Safetrac Limited v Omondi (Appeal E101 of 2021)
[2024] KEELRC 768 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 768 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E101 OF 2021

K OCHARO, J

MARCH 8, 2024

BETWEEN

SAFETRAC LIMITED ..... APPELLANT

AND

GODFREY OCHIENG OMONDI ..... RESPONDENT

(Being an appeal against the whole of the Judgment and orders of the Hon. A.M. Obura (Mrs.) (CM) delivered on 24th August 2021 at Nairobi in CMEL Cause No. 538 of 2018)

JUDGMENT

Introduction

1. The appeal herein which has been commenced vide a Memorandum of Appeal dated 16th September 2021 challenges the Judgment and Decree of the Honorable Chief Magistrate in the above-mentioned cause, putting forth the principal grounds that she erred in law and fact;

   (a) In dismissing the Appellant's claim against the weight of the evidence presented and the applicable law;

   [b]. In allowing the Respondent's counter-claim in its entirety on the assumption that there was no defence to the counter-claim;

   [c]. In disregarding the evidence, submission and judicial authorities cited;

   [d]. In finding that the Respondent had proved constructive dismissal yet she had earlier in the same judgment made a finding that the Respondent had not proved constructive dismissal;

   [e]. In finding that the Respondent ought not to have issued notice as required under Section 35 of the *Employment Act*, 2007;

   [f]. In finding that the Respondent was not responsible for the loss of 21 tracking devices;

[g]. In finding that the Appellant's request for accountability for the missing devices from the Respondent amounted to constructive dismissal.

2. On the above grounds, the Appellant prayed for orders that: -

   a. This Appeal be allowed with costs and that the Judgment of the Learned Magistrate dated 24th August 2021 alongside all its consequential orders to be set aside;

   b. That the Appellants Claim in Chief Magistrates Court of Kenya at Nairobi CMEL Cause No. 538 of 2018 be allowed.

   c. Costs of this Appeal.

3. The Appellant filed a Record of Appeal dated 30th September 2021; and a Supplementary Record of Appeal dated 8th July 2022.

4. When the matter came up for directions on the appeal on 12th July 2022, this Court ordered that the appeal be canvassed by way of written submissions. The Appellant filed Submissions dated 19th February 2023; while the Respondent filed Submissions dated 9th May 2023.

The case before the Trial Court

5. The suit before the Trial Court was commenced by a Statement of Claim dated 9th November 2018 which was amended on 12th April 2019. It was the Appellant's case that on or about the 1st of August 2017, it employed the Respondent in the position of Operations Manager. Formal terms and conditions of the employment relationship were embodied in an Agreement dated 1st August 2017, *inter alia*, his contractual remuneration per month was set at an all-inclusive amount of Kshs. 55,000.

6. His job description dated 6th February 2017, put forth his main responsibility as supervising and overseeing the day-to-day running of operations of the Appellant's stations. Further, the contract of employment referred to hereinabove bound the Respondent to, diligently perform his duties as set out in the job description under the guidance of the Appellant and in accord with its vision and mission; and comply with the code of conduct.

7. The Appellant herein contended that on or about May 2018, its General Manager discovered that the organization was missing 21 tracking devices that were under the custody and care of the Respondent. Upon seeking an explanation from the Respondent, the Respondent resigned from employment via email on 21st May 2018, thereby unilaterally ending the employment relationship between the parties.

8. It was the Appellant's position that the Respondent breached the Contract of Employment by negligently handling the 21 tracking devices that were under his care and custody leading to their loss; and unilaterally resigning without issuing one month's notice or paying one month's salary *in lieu* of notice. As a result of the Respondent's conduct, the Appellant suffered losses of USD 6300. Consequently, it sought as against this sum, notice pay and interest.

9. The Respondent herein resisted the Appellant's claim by way of a Statement of Defence dated 11th March 2019, which was amended on 2nd July 2019. The Statement of Defence incorporated a Counterclaim, wherein he sought; a declaration that the Appellant frustrated him into resigning; a declaration that the acts of the Appellant that frustrated him into resigning amounted to wrongful and or unfair termination and or constructive termination; terminal benefits of KShs. 784,667.00; interest and costs.

10. It was his case that he was first by the Appellant in the year 2016 as the Supervisor of the control room, and was promoted to Operations Manager in 2017. In this position, he worked with a team that included tag operators, the head of the control room, workers in the control room, storekeepers, an assistant etc.

11. The Appellant's core business was the monitoring of its clients' on-transit cargo and ensuring that the same reached its destination safely. The Appellant did this using seals/devices/tags that were placed on the cargo to enable the Appellant to track the cargo. It was stated that the Appellant had offices in Kampala, Malaba, Kisumu, Mombasa and Nairobi. The supervisors of these stations reported to the Respondent.

12. It was contended by the Respondent that in April 2018 he walked into the control room and saw a seal blinking in water meaning that it had not been untagged from the cargo before the same was released for transportation on water. This meant that the seal was still on the cargo notwithstanding that the Appellant's mandate to track the cargo had terminated once the cargo reached the port.

13. Ordinarily, once cargo for export reached the port, the control room would send an email to the supervisor of the nearest station who would then send employees to get to the port and untag the seals before the cargo leaves the port. In situations where the instructed employees didn't act swiftly, the goods could leave the port with the tags on.

14. The Respondent emphasized that he never handled the seals personally. His job was majorly oversight, of the many operations of the Company which ran simultaneously.

15. He stated that as a result of the discovery of the blinking tag, it dawned on him that there could have been many other tags that might have been left untagged from cargo for export. This prompted him to carry out an investigation. The investigation revealed that 21 seals were missing. They were untagged when the cargo reached the destination/port Further, seals were available in the Appellant's system but not physically. He prepared a report to that effect and forwarded it to the Appellant's General Manager.

16. After informing the General Manager, he embarked on the process of searching for and recovering the seals. This he did by identifying the particular missing seals, looking up their last location and calling the drivers of the vehicles that carried the cargo. Through this process, the Respondent recovered 10 of the seals.

17. The Respondent stated that around the same time his secretary resigned, and the General Manager went on maternity leave leaving him to act as the General Manager. He became overwhelmed by work and fell sick forcing him to take a sick off. Shortly thereafter, he was called to a meeting by the CEO where he was accused of faking sickness, incompetence not performing to the expected standards. With these, he felt the trust had been broken. The Appellant never cared what he had put in a lot for it. As a result, he got so frustrated and resigned.

18. Upon resigning, he handed over to the Human Resources officer. However, the officer kept on calling him and accusing him of stealing and/or losing the subject devices/seals. The Respondent is categorical that all the seals could have been found had the Appellant looked for them. He resigned before he could retrieve the remaining 11 seals.

19. The Respondent testified that he was forced to resign by the conduct of the Appellant. He was constructively and wrongfully terminated from employment. As a result, he claimed terminal dues and damages in the sum of Kshs.784,667/- made up of 17 unpaid leave days (Kshs.31,167.00); unpaid salary for 21 days worked in May 2018 (Kshs.38,500.00); salary *in lieu* of notice (Kshs.55,000.00); 12 months damages for wrongful termination Kshs. 660,000.00) by way of Counterclaim.

The Judgment of the Trial Court.

20. After hearing both the Appellant's and the Respondent's witnesses on their respective cases, the Learned Magistrate pronounced herself on the matter on 25th August 2021. She held *inter alia* that there was no evidence linking the missing devices to the Respondent's negligence or breach of duty. Further, the Respondent failed to strictly prove the value of the missing devices, and as the claim before her was a liquidated claim, it had to fail for that reason.

21. On the Respondent's Counterclaim, the Learned Magistrate held that the Respondent was constructively dismissed. He was constrained to resign owing pressure on him by the Appellant who threatened to recover the cost of the missing devices from him, and accused him of faking illness, being incompetent and being a nonperformer during the meeting called in April 2018. The conditions at the workplace became unbearable for the Respondent as he was forced to work alone.

22. Noting that there was no reply to the Defence and Counterclaim, considering that the Appellant had not placed documentary evidence before her to demonstrate that the Respondent was not entitled to compensation for the unutilized leave days, unpaid salary for 21 days worked, and the evidence before her, the Learned trial Magistrate entered Judgment in favor the Respondent for; 17 unpaid leave days [KShs. 31,167], Unpaid salary for 21 days worked in May 2018[KShs. 38,500], Salary *in lieu* of notice [KShs. 55,000], and compensation for unfair termination of employment [KShs. 330,000].

The Appeal.

23. The Appellant, being aggrieved by the decision of the Trial Court, filed the present Appeal, on the grounds set out hereinabove.

Appellant's Submissions

24. The Appellant argued grounds 1 and 2 of the appeal jointly. The Respondent argued that the Learned Magistrate made an erroneous finding that there was no Reply to the Respondent's Amended Defence and Counterclaim and on this basis proceeded to award all the prayers sought in the said Counterclaim. This finding notwithstanding that the Appellant had indeed filed a Reply to Defence and Counterclaim on 12th April 2019, denying the Respondent's Counterclaim.

25. The above-stated approach by the Learned Trial Magistrate was in ignorance of the express provisions of Order 8 Rule 1 (6) which provides that where a party amends their pleadings and serves them on the opposing party if the opposing party does not file an amended response to the pleading, he shall be taken to rely on his earlier response in answer to the amended pleading.

26. They argue that the Learned Magistrate should have considered their Reply to Defence and Defence to Counterclaim filed on 12th April 2019. Further, filing of a Reply to Defence is not a mandatory procedural step as the assailed judgment suggests. To support this point reliance was placed in Civil Appeal No. 17 of 2014 *Joseph Kipkirui Mutai v Richard Kibet & Another* [2015] eklr.

27. The Appellant didn't make any submissions on ground 3 of the appeal.

28. Addressing ground 4 of the appeal, Counsel for the Respondent argued that as regards the Respondent's claim for constructive dismissal, the Honourable Magistrate made contradictory findings. Early in her judgment she categorically made a finding that the Respondent had not proved constructive dismissal, but later on held that he had, and proceeded to award compensation.

29. The evidence that was tendered before the Trial Court showed that the respondent voluntarily resigned from employment. The resignation was triggered by queries over the lost tags. In the resignation email of 21st May 2018, he thanked the Appellants for their support and expressed that the Respondent enjoyed working in the Appellant company. The tone of the email does not bring him out as a frustrated employee. The Respondent didn't prove constructive dismissal. was frustrated by the Appellant, and so he was not constructively dismissed. The Appellants rely on Kisumu ELRC Cause No. 193 of 2014 *Milton M. Isanya v Aga Khan Hospital Kisumu* [2017] eklr to buttress the fact that the tone of a resignation letter can be a basis for a finding that constructive dismissal was not proved. submission.

30. On ground 5, the Appellants submitted that the Learned Magistrate erred in finding that the Respondent was entitled to one month's termination notice as required under Section 35 of the Employment Act 2007. The finding and the award that flowed therefrom were not well founded as in the circumstances of separation in employment as a result of a resignation by the employee, Section 35 of the Employment Act cannot be applicable.

31. In fact, the Respondent resigned without issuing a month's termination notice as per Clause 12 of the Employment Contract. The Respondent ought to have been condemned to pay salary in lieu of notice under the clause. To support this point reliance was placed on Nyeri ELRC Cause No. E13 OF 2022 *Mwaniki v Ava Chem Limited* [2023] KEELRC 55 (KLR).

32. Finally, the Appellant submitted that the Learned Magistrate erred in finding that the Respondent was not responsible for the loss of the 21 tracking devices and that the request for accountability amounted to constructive dismissal. The Respondent was employed as the Operations Manager with the primary duty of coordinating seal management /logistics across all the Appellant's stations, a fact which was admitted to by him in cross-examination. In his position, he had a duty to ensure enforcement of the Appellants' Standard Operating Procedures and to be aware of the location of all the tracking devices at any given time. Being in charge of the lost devices, the Appellant had every right to hold the Respondent responsible.

Respondent's Submissions

33. The Respondent reminded this Court of its mandate as a first Appellate Court, as was aptly expressed in the cases of *Teachers Service Commission v Timothy Onyango Olale* [2022] eKLR and *Bundi Makube an infant suing by his next friend Thomas Bundi v Joseph Onkoba Nyamuro* [1983] eKLR.

34. Counsel for the Respondent addressed the issue of the missing seals, and whether the Respondent was liable for the same. It was argued that through his uncontradicted evidence, on the process of tagging and removing tags from transit cargo, he established that it was not his direct responsibility. Further, he is the one who discovered that some seals were missing as can be deduced from the report tendered in evidence by the Appellant. The seals were only missing and not lost. They could have been recovered if the Appellant had tried to. If there was any loss, it was as a result of institutional failure.

35. It was further submitted that the Appellant's claim before the Learned Trial Magistrate was a special damage claim. The law requires that such claims be specifically proved. The Learned Magistrate rightly found that the appellant did not prove the claim as per law required. The Appellant only produced a Proforma Invoice dated 4th December 2017, a document that could specifically not prove the value of each of the allegedly lost devices as set out therein. The Court was urged not to lose sight of the fact that the Appellant's witness did testify that the devices were acquired at different times.

36. There was no clear evidence as to whether the alleged lost devices were part of the 150 indicated on the Proforma Invoice or part of those purchased in the year 2016 before the witness joined the Appellant. To support the point on specific proof, the Respondent placed reliance on the case cases of *Capital Fish Kenya Limited v Kenya Power and Lighting Company Limited* and *David Bagine v Martin Bundi* [1997] eKLR

37. It was submitted that the Trial Court didn't err in finding that the Respondent was forced to resign as a result of the harsh working environment and the conduct of the Appellant's CEO. His evidence on this was not controverted.

38. It was further submitted that contrary to the assertion by the Appellant the tone of his resignation email was not indicative that he was fully satisfied with the environment at his workplace. The words "I believe I tried my best to exercise my assigned responsibilities..." signify frustration on his part. In any case, the tone of an employee's resignation letter is not the only factor considerable by a court in a claim for constructive dismissal. To buttress this point, reliance was placed on *Robert Gatobu Kimonye v Bank OF Africa Limited* [2021] eKLR.

39. The Respondent addressed the issue of the lack of reply and defence to the amended statement of Defence and Counterclaim by the Appellant. He submitted that the Amended Statement of Defence and Counterclaim dated 2nd July 2019 filed by the Respondent brought out new issues including the claim for constructive dismissal and the averment that the devices were retrievable. By failing to file an Amended Reply to Defence and Defence to Counterclaim, the Appellant failed to controvert the two claims that were introduced. The averment and the claim could be deemed admitted under law. To buttress this point, the Respondent placed reliance on the case of *Monica Muthoni Mwaniki v Jeremiah Kuya Mutunki* [2015] eKLR.

40. Finally, the Respondent submitted that the Trial Court did not in any part of its judgment hold that the Respondent had not proved that he was constructively dismissed.

Analysis and Determination

41. This being a first Appeal, this Court is obliged to reconsider and re-evaluate the evidence and material that was placed before the trial Court and come to its own independent findings and conclusions. This position as was set out elaborately in the celebrated case of *Selle v Associated Motor Boat Co.* [1968] EA 123); see also *(Abdul Hameed Saif v. Ali Mohamed Sholan* [1955] 22 EACA 270) where the Court held: -

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".

42. In The *German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Honourable Court of Appeal held that: -

> "A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the ELRC, we did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212)."

43. In this appeal, three central issues emerge for determination, thus; whether the Appellant did prove before the Learned Magistrate its claim for the value of the "lost" device; whether the Counterclaim was wholly allowed on an erroneous assumption that there was no reply to the Amended Defence and Counterclaim; and whether the Respondent was constructively dismissed from employment.

44. I have carefully considered the nature of the Appellant's case as was placed before the trial Magistrate. In my view, the case could only succeed if the Appellant proved two pivotal things, first, that the disappearance of the devices was linked to the Respondent's acts of commission or omission, or negligence. Secondly, the true value of the devices that were allegedly lost totalled the amount it sought in its Statement of Claim.

45. Where an employer contends that he or she suffered a loss as a result of his or her employee's negligence and or lack of diligence in the manner he carried out his duties, the employee's job description, the employer's standard operation procedures or practices relevant to the employee's job, if any and the employee's job description become imperative for the Court to consider.

46. Clause 6 of the Contract of Employment between the Appellant and the Respondent charged the latter with the responsibility to diligently and professionally carry out his duties in line with his job description, and the Appellant's aims and objectives.

47. The Respondent's Job Description (see pages 22 to 33 of the Record of Appeal dated 30th September 2021) which the Respondent duly executed on 6th February 2017 indicates his duties as:Coordination of seals management/logistics across all the Safetrac Stations;Ensuring enforcement of all the set operations Standard Operating Procedures;Supervises and oversees the day-to-day running of operations in all the Safetrac stations;Coordinating with the tagging coordinator and the supervisors to ensure that all the tagging requests done by the clients are fulfilled/achieved within the given timelines;Coordinating with stores and supervisors to ensure that seals are dispatched to the stations in need in time;Working hand in hand with BT security, seals management and reconciliation coordinator and client service teams to ensure recovery of long in journey seals;Follow up on updating of the seals software system with the station supervisors; andEnsuring the enforcement of all statutory government legal requirements on all taggings/untagging.

48. Keenly looking at the job description, there cannot be any doubt that the Respondent's, role was largely supervisory and that in matters of tagging and untagging the seals, he was not directly responsible. He

depended on tagging coordinators and supervisors, employees assigned to stores etc. This is consistent with the Respondent's evidence before the trial Court. The Appellant's witness's evidence before the Learned Magistrate, under cross-examination, confirmed this.

49. The Appellant contended in its pleadings that the devices were lost due to the Respondent's negligence and breach of duty. I have agonized about this assertion which in my view is one of the pillars of the Appellant's case, and see no sufficient evidence demonstrating the alleged negligence on the part of the Respondent that could be said to have led to the loss of the devices. I see no sufficiently presented explanation of any act of the Respondent that could have attracted the alleged loss.

50. The email correspondences that were placed before the Learned Magistrate reveal that the loss was discovered by the Respondent himself in the course of carrying out his supervisory duties. In what appears to this Court an act in line with his job description, the Respondent upon realizing that some seals were missing, embarked on a recovery process of the same. In my view, the evidence that was presented before the trial Court does not in any manner show that it was the General Manager who discovered the fact that some seals were missing. The various emails and the report he prepared dated 7th April 2018 that were tendered in evidence, totally discount the Appellant's position.

51. By reason of the premises, I am not persuaded by the Appellant that the Learned Magistrate erred in finding that it did not prove that the alleged loss of the devices was a result of the Respondent's negligence and or breach of duty.

52. In the suit before the trial Court, the Appellant had specifically sought;

> "[a]. The sum of USD 6300 being the amount due and owing from the Respondents to the Claimant over the lost 21 tracking devices.
>
> [b]. KShs. 55,000 being salary in lieu of notice....."

53. The Claim for the value of the 21 lost devices was required to be specifically proved. In his evidence, the Appellant's witness asserted in his statement [turned evidence in chief] that each of the devices cost USD 300. However, in his evidence under cross-examination, he asserted that each costed USD 1700. Further, this Court notes that according to the witness's testimony, the stock of the devices that the Appellant had was purchased at different times and that pressed further under cross-examination, he admitted that though the Appellant had tendered a proforma invoice in a bid to prove the value of each, it wasn't possible to tell whether the lost seals were among those that were purchased under the pro forma invoice.

54. In my view, a proforma invoice will always remain such a proforma invoice. In situations where the value and delivery of the items mentioned in the invoice are in contestation, the person alleging the purchase and the value must go beyond the production of the invoice in evidence, and tender a document proving delivery of and payment for, the items in issue. None of these documents were placed before the Trial Court. In the circumstances of this matter, the proforma invoice could not be in my view, a sufficient document to prove the allegedly lost seals.

55. In the upshot, I conclude that the Learned Magistrate didn't err in holding that the Appellant's case was unproven and consequently, dismissing the same.

Whether the Respondent's Counterclaim was entirely allowed an erroneous assumption that there was no reply to the Amended Defence and Counterclaim.

56. The Appellant contended that the Learned Trial Magistrate entered judgment in favour of the Respondent's Counterclaim in its entirety on the erroneous assumption that there was no defence to the Counterclaim. The Learned Magistrate at paragraphs 28 and 29 of his judgment stated;

> "It is worth noting that there was no reply to the Amended Defence and Counterclaim. There was also no record of employment to challenge the claim for unpaid salary for 21 days worked or any terminal dues.
>
> 29. Having found that the Respondent was unfairly and constructively terminated, I find that he is entitled to the following grounds....."

57. Looking at the two paragraphs keenly, I take a clear view that the Appellant's assertion is wholly unfounded. The mention of the failure to file the reply by the Learned Magistrate was for noting. It doesn't come out that the award of the various reliefs under paragraph 29 was influenced as the Appellant contended. In my view, and the Learned Trial Magistrate's holding in paragraph 29 is clear, the reliefs granted were anchored on the finding that the termination was unfair. Ground 2 of the appeal is rejected as a result.

b. Whether the Respondent was constructively dismissed from employment;

58. It is common cause that the Respondent resigned from his employment through written correspondence to the Appellant, what isn't is whether the resignation was voluntary, or involuntarily prompted by the conduct of the Appellant and working conditions at its workplace at the material time, hence the basis for the claim for constructive dismissal.

59. Imperative to state that the doctrine of constructive dismissal doesn't have a statutory underpin within the *Employment Act*, however, guidelines on the aspects considerable by Courts in a claim for constructive dismissal are ample in judicial precedents of, the Court of Appeal, and this Court and from other jurisdictions. It is through the lens provided by the precedents I will consider whether the Learned Trial Magistrate's finding that the claim for constructive dismissal was proved, had basis.

60. At the heart of a claim for constructive dismissal is ever the conduct of the employer, not the employee. 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 characterized by law- see *Porter v N.B Legal Aid* [2015]1S.C.R.

> 47. In the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal did aptly put forth the elements and test for determining if constructive dismissal has occurred, the Court held:
>
> > "What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which give rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. 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."

61. In determining whether the conduct of an employer evinced an intention no longer to be bound by the contract, two branches of tests are evident across jurisdictions. The court must first identify an express or implied term that has been breached, and then determine whether the breach was sufficiently serious to constitute the 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 *Porter case* [*supra*].

62. 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 in the *Coca-Cola case* [*supra*]. See also this Court's decision in *Stephen Michuki v East African Safari Air Limited and Anorther*[2022]eKLR.

63. On the other hand, the Court can declare that an employee was constructively dismissed where the conduct of the employer more generally shows that the employer intended not to be bound by the contract. In such a situation, the Court 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 of the employer. The unreasonable test, in terms of the Court of Appeal decision above stated.

64. The Respondent's claim before the Trial Court was anchored on the fact that the General Manager's and or the Respondent's conduct towards him had made his continuance in employment intolerable. The Respondent in his evidence before the Learned Magistrate pointed out the conduct and or evidence, thus; the threats to have him surcharged for the missing devices; that he was forced to perform the duties of three employees alone (Operations Manager, Acting General Manager and Assistant Operations Manager); and the unjustified accusations against him called him, that he was faking illness, of incompetence and poor performance. In my view, the Claimant's evidence regarding the conduct and or acts was not controverted. The witness who testified on behalf of the Appellant could not sufficiently place forth rebuttal evidence. His was hearsay evidence. The General Manager who was at the centre of the conduct and or actions complained of was not presented by the Appellant to testify against the Respondent's evidence. With the unexplained failure to call this crucial witness to testify before the Trial Court, a safe inference could be made that his evidence could have been averse to the Appellant's position.

65. To accuse an employee of things and or matters like the ones hereinabove mentioned unjustifiably could cause mental anguish and a state of unsettledness in the workplace, for the affected employee. Further, it amounts to a breach of an employer's duty to act in good faith and that of trust and confidence.

66. This Court notes that the Learned Trial Magistrate very shallowly considered the doctrine of constructive dismissal and how it related to the Respondent's case that was before him. Could have done more.

67. The Appellant contended that the Respondent's resignation letter didn't bring him out as an employee who was frustrated in his work environment and by the conduct of the Appellant. In the doctrine of constructive dismissal, the factual circumstances of the alleged dismissal must be taken into consideration. The Court cannot decide on the matter solely on the perceived tone of a letter of

resignation. I am not convinced by the Appellant that I can wholly base my judgment on the perceived tone of the resignation letter. The Learned Magistrate couldn't premise his finding on the alleged tone wholly either. In any event, my consideration of the contents of the email wholly doesn't suggest that the Respondent was exiting employment comfortably and a happy employee.

68. However, exercising the authority of a first Appellate Court, acting within the already set scope by judicial precedent for the exercise of the authority, and applying the unreasonableness test, I conclude that the Respondent was constructive.

69. The remedies for constructive dismissal are the same as for other forms of dismissal. The Learned Magistrate was right in awarding the reliefs he did in favour of the Respondent under the Counterclaim.

70. In the upshot, I find no merit in the appeal. It is hereby dismissed with costs.

71. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF March 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Ms. Owino for Respondent

Mr. Anyado for Respondent