a similar conclusion. That section 10(5) of the *Employment Act* mandates an employer changing the terms of service to consult with the affected employee and notify them in writing of the said changes. That however in the present case, the Respondent did not attempt any consultation with her before it decided to demote (redeploy) her whilst she was on maternity leave and that the omission, by itself, invalidated the impugned redeployment. On this submission, the Claimant relied on the decision of the Court of Appeal in *TEC Institute of Management Limited v Owuor (Civil Appeal 74 of 2017)* [2022] KECA 125 (KLR) (11 February 2022) (Judgment) that a good work environment is one where there is communication and consultation between employer and employees based on good faith, where employees are heard and considered in decisions that affect them directly and their dignity is affirmed. It was the Claimant's submission that where an employer unilaterally decides to make substantial changes to the essential terms of an employee's contract and the employee does not accede to the changes but leaves their job, the said employee will not have resigned but will have been constructively dismissed. That she was thus entitled to treat the contract as repudiated and cease employment.

18. The Claimant further argued that the fact that salaries and benefits remain static during a change of role is not a conclusive factor to displace an allegation of demotion. In this regard, she urged the Court to adopt its decision in Godfrey Odipo Tom v Tabasamu Sacco Limited [2022] eKLR wherein the Court held that a demotion may entail an employer imposing upon an employee a position with diminishing scope of control, authority or lower reporting level than previously held, even if there is no accompanying variation in salary and allowances. The Claimant also noted that the avenue for Internal Dispute Resolution, as stipulated in clause 4.1 of the Respondent's Employee Handbook, was rendered impractical post-redeployment because the Respondent failed to consult her before implementing the impugned redeployment. That the unequivocal statement of the Respondent's

Country Director to effect that only a court order could prompt a review or alteration of the decision to redeploy her reflected the Respondent's lack of willingness to consider alternative resolutions and its deliberate intent to frustrate the Claimant's pursuit of an amicable solution.

19. As to whether she was discriminated against, the Claimant submitted that section 5(3) of the *Employment Act* prohibits discrimination in employment on various grounds and in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters. Her stance was that she was not granted the three-month maternity period stipulated under section 29 of the *Employment Act* and instead experienced a less favourable condition by being demoted. She relied on the case of G M V v Bank of Africa Kenya Limited [2013] eKLR in which the Honourable Court held that the Court must make it clear that there is absolutely no requirement for ladies, who claim to have been discriminated against by their employers on the ground of pregnancy, to strictly prove they were discriminated against on such ground. The Court further found that section 5(6) of the *Employment Act* 2007 places the burden of proof on the employer and not the employee and that the position has adequate support in section 43 of the Act that requires the employer to prove the reason for termination. The Claimant asserted that her case meets the four conditions set in the G M V case (supra) in that: she had established that being on maternity, she belonged to a protected class safeguarded against discrimination on account of pregnancy; her uncontroverted testimony that she held the necessary qualifications for the CIV role showed she was qualified for the job she lost; she suffered adverse employment action as a result of her pregnancy; and had established that there was a nexus between the adverse employment decision and her pregnancy. It was the Claimant's submission that with the threshold being that she only establishes a prima facie case and having successfully done so, this Court should find that the Respondent is in blatant breach of sections 5(3)(b) and 29 of the *Employment Act*, 2007, and that she was discriminated against on account of her pregnancy.

20. The Claimant submitted that her reassignment violated her right to fair labour practices under Article 41 of *the Constitution* and that her case for the said breach is unimpeachable. In the end, she submitted that she is entitled to an award of damages equivalent to 12 months' salary because the Respondent solely contributed to her resignation; there is limited opportunities available for her to secure comparable or suitable employment with another employer; and she had served the Respondent for over 11 years. As regards her prayer for damages for discrimination and loss of career opportunity, she proposed an award of Kshs. 1,500,000/- and relied on the case of *Mokaya v Kithure Kindiki t/a Kithure Kindiki & Associates (Petition 62 of 2019*) [2021] KEELRC 1 (KLR) (30 September 2021) (Judgment) in which the employee was awarded Kshs. 1.5 Million as exemplary damages for discrimination on account of pregnancy. It was the Claimant's submission that she is entitled to costs in the instant claim as costs should be awarded to the successful party.

21. Respondent's Submission

The Respondent submitted that the Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR discussed the tests to apply in determining whether there was constructive dismissal and stated thus:

> "...The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court

must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law... The criterion for evaluating the employers conduct is objective... The employee must be able to show that he left in response to the employer's conduct (i.e. causal link must be shown, i.e. the test is causation). ...The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee." [Emphasis by the Respondent]

22. The Respondent argued that considering clause 2 of the Contract of Employment between the parties herein, its conduct at all material times, as demonstrated hereinabove, was consistent with the Claimant's Contract of Employment and the Respondent's employment regulations. That this Court should thus not interfere with the agreement of the parties without any reasonable cause and or justification. The Respondent cited the case of Geoffrey Mworia v Water Resources Management Authority & 2 others [2015] eKLR as quoted in John Moogi Omare v Kenya National Commission for UNESCO [2020] eKLR and wherein the Court stated that the court will sparingly interfere in the employer's entitlement to perform any of the human resource functions and that an applicant must show that the employer is proceeding in a manner that: contravenes *the Constitution* or legislation; or breaches the agreement between parties; or is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted; or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.

23. According to the Respondent, the Claimant had failed in her quest to overstretch the concept of constructive dismissal having not met the threshold of the contractual approach test as set out in the Coca Cola v Maria Ligaga case (supra) and such, this claim must fail. The Respondent argued that even if this Court would be so inclined to investigate the 'unreasonable test' as described by the Court in the Coca Cola v Maria Ligaga case (supra), the Claimant would still not meet the threshold as the Respondent's conduct was at all material times above board and reasonable as demonstrated by the evidence before the Court and the testimony by parties. Further, the Respondent submitted that the Claimant had not demonstrated a situation it had created that was so gross and intolerable to compel her to resign and or that there was no other way to resolve the instant dispute. That most importantly, the Claimant had not shown that the redeployment was a change of the terms and conditions of employment. The Respondent noted that the Claimant had instead misrepresented material facts by referring to 'on-job training' as probation and alleging that her redeployment to Training Specialist was a demotion and discrimination. In its view, the Claimant attempted to re-write both the contract of employment and the redeployment.

24. Referring the Court to the thread of emails at pages 12 to 17 of the Respondent's Bundle of Documents, the Respondent submitted that the same demonstrate that the Claimant was aware she was doing a final handover of her duties as CIV Administrative Lead as she prepared to proceed for her maternity leave. That it had also demonstrated the issue of reorganization as seen in the emails at pages 7 to 11 of the Respondent's Bundle showing discussions between the Respondent and its regional and global affiliates. It argued that there was actually no evidence before this Court demonstrating the Claimant's attempt at dealing with the grievances raised being thwarted by the Respondent. That the internal avenue remained open but the Claimant chose not to pursue it for reasons known to herself contrary to clause 4.1 of the HR Policy. The Respondent relied on the case of Robert Indiazi v Tembo Sacco Limited [2018] eKLR in which the Court held that since the claimant requested and was allowed to resign instead of being dismissed, he could not now complain at the hearing about the process as he did not allow it to proceed to its logical conclusion. The Respondent noted that it in good faith chose not to initiate disciplinary action against the Claimant in the midst of provocation by the external lawyers and her uncooperativeness at work. It maintained that the Claimant had failed to discharge

the burden of proof that there was a repudiatory breach of contract and or the introduction of an unreasonable condition by the Respondent. That as such, the Claimant's resignation was not due to the Respondent's conduct because there was no other way to resolve the issues before resignation.

25. On the issue of discrimination, the Respondent submitted that the Claimant had not produced any evidence before this Court to demonstrate that she was subjected to any form of discrimination by the Respondent. That it was undisputed that the Claimant went for maternity leave (from 6th February 2016 to 6th May) and came back on 16th May 2016 after the leave had lapsed 2016. Furthermore, even though the redeployment letter issued while she was on leave was to take effect on 1st April 2016, there was no requirement that the Claimant halts her leave and report to work before it ended. The Respondent urged the Court to be guided by the decision of the Court in the case of Lucy Kerubo v Chairman – Finmax Community Based & 2 others [2016] eKLR that the claimant had not in any way demonstrated a case of discrimination, frustration or even being exposed to a situation of hardship as pleaded in the claim and further, that the employer, in denial of the claim, clearly set out a case of a work environment where the parties went out to perform their duties as per the terms and conditions of employment. It was the Respondent's submission that consequently, the Claimant's allegation that it violated her constitutional right to fair labour practices is baseless and misconceived. That evidently, the redeployment did not change the Claimant's terms of service and or remuneration and she was not demoted. It urged the Court to find that this claim had failed as the Claimant had not demonstrated the limb to the required threshold. The Respondent further submitted that from the foregoing, the Claimant is not entitled to any compensation for the purported constructive dismissal, unfair labour practice or discrimination having failed to prove the same as affirmed by the Court of Appeal in Premier Construction Limited v Josephat Bwire Lukale & 5 others [2017] eKLR. That if the Court is however inclined to find that there was constructive dismissal, the Claimant is then not entitled to 12 months' salary compensation. That in any event, the 12 months' salary compensation is not automatic under section 49(4) of the *Employment Act* as the amount to be awarded has to be assessed in view of the grounds set out in the said provision. It urged the Court to consider the Claimant's conduct and the matter having been escalated to external participants at a very early stage without exhausting the internal mechanisms and her failure to mitigate her circumstances in terms of alternative employment after her resignation. In this regard, the Respondent relied on the case of Rhoda Nyatuka Isena v Coptic Hospital [2021] eKLR wherein the Court found that an employee had been terminated without following fair procedure despite the employee having worked for 5 years and being of good standing and awarded the employee 3 months' salary compensation. Regarding damages for discrimination and loss of career opportunity, the Respondent submitted that the Claimant had not demonstrated any economic injury suffered so as to warrant the grant of the said prayer. That having demonstrated that there was no hindrance at the Claimant's career progression as the certificate of service would in any event indicate the position at par as the one, she was serving before redeployment. That as such, the case of Mokaya v Kithure Kindiki t/a Kithure Kindiki & Associates (supra) relied upon by the Claimant in support of this limb is inapplicable.

26. The Court has considered the pleadings, the testimony adduced, the evidence tendered and decisions cited in coming to the decision. The Claimant asserts that the Respondent discriminated against her during its restructuring process and in redeployment, and that it also subjected her to unfair labour practices. The Claimant was expectant at the time this was done hence the charge of unfair labour practices and discrimination. The Claimant was redeployed when she was on her maternity leave. It is uncontroverted that she she received a letter dated 29th March 2016 from the Respondent redeploying her to the position of Training Specialist within its Program Implementation (PI) Department effective 1st April 2016. Whereas an employer has every right to organise its business and the workspace, the timing of the redeployment and the relatively short period of the effective date of the redeployment was

rather suspect. The redeployment was to take place within 2 days of the letter. There was no evidence adduced that the redeployment was critical to the proper function or operations of the Respondent. If indeed it was it would not have been executed so hurriedly without any apparent cause and in the view of the Court this was an affront to fair labour practices. Any distinctions in employment or occupation based on pregnancy or maternity are discriminatory as these only affect women. The Respondent stood on tenuous grounds when it chose to make drastic changes to the Claimant's position during her maternity leave. This is a protection provided for in statute, *the Constitution* and ILO Maternity Protection Convention No. 183, 2000. In the case of Caroline Nyokabi Mwangi v Achellis Kenya Limited [2021] eKLR Rutto J. held as follows:

> 50. It is an undisputed fact that the claimant was pregnant at the time when she joined the respondent's employment. Being pregnant places a woman in a protected class hence the reason for the existence of constitutional and statutory safeguards against discrimination on account of pregnancy...

27. The Claimant was thus in a protected class while pregnant and the period thereafter while on maternity leave as a lactating mother. The Claimant asserts the Respondent deliberately neglected to discuss her work performance for 2016 with her even upon her resuming work after maternity leave. The Respondent did not controvert this. The Claimant also asserted that the redeployment was a breach of her constitutional right to fair labour practices as it firstly purported to convert her employment terms from permanent and pensionable to probationary yet her employment had been confirmed in 2006 and secondly because the redeployment meant she would be expected to travel out of Nairobi on assignments which would deny her the opportunity as a lactating mother to breast feed her child. In answer, the Respondent has little to offer. The Respondent's stance that the Claimant's grievance was not brought to the Respondent as per the directives as she opted to use her appointed lawyers to issue letters to the Respondent and the issue could not thus be dealt with internally. This does not fly. Once the Respondent became seized of information that there was an issue as articulated by the Claimant, the Respondent was bound to deal with the matter. It would be elevating the Respondent's internal mechanism procedures and rules to a fetish. They do not even have the status of legislation yet the Respondent behaved as if the failure to follow every little step denied the Claimant her rights under *the Constitution* and ILO Maternity Protection Convention No. 183, 2000. The Claimant was at best required to bring the matter to the attention of her employer. That she chose to use a lawyer does not detract from the fact that the Respondent was thereby made aware of the existence of the issue. As such, having decided to discriminate against the Claimant and then refuse to do anything about the matter when raised, the Respondent fell afoul the law. Having made her position at work untenable, the resignation by the Claimant fell into the classical mold of constructive dismissal. The Respondent subjected the Claimant and its other employees to unfair labour practices by requiring an employee redeployed to be on probation for 6 months. This is untenable in any work place as the employee who has worked for an enterprise for 6 years and who has accumulated rights in regard to removal from employment on account of redundancy for example, would be by the stroke of a pen be considered as a new employee since they are on probation and amenable to termination by the issuance of a 7 day notice or payment in lieu thereof. That practice is unlawful and must cease if it still applies. What the Respondent could do is undertake training before redeployment and thereby avoid placing itself in harms way when termination ensues as was the case here.

28. The Claimant has sought a raft of reliefs against the Respondent. The Claimant sought for damages for the unfair and unlawful termination of employment at 12 months' gross salary, damages for discrimination and loss of career opportunity, and damages for unfair labour practices. In addition, she sought interest on any sums awarded by the Court at court rates at 12% p.a. from date of filing this suit until payment in full as well as costs of the suit and interest thereon. The Claimant has

demonstrated the resignation she undertook was on account of the suffering the Respondent subjected her to while on maternity leave, compelling her to be placed on probation and worse still, abrogating her rights as a lactating mother contrary to Article 41 of *the Constitution* which provides that everyone has a right to fair labour practices. The decision to place her in a role that required movement out of Nairobi and inability for her to fulfil her maternal obligations was also unlawful and contrary to ILO Convention 183 - Maternity Protection Convention. She was subjected to the hard choice of keeping her employment with the disadvantageous changes unilaterally made by the employer and the option of quitting as she was the case herein. For these infarctions of the law, the Claimant would be entitled to the following reliefs:-

a. Compensation equivalent to 12 months gross salary for the constructive dismissal – Kshs. 2,626,768/-

b. Damages for the unfair labour practices and in particular for disregard to her situation which was maternity related leave post partum as well as the unilateral transfer in disregard of lactation requirements and the Respondent's policies – Kshs. 2,000,000/-

c. Costs of the suit.

d. Interest on (a) and (b) above at court rates from the date of judgment till payment in full.

e. A certificate of service strictly in compliance with section 51 of the *Employment Act*.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JANUARY 2024

NZIOKI WA MAKAU

JUDGE