



Njuguna v Sybrin Kenya (Employment and Labour Relations Cause E706 of 2020) [2024] KEELRC 287 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 287 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E706 OF 2020**

K OCHARO, J

FEBRUARY 16, 2024

BETWEEN

SOLOMON GICHUNG'WA NJUGUNA CLAIMANT

AND

SYBRIN KENYA RESPONDENT

JUDGMENT

1. The Claimant filed the Statement of Claim on 02.11.2020 through Nderu Ngaruni & Karanja Advocates. The Claimant prayed for judgment against the Respondent for:
 - a. A declaration that the Claimant was validly employed by the Respondent/employer during the suspension period and was entitled to full salary and benefits during this period.
 - b. That the continued suspension of the Claimant after the conclusion of the disciplinary process in favour of the Claimant is untenable and unlawful and amounts to unfair labour practices.
 - c. That the Claimant's suspension is lifted and his employment reinstated.
 - d. That if there is continued failure to settle the Claimant's outstanding dues, lift the suspension and reinstate the Claimant to employment. That the actions of the Respondent amount to constructive unfair and unlawful termination.
 - e. Outstanding basic salary and fuel allowance during suspension for 8 years and 8 months being 104 months (Kshs 250,000 × 104 months) = Kshs 26,000,000
 - f. Salary arrears 10 months (January to October 2020)= Kshs 2,500,000
 - g. Damages for constructive unlawful and unfair termination (Kshs 250,000 × 12 months) = Kshs 3,000,000



- h. One month in lieu of notice..... = Kshs 250,000
 - i. General damages
 - j. Interest on (e), (f), (g) and (h) at court rates from the day each payment fell due and payable until payment in full.
 - k. Certificate of service
 - l. Any other award the court deems fit.
 - m. Costs of this suit.
2. The Respondent's Response to Claim dated 21.12.2020 was filed through Coulson Harney LLP. The Respondent prayed that the Claimant's suit against it be dismissed with costs.
3. The Claimant's case was that he was employed by the Respondent on 03.11.2010 at a basic salary of Kshs 235,000 and a fuel allowance of Kshs 15,000.

The Claimant's Case

4. The Claimant stated that through a letter dated 30th May 2011, the Respondent suspended him from employment, following a criminal complaint against him by one of its customers. As a result of the complaint, he was arraigned in court and charged vide criminal case No. 713 of 2011. The criminal court eventually adjudged him not guilty and acquitted him on the 6th of December 2019.
5. The Claimant stated further that during the period 30.05.2011 to 06.12.2019, he was under an indefinite suspension with no remuneration from the Respondent, pending the determination of the disciplinary process. Further, after the acquittal, he informed the Respondent of the same and urged that the suspension be lifted. However, the Respondent refused to lift the suspension.
6. It was further stated that the Claim herein was filed eight months after the date of the acquittal and the Respondent's refusal to reinstate him to work. The Respondent's actions amounted to constructive dismissal, which was both unfair and unlawful.
7. The Claimant stated that he worked in the financial technology industry, otherwise known as Fintech for over 8 years where he started as a junior programmer and rose to a product manager. He first worked with Fintech Limited which was then a subsidiary of Loita group before he was headhunted by the Respondent company.
8. The Claimant further stated that he was working in a highly specialized and sensitive space which entailed processing cheques and payment systems and clearing cheques between banks through the Central Bank of Kenya. The suspension adversely affected his chances of getting employment in other entities within the Fintech space.
9. The Claimant maintains that at the time of joining the Respondent company, he had already worked in the Fintech industry within Kenya and the Africa region at large for over 8 years and was highly regarded and recognized due to his skill and diligence and had won several awards due to his distinguished accomplishments.
10. It was the Claimant's case that it is unfair for the Respondent to refuse to restore him to work and that the refusal of the Respondent to reinstate him and pay his outstanding emoluments places him in limbo as to whether he is still an employee of the Respondent company or not.



11. The Claimant contended that the Respondent's refusal to reinstate him violates his right to fair labour practices contrary to Article 41 of the Constitution and Section 12 of the Employment Act 2007.
12. Cross examined by Counsel for the Respondent, the Claimant testified that he was suspended as a result of the criminal case. The case was concluded after 9 years of the date of suspension. Further, the suspension was effected on the 30th of May 2011, an action that aggrieved him. He didn't file the claim herein within three years of the Respondent's decision to suspend him.
13. In the criminal case, he was charged with the offence of stealing. At the time of arraignment in court, he was a Software Engineer. As such an Engineer and in his position with the Respondent, he was serving Banks who were the Respondent's major clients.
14. The Claimant further testified that the suspension was improper as he was suspended immediately after a complaint was laid against him, without first allowing him to be heard. The complainant in the criminal case was Diamond Trust Bank and not the Respondent.
15. In the suspension letter it was expressed that the Respondent was to get in touch with the Claimant but the former never did so at any time.
16. The Claimant testified further that he never got into any other employment during the suspension period. Referring to an extract from his LinkedIn profile, he stated that it showed that he was with Radiant Digital Solutions. Further, he was featured in a business magazine.
17. The statement of his National Social Security Fund account for the period 01/08/ 2003 to 31st December 2019, shows Gold Avenue Africa Limited as his employer. Contributions were being made for me during the period of suspension.
18. The statement further shows that between 2014-2015 Kinde Engineering Works Limited was making contributions to his NSSF account.
19. The Claimant further stated that he was entitled to KShs. 15000 a month as travel allowance. The allowance was for purposes of work travels. During the suspension period, he was not involved in any work travels.
20. He tried to apply for jobs but he was not successful. All through he was told that he was blacklisted.
21. Testifying under re-examination, the Claimant stated that the statement that he recorded with the police when he was arrested was procured by threats, and when he first appeared in court, he raised the issue with the court.
22. In acquitting him and the other accused persons, the trial Court found that they were merely scapegoats.
23. According to him, he was to remain in suspension until the criminal case was determined. He reiterated that after the acquittal he notified the Respondent and sought reinstatement but the Respondent didn't reinstate him.
24. It was further stated that the Respondent was represented by an advocate throughout the proceedings in the criminal trial.
25. In the year 2011, the Respondent was making remittances for the Claimant's NSSF account. The remittances ceased in January 2012. Between 2013-2013 there were no remittances. Between 2014 and 2015 there were remittances made into his account, however, he was not aware of who was doing the same. In 2015 -2019, there weren't any remittances made. The NSSF statements produced by the



Respondent are doubtable as people who are indicated to have made payments into his account are people he doesn't know, for instance, Kinde Engineering Works.

26. The Claimant classified, Radiant Company as just a LinkedIn name. It is not the name of an existing company. He just conceived the same but never pursued its registration.
27. Gold Avenue Ltd was a company that was incorporated by his brother and wife. It was a start-up. They sought his help in marketing the same. He didn't get in as an employee. This company made contributions to his NSSF account in the year 2019 only. Thereafter, they couldn't as their business collapsed due to the COVID-19 pandemic.
28. The Claimant asserted that Fintech is a small industry. The happenings soiled his reputation. As a result, his ten years of hard work went to waste.
29. There were negotiations between him and the Respondent, through their respective Advocates. The negotiations collapsed as the Respondent only offered KShs. three million an amount which he considered insufficient in the circumstances of the matter.

The Respondent's Case

30. The Respondent presented one witness, Mr. Wilson Some to testify on its behalf. The witness urged the Court to adopt the contents of his witness as part of the evidence in chief and admit the documents filed by the Respondent as its documentary evidence.
31. It was stated that the Respondent employed the Claimant in the position of System Implementation and Support with effect from 01.12.2010 by the letter of offer signed on or about 05.11.2010. The Claimant's role in the position entailed installation and configuration of Sybrin Software modules at its clients' sites and thereafter providing support.
32. During the period of the Claimant's employment, around May 2011, the Respondent was made aware of allegations of impropriety, dishonesty and fraud levelled against him by one of its clients regarding an amount of about Kshs 6,200,000/=.
33. Criminal charges were subsequently preferred against the Claimant for stealing and he was arraigned in a criminal court under Criminal Case No. 713 of 2011 *Republic Vs. Solomon Gichungwa Njuguna*.
34. It was the Respondent's case that owing to the serious nature of the criminal allegations against the Claimant and while noting the sensitive nature of the Claimant's role and the Respondent's operations, it became imperative that the Claimant's presence on the Respondent's business premises be restricted during the criminal proceedings. For the said reason, the Respondent through its letter to the Claimant dated 30.05.2011 suspended him pending the determination of the criminal proceedings.
35. The Respondent stated that as the Claimant's suspension was for the period of the criminal proceedings, according to the suspension letter, the Respondent required the Claimant to keep in touch for the duration of the criminal proceedings, or otherwise relating to the status of his employment.
36. The contrary, the Claimant failed and/or refused to communicate with the Respondent leaving the Respondent uncertain about the Claimant's status of employment and the criminal proceedings.
37. In April 2015, during the suspension, and the pendency of the criminal proceedings, it came to the Respondent's attention that the Claimant had been engaged for employment with a firm known as Radiant Digital Solutions.



38. Later, it also came to the attention of the Respondent that the Claimant was later employed for gain at Gold Avenue Africa Limited as a Head of Portfolio known as Umeme City and that on 13.01.2020 the Claimant was featured in the Gold Avenue Africa Limited's magazine as their cover model.
39. It was the Respondent's case that on the strength of the aforesaid developments, the Claimant had deserted his employment and repudiated his contract of employment with the Respondent.
40. The Respondent denied that the suspension caused the Claimant to be blacklisted or that the Claimant could not secure any form of employment elsewhere in Kenya or that his niche was so unique that it could not be utilized elsewhere other than working with the Respondent.
41. The Respondent later learnt that the Claimant was acquitted of the charges in the criminal proceedings, on or about 06.12.2019. Consequent to the acquittal, the Claimant demanded that his suspension be lifted, his employment benefits be restored and that the Respondent make immediate payment of salaries and benefits up to the date of the final determination of the criminal proceedings.
42. The Respondent asserted that upon receipt of the Claimant's demand letter, in a bid to resolve the dispute, it engaged the Claimant's advocates on a "without prejudice" basis but the attempts to resolve the matter were ultimately unsuccessful.
43. The Respondent's case is that any attempts to bring a claim by the Claimant ought to have been done three years after the Claimant repudiated his employment contract sometime in April 2015 when he was employed by Radiant Digital Solutions.
44. The Respondent maintains that having been employed with other employers all along, the Claimant is seeking to unjustly enrich himself by bringing this claim. Additionally, the Claimant is seeking an order for reinstatement that can only be granted in very exceptional circumstances. The Claimant having been shown to have been employed elsewhere, cannot be the vailed order.
45. The Respondent contended that the Claimant on his own volition deserted his employment and repudiated his employment contract, accordingly, there is no legal or factual basis for issuance of the declarations or awards sought by the Claimant.
46. Cross-examined by Counsel for the Claimant, the witness stated that his only bone of contention with the Claimant's claim was that it had been initiated after a very long time. The Respondent received a letter from the Claimant for reinstatement after his acquittal. However, the Respondent didn't reinstate him as it could only rightfully do so within three years of the suspension date.
47. The witness testified further that the Respondent has never terminated the Claimant's employment. It has not at any time issued him with a termination letter. Further, the Respondent was waiting for the outcome of the criminal case to see where they could place him in case of an acquittal so that he could continue serving its clients.
48. All through, the Respondent kept on checking with Diamond Trust Bank for information on the position of the proceedings in the criminal matter. The witness could however not tell whether or not the Respondent was represented through the proceedings as alleged by the Claimant.
49. The witness alleged further that the Claimant deserted duty. The NSSF statement shows that he was working for other companies during the period of suspension.
50. When the Court sought clarification, the witness stated that according to the suspension letter, any further action by the Respondent was to depend on the outcome of the Criminal case. The suspension was to remain effective pending the conclusion of the criminal case. The witness further asserted that



if the Claimant can prove that he was not employed elsewhere, then he still is an employee of the Respondent.

Claimant's Submissions

51. The Claimant's Counsel identifies four issues as those that emerge for determination in this matter, thus; whether the suit is time barred.; whether the Claimant is still an employee of the Respondent and thus the Respondent is bound to lift the suspension and reinstate the Claimant back to the position he held before the disciplinary proceedings; whether the Claimant is entitled to be paid all his dues for the period of suspension and up to date; and whether the Respondent's failure to lift the suspension after the conclusion of the Claimant's criminal case would amount to an illegal, continuous and indefinite suspension and consequently would amount to unlawful and unfair constructive termination.
52. Counsel submitted that the Respondent's assertion that the Claimant's claim herein is time-barred doesn't have any legal foundation. Citing the case of *David Wekesa Nambafu v Bob Morgan Services Ltd* [2020] eKLR, Counsel submitted that the cause of action in this matter arose when the criminal matter was concluded and the Respondent failed to lift the suspension and have the Claimant back to his employment.
53. On the 2nd issue, Counsel submitted that in the suspension letter dated 30th May 2011, the respondent was categorical that the Claimant was to be under suspension pending the determination of the criminal case. As such, after the Claimant's acquittal, the Respondent didn't have any legal or justifiable reason to continue having him under suspension. It ought to have recalled him to work. The failure to recall the Claimant amounted to unfair practice, prohibited under Article 41 of *Constitution* of Kenya, 2010. To buttress these submissions, Counsel placed reliance on the decision of *David Wekesa Nambafu v Bob Morgan Services* [*supra*].
54. It was submitted further that the Respondent has not demonstrated any sufficient reason why the Claimant cannot be reinstated. The Respondent's witness admitted during the hearing that the Claimant is their employee and that the Respondent has never terminated the Claimant's employment. The continued suspension amounts to a disciplinary sanction yet the Claimant has not been taken through any disciplinary hearing. In the peculiar circumstances, as are in the instant matter, this Court has jurisdiction to issue an order for reinstatement. To buttress this point, reliance was placed on the case of *Alfred Nyungu Kimungui vs- Bomas of Kenya* [2013] eKLR.
55. The Claimant having been suspended without pay pending the conclusion of the criminal matter, had a legitimate expectation that once the matter was concluded and, in his favour, he would be paid all his dues that weren't paid during the suspension period. To support this point reliance was placed on the decision in *Paul Ngeno v Pyrethrum Board of Kenya Ltd* [2013] eKLR. The Respondent should be directed to pay the same.
56. Counsel further submitted that the NSSF statement tendered in evidence by the Respondent cannot be sufficient evidence to demonstrate that the Claimant got into another gainful employment. In any event, the statements are unverifiable.
57. Counsel submits that in case the Respondent refuses to reinstate the Claimant, this Court should find that it amounts to unfair constructive dismissal and award compensation thereof to an extent of 12 months gross salary and one month's salary in lieu notice.

The Respondent's Submissions

58. Counsel for the Respondent distils five issues for determination thus;



- i. Whether the suit is statute-barred by reason of Section 90 of the *Employment Act*, 2007.
 - ii. Whether the Claimant, by conduct, rescinded his employment contract with the Respondent by taking on subsequent employment during the suspension period.
 - iii. Whether the suspension amounted to constructive dismissal.
 - iv. Whether the Claimant is entitled to the reliefs sought.
59. It was submitted that Section 90 of the *Employment Act* provides that no civil action or proceedings based on or out of the said Act or a contract of service, in general, shall be instituted unless it is commenced within 3 years after the cause of action arose. As to what amounts to a cause of action this Court was urged to consider the elaboration in Civil Appeal No. 21 of 2015- *Attorney General & another vs Andrew Maina Githinji & another* [2016] eKLR.
60. It was further submitted that the cause of action in this matter arose on the 30th of May 2011 when the Claimant got suspended. In his evidence under cross-examination, the Claimant testified that the decision to suspend him aggrieved him. Despite being aggrieved, he didn't commence any suit against the Respondent within the 3-year limitation period. As a result, the claim became time-barred. Reliance was placed on the decision of *Evans Mutungi Musyoka v County Government of Makueni* [2019] eKLR.
61. Counsel submitted that the circumstances in the case of David Wekesa Nambafu [Supra], are distinguishable from those in the instant case. In the cited case, the Claimant therein remained in employment over the suspension period and the Claimant therein was therefore rightfully deemed to have continued to be in employment throughout the suspension period. In the instant suit, there is irrefutable evidence to show that the Claimant herein rescinded his employment contract effectively ending the employment relationship between him and the Respondent during the criminal proceedings. The suspension was automatically lifted.
62. The Respondent's Counsel submitted that upon suspension, the Claimant continued to be an employee of the Respondent until circumstances arose where the employment could no longer be deemed to exist. Such circumstances include the Claimant's engagement in employment with another employer as evidenced in his NSSF andNHIF records.
63. It was submitted that the Respondent's decision to suspend the Claimant was based on a criminal complaint by one of its Clients. The Claimant was suspected to have engaged in theft. Considering the sensitive space within which the Respondent was operating it had a valid reason to suspend the Claimant. In support of this point, the Canadian case of *Cabiakman v. Industrial Alliance Life Assurance Company* [2004] was cited.
64. As to whether the suspension amounted to constructive dismissal, Counsel for the Respondent submitted, that the Respondent's action of suspending the Claimant was not in breach of the employment contract as the same was founded on valid reasons and was effected vide a lawful procedure. The David Wekesa Nambafu case was cited in support of these submissions. Further, in any event, the Claimant didn't issue any resignation letter.
65. The Claimant's case herein does not meet the threshold for constructive dismissal set out elaborately in the case of *Richard Nyaundi Marasi v. Board of Management, Giturai Mixed Secondary School* [2017] eKLR.
66. It was argued that the remedy of reinstatement is a remedy that applies only in unfair dismissals governed by section 49[3] of the *Employment Act*. It can only be issued upon a finding of unfair



dismissal. The instant suit not being an unfair dismissal case, the remedy cannot be availed to the Claimant.

67. In any event, considering the time that has elapsed between the time he was suspended and now, a period of 10 years, it will be impracticable for the Respondent to reinstate him. Further, the Respondent lost confidence in the Claimant in light of the accusations that were laid against him.
68. The Respondent's Counsel further submitted that the relief sought for the salaries for the duration of the suspension to date can not be availed to the Claimant for the reasons that; the claim is time barred; the Claimant was bound to mitigate his losses; and an order for payment of the Claimant's salaries and benefits for the suspension period would be tantamount to unjust enrichment as the Claimant was engaged in the employment of other entities during the period of his suspension.

Analysis and Determination

69. I have carefully considered the pleadings by the parties, their evidence both oral and documentary, and their respective submissions, and the following issues emerge for determination;
 - i. Whether the Claimant's claim herein is time-barred.
 - ii. What was the effect of the Claimant's suspension on his employment, and contractual and statutory benefits?
 - iii. Whether the Claimant is entitled to the salary and benefits that he didn't earn during the suspension period.
 - iv. Whether the Claimant has been constructively dismissed.
 - v. If the answer to [iv] above is in the affirmative, whether the Claimant is entitled to the reliefs he has sought on account of constructive dismissal.

Whether the Claimant's claim herein is time-barred.

70. The Respondent asserted that the Claimant's claim herein is time-barred by dint of the provisions of Section 90 of the *Employment Act*, 2007. The Section provides;

“Notwithstanding the provisions of section 4 [1] of the *Limitation of Actions Act* [Cap 22], no civil action or proceedings based or arising out of this Act or a contract of service, in general, shall lie or be instituted unless it is commenced within three years next after the act, neglect, or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

71. The Respondent contends that the cause of action in respect of the claim before this suit accrued on the 30th May 2011, when the Claimant was suspended. The Claimant held a contrary opinion. He argued that the cause of action arose after his acquittal, the time when the Respondent failed without reason to lift the suspension notwithstanding the acquittal and the fact that the suspension was pending determination of the criminal matter.
72. The stated controversy can be easily and justly resolved by first appreciating what a cause of action entails. In my view, a cause of action is a bundle of circumstances that constitute grounds for initiating a civil action for redress in a court of law. In other words, it's a series of circumstances that gives the plaintiff the right to sue the defendant under the law that applies to them.



73. A cause of action in a matter can only be discerned or rather understood by careful consideration of the facts as brought out in a Claimant's pleadings and evidence [where it has been taken] in their totality, and not in a selective manner. The facts must be considered in the context of the reliefs sought.
74. I have carefully considered the Claimant's pleadings, the facts upon which they are anchored and the evidence he adduced during the hearing, and I am of the view that the Claimant is not challenging the validity or fairness of the suspension, therefore the act that took place on the 30th of May 2011 as alleged by the Respondent, but the lawfulness, justifiability and reasonableness of the Respondent's failure to lift the suspension that was expressly pending the conclusion of a criminal matter. This Court hasn't lost sight of the Respondent's witness's evidence that indeed the suspension was to be pending the determination of the matter and that the Respondent has not terminated the Claimant's employment.
75. Considering the facts from which the reliefs sought by the Claimant derive, including the fact that; the Respondent expressly through its letter placed the Claimant under an administrative suspension; during the pendency of the criminal trial, the Respondent didn't terminate the Claimant's employment in any of those manners known in law or at all; and the Claimant had a legitimate expectation that the suspension could be lifted upon his acquittal in the criminal case; the legitimate expectation was breached by the Respondent after the acquittal, compulsively drive this Court to conclude that the cause of action in this matter accrued not on the 30th May 2011, but on or about the 6th December 2019, when the Claimant was acquitted of the criminal matter and the Respondent refused to lift the suspension and pay him his dues.
76. In the upshot, I am not persuaded that the Claimant's claim is time-barred. And having found it as such, I now turn to the second issue.

What was the effect of the suspension of the Claimant from employment and his contractual and statutory benefits?

77. There is no dispute that the Claimant was suspended pending the conclusion of the criminal matter that had been initiated against him.
78. There is no doubt in my mind that suspension as an area in the employment and labour relations realm, has not been elaborately or at all statutorily provided for in Kenya. However, that is not to say that this Court is not cognizant that the employer has the right for good cause to place an employee on an investigatory suspension in proper contexts, and there is a line of judicial decisions so suggesting. At this point, it must be stated that the decision to suspend heavily depends on the alleged misconduct, and an employee should not be suspended unless there is prima facie ground for believing that the employee has committed serious misconduct and that there is some objectively justifiable reason for excluding the employer from the workplace. The rationale here is that suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, career advancement, self-worth, and sense of identity. Where suspension is without a valid and fair reason, condemnation for unfair labour practice shall rightfully abound against the employer, or may result in constructive dismissal entitling the employee to damages.
79. Having stated as I have hereinabove, I now turn to consider the import of suspension of an employee from employment pending inquiry or criminal prosecution, on her or his contract of employment, and his contractual or statutory benefits.
80. In my view, the word "suspension" in the world of work means a temporary privation or deprivation, cessation or stoppage of or from the privileges and duties of a person. The word carries or conveys a temporary or transient period that keeps away the employee affected from his or her regular occupation



or calling. It can be either disciplinary or administrative. A suspension is neither a termination nor a dismissal of an employee from employment, therefore. Temporality is the key character of the aspect of suspension.

81. The classification of suspension as either disciplinary or administrative is elucidated in the case of *Donald C. Avude vs Kenya Forest Service* [2015] eKLR where the Court held that:

“The claimant argues that suspension being a process not provided for by law, must be considered in line with the criteria set in the decision of the Supreme Court of Canada in the case of *Cabiakman V Industrial Alliance Life Insurance Co.* [2004] 3 S.C.R. 195, 2004 SCC 55. The court in this case distinguished between “disciplinary” suspension and “administrative” suspension. For the purposes of the case, disciplinary suspension was defined as “a punitive measure for a reproachable act made during work” while administrative suspension is “a preventive measure which can be taken when the interest of the employer’s business requires it, even in the absence of an act made by the employee while working.”

In the Cabiakman case, the court set the criteria for administrative suspension as follows; sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or to his reputation; the existence of immediate, important inconveniences that cannot be practically countered by alternate measures (for example: assigning the employee to another post); and, the necessity of protecting the public...My understanding of suspension of an employee is that it is intended to enable an employer to carry out investigations where the presence of the employee may jeopardize the investigations, or where an employee has been convicted and is awaiting sentence as provided for in the Public Service Code of Regulations, or where the employee has or is suspected of having committed a criminal offence to the substantial detriment of the employer as provided in Section 44(4)(g) of the *Employment Act*. In all these cases suspension should be for a determinate period where such suspension is without pay. Otherwise, it would constitute inhuman treatment, especially in the case of the respondent’s Manual where the employee is required to be at the place of work without a salary and for an indeterminate period.”

82. The Supreme Court of Nigeria in the case of *Longe v. First Bank of Nigeria PLC* [2010] 6NWLR held that;

“Suspension by its legal colouration in statutory flavoured employment [and by implication, master-servant] is not a demotion and does not entail a diminution of rank, office, or position. It cannot import a diminution of the rights of the employee given to him under the law. An employer suspending his employee from work only means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office. Hence, it is trite that the contemplation of the law is that suspension would not extinguish the employee status as an employee nor jettison the employment contract.”

83. In the Nigerian case of *Duru v. Skye Bank Plc* [2015] NLLR neatly elaborated it, thus;

“During the period of suspension of an employee, the employment is neither terminated nor dismissed. Rather, it is merely put on hold to enable the employer to properly carry out its investigations on its allegations against the employee. For the period of the employee’s



indefinite suspension without pay, he is still in the employment of the employer and so is entitled to his salaries and allowances.

84. In my view, the Respondent couched the suspension letter in a tone explicitly suggesting that it understood the hereinabove-enunciated position of law, suspension neither equates to termination of employment nor dismissal of an employee from employment. In my view, the suspension was definite. It was subject to the occurrence of an event, the event being the conclusion of the criminal matter.
85. Further, the evidence of the Respondent's witness was aligned with the legal position hereinabove brought out and the contemplation of the Respondent as obtained on the suspension letter. He testified that the Claimant is still an employee of the Respondent if he proves that he didn't or hasn't gotten into employment with another employer.
86. The Respondent asserted and, in my view, wrongfully so, that the Claimant terminated his employment when he committed a repudiatory act. The Claimant engaged in the employment of other parties. To buttress this assertion, it relied on the statements of account purportedly on the Claimant's NSSF and NHIF accounts. On his part, the Claimant denied the authenticity of the statements and that he got into an employment relationship with other companies.
87. The Respondent was the party asserting, that the onus was on it therefore to prove that during the period of suspension and pendency of the criminal trial, the Claimant got gainful employment elsewhere. On the burden of proof, Sections 107 and 109 of the Evidence Act Cap 80 of the Laws of Kenya provides that: -

“ 107. The burden of proof.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

88. I have carefully considered the evidence by the Respondent on the alleged employment of the Claimant by other parties and hold that the same was insufficient to establish that fact. There was no clear evidence of how the statements were obtained. The statements were electronic evidence that was not accompanied by a certificate of electronic evidence under the provisions of section 106 B of the Evidence Act, Cap.80 Laws of Kenya. Lastly, the statements are confusing and not clear. Their contents are incapable of belief. For instance, from May 2019 to January 2020, the NHIF statement suggests that there were two employers, Golden Avenue Africa Limited and St. Ann's Kirwanda Academy, making contributions as the Claimant's employers.
89. The NSSF, statement of account is for the period,01.08. 2003 until 31.12.2019. It shows the Employer as Gold Avenue Africa Limited. There is no doubt that the Claimant was an employee of the Respondent between 1st December 2010 to November 2011, yet this detail isn't reflected anywhere in the statement that the Respondent is putting reliance on to prove the Claimant's employment history



for the material time. In my view, the statement is not an accurate document, therefore. It cannot prove the fact that it was intended to prove.

90. It is trite law that where a party is in a repudiatory breach of the contract of employment, the contract subsists until the innocent party accepts repudiation and puts an end thereto. Upon the occurrence of a repudiatory breach of the contract, the innocent party is entitled to elect to either accept the repudiation and terminate the contract or, in the alternative, affirm the contract and allow it to subsist. See *Societe Generale, London Branch v. Geys* [2012]UK SC 63.
91. The Respondent just asserted that the Claimant rescinded the contract of employment by getting employment elsewhere, however, it didn't prove that it accepted the repudiation thereby bringing the employment relationship to an end. In my view, assuming there was a repudiation, which I think there wasn't, the Respondent didn't at any time elect to terminate the contract.
92. In the upshot, I conclude that the Claimant's employment didn't come to an end either in the course of the suspension period or at any time after the conclusion of the criminal case in his favour, it only did when the Respondent constructively dismissed him.
93. The finding hereinabove is inspired by the holding in the case of *Bamisile v National Judicial Counsel & Ors.* [2013] ALL FWLR [Pet. 678] 911, where the Supreme Court of Nigeria held;

“Since the suspension is not a termination of employment contract nor a dismissal of the employee, the implication is that the employee is still in continuous employment of the employer until he is recalled or formally terminated or dismissed. Pending his recall or dismissal, a suspended employee is entitled to his wages or salary during the period of suspension unless the terms of the contract of employment or the letter of the suspension itself are specific that the suspended employer will not be paid a salary during the period of suspension.”

94. Having stated this, the next question which crops up is whether the Claimant's suspension did set in with a diminution of his entitlements to statutory and contractual benefits, to be specific the salary and allowances.
95. The tragedy of this matter is that the Respondent didn't place before this Court any policy or procedure manual from where it can be discerned how the suspension process is handled within the organization. Further, the suspension letter was silent as regards the Claimant's salary and other benefits during the suspension period. My conclusion is, therefore, that there was no justification on the Respondent's part for the failure to pay the Claimant his salary and other benefits during the period of suspension or on his acquittal in the criminal matter. See *David Nambafu v Bob Morgan Services Ltd* [2020] eKLR.
96. Additionally, in the case of *Chief Justice and President of the Supreme Court of Kenya & Judicial Service Commission vs Bryan Mandila Khaemba* Civil Application No. 299 of 2019 [Ur. 267/2019] The Supreme Court of Kenya Stated;

“The Court further follows the holding by Rika J in *Peterson Ndung'u & 5 Others –Versus- Kenya Power and Lighting* that the withholding of an employee's pay during the period of suspension has no basis and validity under the *Employment Act*, 2007. That principle applies as the minimum term and condition of service under the *Employment Act*, 2007. Needless to state, it is a principle within the purview of Article 41 of *Constitution* on fair labour practices. Further, the Court considers that the minimum terms and conditions of service under the *Employment Act*, 2007 constitute such rights that are incorporated in the Bill of



Rights when Constitution provides in Article 19 (3) (b) that the rights and fundamental freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Chapter 4 of Constitution on the Bill of Rights.

Thus, the Court returns that it is unconstitutional for an employer by policy or regulation to impose suspension with nil pay as an administrative or executive interlocutory disciplinary measure pending the finalisation of the disciplinary process. The Court considers that it amounts to unfair labour practices in contravention of Article 41 of Constitution for an employer to impose suspension, more so an indefinite suspension, with nil pay. Thus, the Court has held before that where an employer withholds salary during interdiction, then the employee would be entitled to recover at the end of disciplinary process and there cannot be a notion of suspension with nil pay. The court follows the holding in *Grace Gacheru Muriithi –Versus- Kenya Literature Bureau* (2012) eKLR, in which the court stated thus, “The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proven to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process, the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process, the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of Constitution; it is unconstitutional...”.

97. In the High Court of Allahabad, India case of Naresh Chandra Gupta vs. U.P State Road 2003[3] AWC 1931, the court stated and I am persuaded:

“34. Reference may be made to the decision of the Apex Court in *R.P. Kapur’s case* [supra] relied upon by the learned counsel for the petitioner. In *R.P. Kapur’s case* [supra], their Lordships of the Supreme Court laid down as follows [paragraph 11 of the said AIR]:

“11. The general principle, therefore, is that an employer can suspend an employee pending an inquiry into his conduct and the only question that can arise on such suspension will relate to the payment during the period of suspension. If there is no express term in the contract relating to the suspension and payment during such suspension or if there is no statutory provision in any law or rule, the employee is entitled to his full remuneration for the period of his suspension; and on the other hand, if there is a term in this respect



in the contract or there is a provision in the statute or the rules framed under providing for the scale of payment during the suspension, the payment would be in accordance therewith. These general principles in our opinion apply with equal force where the Government is the employer and the public servant is the employee...But what amount should be paid to the public servant during such suspension will depend upon the provisions of the statute or rule in that connection. If there is such a provision the payment during the suspension will be in accordance therewith. But if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension. This suspension must be distinguished from suspension as a punishment which is a different matter altogether.”

98. In sum, I conclude that up until the date of filing this suit, the Claimant was an employee, entitled to his full benefits under his contract of employment with the Respondent, the Respondent didn't have any legal justification, withholding his salary and benefits during the period.

Whether the Claimant is entitled to the reliefs sought.

99. The Claimant sought inter alia for outstanding salary and Fuel allowance for the period during the suspension period, 8 years and Eight months, having found as I have hereinabove that the Respondent didn't have any legal justification to withhold his salary, I am convinced that he should be granted the sums sought, KShs. 26,000, 000.
100. The implication of my finding hereinabove is that the Claimant remained an employee of the Respondent even up to the date of filing this suit on the 2nd November 2020, when he sought that this Court find that by the conduct of not reinstating him to work after the acquittal, it constructively dismissed him. He is therefore entitled to the salary for January 2020 to 30th October 2020.
101. The Claimant has sought that this Court directs that the suspension be lifted with an allied consequence, his reinstatement. I am not inclined to grant this relief for two reasons. First, I have considered the time that has elapsed since the time the Claimant was suspended from the place of work and now, a period of more than 10 years, and hold that it shall be impracticable for the Respondent to have him back. Secondly, as shall come out hereinafter shortly, the Claimant was constructively dismissed.
102. A certificate of service is an employee's statutory entitlement. The Claimant is entitled to it. The Respondent should avail the same to him within 30 days of this judgment.

Whether the Claimant was constructively dismissed.

103. The test for constructive dismissal has two boughs. The Court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently grave to constitute constructive dismissal. However, an employer's c which a Claimant needs to surmount to conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. This approach is necessarily retrospective as it requires



consideration of the cumulative effect of the past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.

104. In the case of *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR this Court elaborated the tests, thus: -

“76. From the onset, it should be pointed out that the Claimant’s claim is one for constructive dismissal. It is trite law that where an employer’s conduct evinces an intention no longer to be bound by the contract of employment, a path gets available to the employee to either accept the conduct or changes made by the employer or treat the conduct or changes as a repudiation of the contract by the employer and sue for wrongful dismissal. In the instant matter, it is clear that the Claimant settled for the latter choice.

77. Having said this, it is further imperative to state that at the centre of a claim for constructive dismissal is ever the conduct of an employer, not the employees’. The term “constructive” indicates that the dismissal is a legal construct. The employer’s act is treated as a dismissal because of the way it is characterised by law- *potter v. N.B Legal Aid* [2015] 1 S.C.R...

In determining whether the conduct of an employer evinced an intention no longer to be bound by the contract, there are two branches of test that are evident across jurisdictions. Court must first identify an express or implied term that has been breached, and then determine whether the breach was sufficiently serious to constitute constructive dismissal. Typically, the breach in question involves changes to the employee’s compensation, work assignments or place of work that are both unilateral and substantial. See the *Porter case* [Supra.]

79. In order for a claim for constructive dismissal to succeed where the Court applies this test, it must be concluded that the employer’s conduct or unilateral change, constitutes a breach of the contract of employment, and second if it constitutes such a breach, it must be found to substantially alter an essential term of the contract. This is the test that the Court of Appeal called the contractual test, Coca in *Cola East & Central Africa Limited v. Maria Ligaga* [2015] eKLR.

80. On the other hand, the Court can declare being of constructive dismissal where the conduct of the employer more generally shows that the employer intended not to be bound by the contract, it need not identify a specific term that was breached, it shall be enough to find that the employer’s treatment of the employee made continued employment intolerable. This approach is in character retrospective. It takes stock of the cumulative effect of the past acts by the employer and considers whether those acts evinced an intention to no longer be bound by the contract. In terms of the Court of Appeal decision [supra], this is the unreasonable test.”

105. In the instant case, the Respondent represented to the Claimant through the suspension letter that the suspension was to be effective pending the conclusion of the criminal case. Through its representation, it aroused a legitimate expectation in the Claimant that upon acquittal the suspension was to stand lifted for his resumption of duty. By its conduct of not recalling the Claimant to work even after he



notified it of the acquittal and demanded the lifting of the suspension, the Respondent evinced an intention no longer to be bound by the contract. It constructively dismissed the Claimant.

106. One of the fundamental contractual obligations of the employer in an employment relationship is to supply work to the employee. By failing to allow the Claimant to resume work after the acquittal, implicitly the Respondent signalled that it could no longer supply work for the Claimant. In my view, this was a repudiatory breach, the basis for which this Court hereby finds that there was constructive dismissal.
107. By refusing to allow resumption of the Claimant to work had a twin implication, thus; the Respondent had decided to continue having the Claimant under suspension, and therefore an indefinite suspension without pay. An indefinite suspension has been found across jurisdictions to amount to a fundamental breach of a contractual term, repudiatory in nature, and therefore a ground for the finding that there was constructive dismissal. By filing this suit, the Claimant had accepted the repudiation.
108. The Respondent's Counsel submitted that the Claimant's claim for constructive dismissal is not well anchored as he didn't issue any resignation letter. Time and again, this court has held that where the employee is forced to exit employment due to the conduct of the employer, which has made the continuance of the employment relationship impossible, the exit need not be preceded by a notice. The actions of the employer, others which might be too deplorable, or maybe dangerously heightened if the employer were to be issued with a notice, drive the employee to leave.
109. The Labour Appeal Court of South Africa, held in *Amalgamated Beverage Industries (Pty) Ltd vs Jonker* (1993) 14 ILJ1232 (LAC)1248H. and I agree, that a formal resignation is not necessary for a case of constructive dismissal to succeed.

Whether the Claimant is entitled to those reliefs he has sought on account of constructive dismissal.

110. Constructive dismissal is an unfair dismissal. Having found that the Claimant has proved that he was constructively dismissed, I now turn to consider whether he is entitled to any relief on account of the dismissal. Section 49[1] of the *Employment Act*, 2007 bestows on the Court the authority to grant a compensatory award for unfair dismissal. The award and the extent thereof depend on the circumstances of each case. The exercise of the authority is discretionary. In this matter, I have considered how the Claimant was recruited into the employment of the Respondent, his area of training, the space [Fintech] industry in which was working, the chances of him not getting a job within the industry following its sensitivity, and how he shall be held to have left the employment of the Respondent, the Respondent's conduct which could easily pass for unfair labour practice, and the length of time the Claimant was in the employment of the Respondent and come to the conclusion that he is entitled to the compensatory remedy and the extent of eight months' gross salary, KShs. 2,000,000.
111. In the upshot, judgment is hereby entered in favour of the Claimant for;
 - i. A declaration that the Claimant remained as an employee of the Respondent throughout the period he was under suspension, and up to the date of filing this suit.
 - ii. Salary arrears for 8 years and six months [104 months] KShs. 26,000,000.
 - iii. Salary arrears for the period 1st January 2020 to 30th October 2020, KShs. 2,500,000.
 - iv. Compensation for constructive dismissal under the provisions of section 49[1][c] of the *Employment Act*, KShs. 2,000,000.



- v. The Respondent is to issue a certificate of service to the Claimant within 30 days of this judgment.
- vi. Interest on the sums awarded at court rates from the date of this judgment till full payment.
- vii. Costs of this suit.

READ, DELIVERED AND SIGNED THIS 16TH DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the Presence of;

Mr. Kimeru for the Claimant

Ms. Wayare for the Respondent.

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

.....

OCHARO KEBIRA

JUDGE

