



**Gichuru v Startimes Media (Kenya) Company Limited (Cause  
2384 of 2016) [2024] KEELRC 1736 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1736 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2384 OF 2016**

**K OCHARO, J  
JUNE 28, 2024**

**BETWEEN**

**ANDERSON NG'ARU GICHURU ..... CLAIMANT**

**AND**

**STARTIMES MEDIA (KENYA) COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a statement of claim dated 21<sup>st</sup> November 2016 which was later amended on 18<sup>th</sup> May 2017, the Claimant sued the Respondent seeking the following reliefs;
  - a. Gratuity/Pension calculated at 31% of the gross salary for the years worked KShs.  $(2 \times 8,775 \times 12 \times 7 \times 31\%) = \text{KShs.}6,478,101$ .
  - b. Special damages for constructive unlawful termination:
    - i. Calculated as gross pay of  $\text{KShs.}248,775 \times 12 = \text{Kshs.}2,985,300/=$ .
    - ii. Loss of earning due to amended contract salary for 6 months being KShs.  $(248,775 - 130,000) \times 6 = 712,659.00$ .
  - c. General damages for violation of human rights and rights of workers on account of racial discrimination.
  - d. Cost of this claim and interest.
  - e. Any other relief that this Honourable Court may deem just and expedient in the circumstances to grant.



2. The claim was resisted by the Respondent through the reply to amended statement of claim dated 15<sup>th</sup> June 2017. The Claimant's claim was denied. The reliefs sought too.
3. At the hearing of the matter, the Claimant testified on 14<sup>th</sup> March 2023, without calling any witness to further testify on his case.
4. The Respondent presented three witnesses who testified in support of its defence on 7<sup>th</sup> and 8<sup>th</sup> March, 2024.
5. After hearing the parties on their respective cases, this court did direct them to file written submissions, a direction which was obliged by them. The judgement herein is therefore with the benefit of the submissions.

### **The Claimant's Case**

6. It was the Claimant's case that he was first employed by the Respondent on the 19<sup>th</sup> June, 2010 under a letter of appointment of the same date as a Sales Manager.
7. The Claimant asserted that he started working for the Respondent company even before it was formally registered. Further, he was instrumental in helping the Respondent have a foot point in the Kenyan market. His hard work earned him a promotion on 19<sup>th</sup> March 2012, to the position of Director of Sales. Again, on 1<sup>st</sup> April, 2015 he was promoted to be Sales Director due to his extemporary performance.
8. He asserted that during his tenure of employment, he was awarded several honours, all attributed to his diligence and hard work.
9. The Claimant stated that things started going south in July, 2016. The Respondent started treating him unfairly and his duties were chipped away. This led to diminished earnings on his part as he could no longer earn commissions. His CEO embarked on using abusive language against him. His duties were taken away and given to Mr. Hanson, a foreigner. As a result, he suffered ill health. Further, the Respondent company allowed practices which saw Africans treated as second class employees, to be entrenched at the workplace. There was rampant racial discrimination.
10. He asserted that on the 2<sup>nd</sup> of November 2016, the Respondent changed his contractual duties completely. The changes to his were communicated were to all staff through an email dated 9<sup>th</sup> November 2016. The changes were unilateral, and aimed at frustrating. The changes ere not preceded by any consultations between him and the Respondent as required by law.
11. The Claimant contended that his remuneration comprised basic salary and commissions. Further, commissions pray a major motivational role. It is ordinarily a key component of a sales person's remuneration. His pay slips are a testament to this.
12. The Claimant stated that in June 2016, at a party that was organized by the Respondent for its employees to celebrate the good performance in sales, even after praising the Claimant for the 98% sales target met, the CEO surprisingly started using belittling words against them telling them that they were weak, stupid and with empty heads. The He utterance was made when the CEO was addressing the Claimant. This happened in front of the Claimant's junior staff. The CEO was Chinese in race.
13. This turn of events (maltreatment) by the CEO was a thing which was totally absent in the reign of the former CEO. The Claimant had a cordial relation with the Claimant.



14. The Claimant testified further that when his terms of employment were changed without consultation, he was constrained to seek legal redress. On the 24<sup>th</sup> November 2016 a restraining order was issued against the Respondent, prohibiting them from changing the terms in any manner prejudicial to him.
15. Upon being served with the court order, the Respondent decided to keep the Claimant in the office, without allowing him to manage its systems. As a result, he lost the whole bit of commissions.
16. On 12<sup>th</sup> April 2017, the Human Resource Manager issued him with a letter accusing him of absconding duty. Subsequently, he received other letters inclusive the notice to show cause, letters that were couched in a very demeaning manner, not reflective of his good performance throughout his service.
17. Employees of African origin were treated differently from their Chinese counterparts. The Chinese employees of the Respondent were earning, house allowances and transport allowance, allowances that employees of the African origin did not have. Harsh language could be used against them but not against the Chinese employees. The African employees were under remunerated as compared with the Chinese employees. For instance, the salary of the person (Chinese) who took over his role was earning KShs.150,000.00 while the Claimant was earning KShs.74,000.00.
18. Cross-examined by Counsel for the Respondent, the Claimant testified that he came into the employment of the Respondent under the contract dated 19<sup>th</sup> June 2010, as a sales manager. Per the contract, his remuneration was an embodiment of basic salary (KShs.25,000.00), position allowance and commissions. Further, he received meals and transport allowances.
19. The Claimant testified that on or about the 15<sup>th</sup> March 2012, he entered into a fixed term contract with the Respondent and under this contract he received his remuneration duly. The contractual period was 1<sup>st</sup> April 2012 – 31<sup>st</sup> April 2015.
20. The Claimant further testified that during the tenure of his first contract with the Respondent, the Respondent had in its workforce, employees who were of Chinese origin. They included the managing/Director and the Human Resource Manager. He had no documentary evidence to demonstrate how much they were earning.
21. He entered into a 3<sup>rd</sup> contract with the Respondent on or about the 1<sup>st</sup> April 2015. Equally, this contract was a fixed term contract for a period of two years (1<sup>st</sup> April 2015 – 31<sup>st</sup> March 2017). Under this contract, his remuneration was the basic pay of KShs.28,800.00 and allowances. The contract did not provide for commissions. Despite the fact that commissions were not provided for in the contract, he continued drawing the same. His pay slips are a testament. He served under the title, Sales Director.
22. The person whom he alleges took over his roles, was employed in the position of Vice President Sales.
23. In his evidence under re-examination, the Claimant asserted that at his place of work, one could see and tell that there was differential treatment between Kenya and Chinese employees.
24. The Claimant asserted that when one considers his roles as were stipulated under his third contract as the Head of Sales, and that of Vice President one could have a quick impression that their roles were completely different. However, the impression won't be true if one were to consider the responsibilities were taken away from him and bestowed on the Vice President.
25. Clarifying on his remuneration under the 3<sup>rd</sup> contract, the Claimant testified that the contract was a continuation of those that preceded it, the reason why his pay slips issued during the period of the contract had an item for commission.



## The Respondent's Case

26. The Respondent presented three witnesses to testify on its behalf in defence against the Claimant's case, Samuel Wachira (RW1) and Francis O. Okongo (RW2) and Simon Macharia Kinuthia [RW3]
27. RW1 adopted his witness statement as part of his evidence in chief. The witness testified that he was employed by the Respondent in July, 2012 as a driver. He placed in the Technical Department and tasked with driving to various stations across the country. He asserted that the CEO was a jovial and compassionate person.
28. Cross-examined by Counsel for the Claimant the witness stated he is a driver. The nature of his work involves moving out and in the place of work. As a result, his time at the Respondent's offices is limited.
29. The witness testified that all drivers within the Respondent enterprise, all drivers are Kenyan. None of them is Chinese. Further, therefore there is no Chinese driver, a comparator. His work was limited to driving the CEO. He would not interact with him in any other manner. As a result, he was not in a position to confirm or deny an allegation by any employee, on mistreatment, humiliation or discrimination at the workplace.
30. The witness confirmed that he was employed long after the Claimant had.
31. RW2, testified that he is the Respondent's Human Resource Manager, having joined the Respondent on 21<sup>st</sup> April, 2015. The witness adopted the contents of his witness statements dated 15<sup>th</sup> June 2017 as his evidence in chief.
32. The witness stated that the Respondent company was incorporated on 17<sup>th</sup> June, 2012. The Claimant came into the Respondent's employment on or about 19<sup>th</sup> June, 2010. Therefore, it is untrue that he was an employee of the Respondent before its incorporation.
33. He stated further that the Claimant was first employed as a Sales Manager – Nairobi under a fixed term contract of one year. The contract period ran from 5<sup>th</sup> October, 2010 to 1<sup>st</sup> October, 2011.
34. The witness asserted that at the expiration of this contract, the Claimant was employed by the Respondent as Head of Sales in its Sales department for a period of two years from 1<sup>st</sup> April, 2013 to 31<sup>st</sup> March, 2015.
35. Upon expiry of the contractual period under the 2<sup>nd</sup> contract, the Respondent and the Claimant entered into another agreement independent of the 2<sup>nd</sup> contract, for the period 1<sup>st</sup> April 2015 to 31<sup>st</sup> March 2017. Under this third contract, the Claimant was employed as a Sales Director and put under probation for a period of 6 (six) months.
36. Under Clause 4 of the contract (3<sup>rd</sup>) the Claimant and the Respondent agreed on the remuneration of the former thus:
  - a. Monthly basic salary of KShs.74,900.00;
  - b. Kshs. 39,700.00 monthly allowance;
  - c. During probation, he was to earn 80% of the basic salary and allowances;
  - d. The Respondent was to pay for NHIF, NSSF and WIBA for him; and
  - e. He was to be entitled to 21 days annual leave and sick leave.
37. Under the contract the Claimant's duties and responsibilities included;



- a. Develop new clients both in new markets and developed market;
  - b. Maintain the relationship with the client and measure the client's satisfaction with client's feedback about quality of services;
  - c. Strictly and efficiently comply with the company's policies and regulations;
  - d. Support the work of delivery adding goods, goods returning payment collection, receipts, reconciliation etc.
  - e. Achieve the individual sales targets and submit the required documents in time.
38. The witness asserted that the Claimant was further bound by the stipulations of the Respondent's Human Resource policy which further defined the scope of work and duties of the Claimant.
  39. The witness stated that the Claimant was informed of changes in his duties but never at any one point express that he was disgruntled, using the procedure outlined in the employment Human Resource Policies Manual handbook. Instead, the Claimant applied and proceeded for his annual leave.
  40. The witness further asserted that commissions are paid to employees at the discretion of the Respondent. Commissions are not a contractual term. Further, payment of commission is based on sales done and since the Claimant proceeded on leave there was no commission earned that could be paid.
  41. By executing the employment contract, the Claimant bound himself to perform the duties that were stipulated therein and any other duties that may be assigned to him by the Respondent from time to time. The Claimant was not discriminated in any way. The Claimant's claim for racial discrimination is unfounded.
  42. The witness contended that the Claimant's employment was not terminated but the employment period expired.
  43. The witness further stated that throughout the employment of the Claimant, the Respondent faithfully remitted dues to the National Social Security Fund on behalf of the Claimant.
  44. The witness contended further that throughout his employment, the Claimant was not diligent in his work and constantly breached the Respondent's rules and received verbal warnings. The Claimant's claim is not justified. It is an abuse of the court. As a result, he is not entitled to the reliefs sought. The claim should be dismissed with costs.
  45. Cross-examined by Counsel for the Claimant, the witness testified that he was employed by the Respondent on 21<sup>st</sup> April 2015. Therefore, he could not be in a position to testify on matters of before this date.
  46. He could not tell whether the Claimant was involved in the incorporation of the Respondent company or not.
  47. Testifying on the letter dated 2<sup>nd</sup> November 2016, by the Human Resource Manager to the Claimant, the witness accepted that it was captioned "change of duties". In changing the duties, the Respondent exercised its powers under the contract of employment.
  48. Referred to the contract of employment dated 1<sup>st</sup> April 2015 and specifically Clause 3.1 thereof, the witness stated that the Claimant's responsibilities were set out. The clause did not bestow authority on the Respondent to change the responsibilities and duties.



49. Under the contract of employment, dated 19<sup>th</sup> June 2010, the Claimant’s remuneration was defined to include commissions. His position was that of Sales Manager.
50. Under the 2<sup>nd</sup> contract (Ext. 2), the Claimant was employed as Head of Sales on 15.03.2012, and commissions were part of his remuneration. The contract dated 1<sup>st</sup> April, 2015 (Exh.3) was silent on the aspect of commissions.
51. Asked to comment on the pay slips of 25.07.2012 and 24.08.2012, the witness testified that they did not have an item for commission. However, the pay slips for 20<sup>th</sup> December 2015 – 20<sup>th</sup> January 2016, had the basic salary as KShs.74,900.00, and an item for commission KShs.263,261.00. In this month the basic salary earned was almost 1/3 of the commission earned.
52. On the pay slip for 21<sup>st</sup> January 2016 to 20<sup>th</sup> February 2016, the basic salary is reflected as KShs.74,500.00, and commission earned as KShs.92,816.00. The one for 21<sup>st</sup> February 2016-20<sup>th</sup> March 2015, had basic salary as KShs.84,200.00 and commission earned KShs.69,027.00. He concluded that from the pay slips, the commission aspect formed the larger part of the Claimant’s remuneration. The commissions were earned on sales made.
53. The witness stated that the letter dated 2<sup>nd</sup> November 2016 did not take away his sales responsibility. Under the letter he was entrusted with promotional activities for the whole of the Respondent company. Pressed further, he testified that indeed the letter did not provide for the role of making sales, as such the role was taken away. After this date of the letter, and commissions that were paid to him related to the period before it.
54. The witness stated that, that he could not testify on the relationship between the CEO and the Claimant. All that he stated about the CEO in his evidence in chief was his own personal assessment.
55. The Respondent has not filed in this matter any document that speaks to benefits that were being paid to the Chinese employees and that to Kenyan employees.
56. In his evidence under re-examination, the witness testified that the Claimant served under various fixed term contracts and that each contract had its peculiar terms.
57. RW3, testified that he is a Finance Manager of the Respondent. He adopted his witness statement dated 27<sup>th</sup> February 2014 as his evidence in chief. He testified that he closely worked with the CEO.
58. Cross-examined by Counsel for the Claimant, the witness stated that he cannot confirm whether the CEO was discriminatory or not. Further, he was employed on 3<sup>rd</sup> December 2012, the discriminatory incidents might have happened before then.

### **The Claimant’s submissions**

59. The Claimant’s Counsel identified four issues for determination thus;
  - a. Whether the Claimant was constructively dismissed.
  - b. Whether the Claimant was treated by the Respondent in a discriminatory manner on account of race contrary to Article 10, 27 of *the Constitution* and Section 5 of the *Employment Act*.
  - c. Whether the Claimant’s human rights were violated.
  - d. Whether the Claimant is entitled to the reliefs sought.
60. Counsel submitted that although the doctrine of constructive dismissal has its origin in the law of contract under the doctrine of “discharge by breach” it is now trite that it has found constitutional



underpinning within Article 41 of *the Constitution*. To support this position, Counsel placed reliance on the case of *Mkala Chitavi vs. Malindi Water & Sewage Company Ltd* case No. 64 of 2012.

61. Counsel further submitted that constructive dismissal has two facets;
  - i. The employer making a unilateral alteration is breach of the employment contract to the detriment of the employee, and
  - ii. The employer making or otherwise permitting working conditions for the employee to be intolerable for him to continue working. To support this submission reliance was placed on the case of *Joseph Alegur & Another vs. Lodwar Water & Sanitation Company Limited* (2015) eKLR.
62. He further submitted that the principles considerable in determining whether an employee was summarily dismissed were elaborately brought out by the Court of Appeal in the case of *Coca Cola East & Central Africa Ltd vs. Maria Kagai Ligaga* (2015) eKLR.
63. It was argued that the Respondent unilaterally altered and breached the employment conduct to the detriment of the Claimant by taking away core roles in sales which was a main contributor to his remuneration.
64. The Respondent did not have any contractual powers to effect the changes unilaterally. Further, section 10 of the *Employment Act* prohibits a unilateral amendment to an employee's contract of employment.
65. It was further submitted that a unilateral change of an employee's contractual terms, is an affront to that employee's right to fair practices envisioned in Article 41 of *the Constitution*.
66. The Respondent's CEO got to the habit of hurling insults and obscenities at the Claimant, creating an untenable working environment for him. This evidence was not challenged.
67. Considering these premises, constructive dismissal was established. It was submitted.
68. On whether the Claimant was treated in a discriminatory manner on account of his race contrary to Article 10 & 27 & 41 of *the Constitution* and Section 5 of the *Employment Act*.
69. Section 5(7) of the *Employment Act* speaks to the burden of proof in matters where discrimination is alleged. The Claimant tendered evidence on his claim for racial discrimination. In an attempt to discharge the burden of proof under the provision, the Respondent presented three witnesses whom could not sufficiently speak to the alleged discrimination. The Respondent failed to discharge its burden, therefore. To support the submission that a failure to call a crucial witness, equates to failure to discharge the burden, reliance was placed on the case of *Mokaya vs. Kithuri Kindiki t/a Kithure Kindiki & Associates* (2021) eKLR 1 (KLR) (30 September 2021) (judgment).

The CEO was a crucial witness. He was not called to testify.
70. Counsel submitted that racial discrimination was given an elaborate judicial analysis in case of *David Wanjau Muhoro vs. Ole Pejeta Ranching Ltd* (2014) eKLR, that was largely affirmed by the Court of Appeal in *Ole Pejeta Ranching Ltd vs. David Wanjau* (2017) eKLR, and urged this Court to follow to arrive at a conclusion that the Claimant was discriminated against.
71. It was submitted that the Claimant was not accorded similar benefits to those accorded to Chinese people holding similar position. Employees of Chinese extraction enjoyed superior benefits including a paid house benefit, a paid cook, used company's vehicles at the company's expense, unlike employees of African extraction who did not receive similar treatment.



72. Presence of racial discrimination against the Claimant is clearly revealed the fact that Mr. Hanson Wang, who eventually replaced, was initially serving under him, when he first came to the country. He trained him on the sales role. This notwithstanding, while the Claimant was earning a basic salary of KShs.84,200.00 as at September 2016, Mr. Hanson Wang was getting a sum of KShs.183,638.00. Counsel concludes that the disparity was racially motivated. No other reason was preferred by the Respondent to justify the apparent discrimination.
73. It was further submitted that racial discrimination was further exhibited when the Claimant's role as the Sales Director were taken over and handed over to his understudy, Mr. Hanson Wang.
74. The letter under which his duties were changed expressly him placed under the Sales Vice President. The Sales Vice President was reporting directly to the CEO. Before the changes, the Claimant was a top-ranking employee in the Sales department and directly reporting to the CEO.
75. On the reliefs sought, Counsel for the Claimant submitted that the Claimant should be awarded a global sum of KShs.10,000,000.00. In awarding the sum, the court should consider the ill health that he suffered as a result of the Respondent's action, and the devastating effect the violation of his rights had on the Claimant's career. The career was completely destroyed. Reliance was placed on the decision in *OI-Pejata Ranching Ltd vs. David Wanjau Muhoro (2017) eKLR* where the court awarded KShs.7,500,000.00 for racial discrimination.
76. On the relief of loss of earnings, it was submitted that the Claimant's duties were changed on 2<sup>nd</sup> November, 2016. He continued to work for the Respondent until termination on 12<sup>th</sup> April 2017, a period of 6 calendar months. Further, during the time of his employment, he earned an average of gross salary of KShs.248,775.00. Excluding statutory deductions, he could have earned an average KShs.118,775.00 per month. In the 6 months he could earn, therefore, Kshs.712,650.00.
77. On gratuity, Counsel submitted that it is a requirement under the *Employment Act*, that an employee qualifies for gratuity upon completion of service with his employer. To support this submission, the Claimant's Counsel, cited the Court of Appeal case in *Bamburi Cement Limited vs. Farid Aboud Mohammed (2016) eKLR*.

### **The Respondent's submissions**

78. Counsel for the Respondent identify the following issues for determination:
  - a. Whether the Claimant is entitled to the Gratuity/Pension calculated at 31% of the gross salary for years worked;
  - b. Whether the Claimant was "constructively unlawfully terminated;
  - c. Whether the Claimant was discriminated against on the basis of being an African.
  - d. Whether the Claimant is entitled to the damages sought; and
  - e. Who should bear the costs of the suit?
79. Counsel submitted that it is trite that parties are bound by their pleadings. Further, the issues for determination in a suit ought to generally flow from the pleadings. To support this submission, Counsel cited the dicta by Lord Denning in *Jones vs. National Coal Board (1957) 2 23, 55* thus:

"Judges sit to hear and determine issues raised by the parties, not to conduct an investigation, or exam on behalf of the society at large."



80. It was submitted that there is a clear difference between gratuity payment and pension payment. It is not clear from the Claimant’s pleadings and or evidence on which of the two he is pursuing. Further, he did not lead any evidence to establish entitlement.
81. Gratuity is a contractual payment whilst pension is a payment under statute. To support this submission, Counsel cited the case of *Bamburi Cement Ltd vs. William Kilonzo* (2016) eKLR. The Claimant did not at all demonstrate that there was a contractual basis for the relief sought.
82. One of the issues for determination identified by the Claimant is “Whether the Claimant was constructively dismissed as an issue for determination.” This doesn’t appear to be following from the Claimant’s pleadings or evidence. The issues refer to constructive dismissal, and not the “constructive unlawful termination” that feature in his pleadings.
83. It was further submitted that the underlying circumstances that led to the severance of the employer-employee relationship between the Claimant and Respondent was the expiry of the employment period. Further, where parties agree to end the contract at a fixed date, the other cannot allege breach, as to do so would be to defeat the very essence of having agreed on the fixed term of the contract in the first instance. In support of this point, reliance was placed on the case of *Samuel Chacha Mwita vs. Kenya Medical Research Institute* (2015) eKLR and the Court of Appeal decision in *Registered Trustees of the Presbyterian Church of East Africa & Another vs. Ruth Gathoni Ngotho – Kariuki* (2017) eKLR.
84. It was further submitted that the Claimant’s claim does not satisfy the prerequisites for a constructive dismissal suit. In order for a claim of constructive dismissal to succeed, it must be demonstrated that the employee resigned. In the instant case, the Claimant did not resign. His claim for constructive dismissal must fail, therefore. As regards the prerequisites reliance was placed on the case of *Coca Cola East Africa and Central Africa Ltd vs. Mana Kapai Ligaga* (2015) eKLR.
85. The Respondent submitted that the Claimant did not sufficiently prove that the Respondent’s actions were discriminatory. The burden of proof lay on the Claimant to prove that indeed the acts complained of could be classified as discriminatory. Section 107 and 109 of the *Evidence Act* placed the duty on the Claimant, being the party who was asserting. To further buttress this point, the Supreme Court of Kenya decision in *Samson Gwen & 5 Others vs. Kenya Medical research Institute & 3 others* (2020) eKLR, was cited.
86. In considering whether or not the Claimant was discriminated against, this court should consider the definition that was set out in the case of *Nyarangi & Others vs. Attorney General* (2008) eKLR;
- “Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the circumstances.
- Indirect or subtle discrimination invokes setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification.”
87. The Claimant did not particularize elements of discrimination in his amended statement of claim. His claim should fail on this account.
88. The Respondent urged this court to compare the job descriptions for Mr. Hanson Wang who the Respondent employed as the Vice President Sales, on the one hand and that of the Claimant on the other hand, and conclude that there was a distinction between the responsibilities assigned to the



Claimant and those assigned to Mr. Wang. In no instance did Mr. Wang take over the Claimant's responsibilities nor did the Respondent intend to replace the Claimant with Mr. Wang.

89. Both the Claimant and Mr. Wang were hired based on their skills and knowledge that they possessed which informed the difference in their job description. The Claimant failed to demonstrate that there was a separate criteria that was used by the Respondent. In hiring its employees.
90. Having failed to prove his claim on discrimination, the prayer for damages should be declined. As costs follow the event, the Claimant should meet the cost of this suit.

### **Analysis and Determination**

91. I have carefully considered the pleadings, evidence and submissions by the Parties herein, and the following issues emerge for determination;
  - a. Whether the Claimant was constructively dismissed.
  - b. Whether the Claimant was discriminated against contrary to the provision of Article 27 of *the Constitution* and Section 5 of the *Employment Act*.
  - c. Is the Claimant entitled to the reliefs sought?

### **Whether the Claimant was constructively dismissed**

92. Constructive dismissal has not been codified in Kenya. However, that is not to suggest that courts here have not been confronted with controversies emanating from an alleged constructive dismissal, asked to resolve the same, and rendered themselves thereon.
93. Before I delve further into this issue, I must first determine a vital point that has been raised by Respondent. The Respondent contended that the severance of the employer – employee relationship between the Respondent and the Claimant came about when the fixed term contract between them came to an end by effluxion of time.
94. There is no controversy that the Claimant and the Respondent entered into a fixed term contract on the 1<sup>st</sup> April 2015. The contract was to run for the period 1<sup>st</sup> April, 2015 to 31<sup>st</sup> March 2017. However, there is a dispute as to whether the contract did run its full course. The Respondent argued that it did, while the Claimant asserted that it did not, hence his claim for constructive dismissal.
95. It was common cause that on the 2<sup>nd</sup> November 2016, the Respondent issued the Claimant with a letter captioned “charge of duties”. The Respondent’s witness testified that after getting the letter, the Claimant decided to proceed for his leave, and instead of reporting back to duty he sued the Respondent.
96. This court notes that the suit herein was filed on the 23<sup>rd</sup> November 2016, almost five and one-quarter months before the appointed date for the lapse of the contract. The Respondent’s witness’s evidence, taken together with the timing in filing of the instant suit, speaks to only and only one thing, the contract did not run its full course. The Respondent’s position is totally misplaced.
97. Having found as I have, hereinabove, that the fixed term contract did not run its full course, I now turn to consider whether the Claimant was constructively dismissed.
98. Judicial precedents are ample on the doctrine of constructive dismissal/termination. The principles considerable by courts in a claim for constructive dismissal are settled.



99. 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 constructive dismissal. See *Stephen Michuki vs. East African Safari Air Express Limited & another* (2022) eKLR. In the instant case, the Claimant settled for the latter choice.
100. It is imperative to state that at the centre of a claim for constructive dismissal is often the conduct of an 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 the law – *Potter vs. N. B. Legal Aid* (2015) 1 S.C.R.
101. In determining whether the conduct of an employer evinces an intention no longer to be bound by the contract, there are two branches of the test that 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 constructive dismissal. Typically, the breach in question involves changes to the employees' compensation, work assignment or place of work that are both unilateral and substantial. See *Porter Case* (supra).
102. 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, constitute a breach of the contract of employment, and second if it constitutes as such a breach, it must be found to substantially alter an essential term of the contract. In my view, this is the test that the Court of Appeal called the contractual test in *Coca Cola East Africa & Central Africa Ltd vs. Mana Lipaga* (2015) eKLR.
103. On the other hand, the court can declare there being 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 consider whether those acts amount an intention to no longer be bound by the contract, in terms of the Court of Appeal decision is the unreasonable test.
104. Undeniably, through its letter dated the 2<sup>nd</sup> day of November 2016, the Respondent changed the Claimant's duties. The Claimant contended that this decision and action by the Respondent was unilateral. He was not consulted before the decision was made. The Respondent's witness RW2 admitted that there was no consultation.
105. The Respondent contended that under the contract of employment it had a right to change the duties without consulting the Claimant. This cannot be true in the post – 2007 legal regime, in my view.
106. The Claimant asserted that the changes had an impact on his remuneration as it took away the sales role from him and largely confined him to the office. Commissions that ordinarily formed the larger part of the remuneration dwindled. The Respondent's Human Resource Manager (RW2) in his evidence under cross-examination admitted that the Claimant sales role was taken away and that true, this had an impact on his remuneration.
107. Section 10(2) of the *Employment Act* provides;
- “ A written contract of service shall state –
- a. The name, age, permanent address and sex of the employees
  - b. The name of the employer.



- c. The job description of the employment;
  - d. The date of commencement of the employment’
  - e. The firm and duration of the contract.
  - f. The place of work;
  - g. The hours of work;
  - h. The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits.
  - i. The interests at which remuneration is paid;
  - j. The date on which the employees period of continuous employment began, taking into account any employment with a previous employer which accounts towards that period; and
  - k. Any presented matter.
108. True, as counsel for the Claimant submitted, sub-section 5, proscribes changes in any matter stipulated in sub-section (1), without consultation with the employee affected.
109. To cause changes on the job description of an employee, with a prejudicial effect on that employee’s remuneration and deliberate ignorance of the proscription by law, as did the Respondent, cannot be meet any other description than being a fundamental breach of the contract of service by the employer.
110. The Claimant further asserted that the Respondent’s CEO of a Chinese extraction without justification got into the habit of calling him names, and scolding him in front of his juniors without care. This mistreatment resulted to his ill health. The working environment became intolerable. It became difficult for him to continue working.
111. The Claimant was detailed in his evidence on this. He was even specific on the time when some of the incidents happened. I have carefully, considered the Respondent’s witnesses’ evidence and conclude that none was sufficient to rebut the Claimant’s. All that the witnesses gave was general evidence that did not specifically address the matters raised by the Claimant.
112. By reason of the foregoing premises, and applying both the contractual and unreasonable test of constructive dismissal, I come to the inescapable conclusion that the Claimant proved his case for constructive dismissal.
113. Before I pen off on this issue, I feel impelled to comment on this one point. The Respondent contended that the Claimant’s claim should fail as he did not resign on account of the fundamental breach of contract by the Respondent or its CEO’s intolerable conduct. I have held before, that considering the nature of, and the circumstances that could attract, constructive dismissal, it is not mandatory that the employee exiting employment because of the employer’s conduct, gives notice. A formal resignation is not a prerequisite. I am not persuaded that the Court of Appeal in the case of Coca Cola (supra) had a formal resignation in mind. Once an employee establishes his or her claim for constructive dismissal, he or she gets entitled to the remedies for unfair termination. One of them being the compensatory relief contemplated under section 49 (1) (c) of the *Employment Act*.
114. The Claimant sought for compensation under the above stated section to the maximum amount contemplated thereunder, twelve [12] month’s gross salary.



115. I have carefully considered the circumstances of the severance of the relationship between the Claimant and the Respondent; the fact that it was induced by the conduct of the Respondent; the Respondent cared not about the requirements of the law; the health effect that the actions the Respondent's CEO visited on the Claimant; the fact, as shall come out shortly hereinafter, the Respondent infringed on the Claimant's rights; and the time that was remaining to expiry of the contract period, five (5) months, and come to the conclusion that he is entitled to the compensatory award and to the extent of four (4) months remuneration.
116. From the evidence by the parties, it was evident that the Claimant's remuneration embodied basic salary allowances and commissions. It has not escaped my mind that the commissions that the Claimant was earning were not fixed, and that is the true nature of commissions in the sales space. For purposes of computing the compensatory relief under section 49[1][c], gross salary is applicable. To balance the interest of both the Respondent and the Claimant and to attain fairness, I will use the gross pay obtaining on the pay slip for 21<sup>st</sup> May, 2016 to 21<sup>st</sup> June 2016, to 20<sup>th</sup> July 2016, KShs.190,452.00, as it reflects the average remuneration.

### **Of violated Rights**

117. Article 41 of *the Constitution* of Kenya 2010 provides inter alia everyone has the right to fair labour practices. No doubt, *the Constitution* has not defined the phrase or given a comprehensive description on what the right entails. Suffice to say that the right is incapable of precise definition. What is "fair" will depend on the circumstances of each case. An unfair practice in my view, could mean any act that is capricious, arbitrary and unilateral, one which unjustifiably cares not about the dictates of the law as was in this case. It is imperative to state that "practice" should be interpreted to include not only a habitual conduct but also a single act or omission.
118. I have carefully considered the circumstances of this case and hesitate not to find that in many respects the actions by the Respondent were arbitrary, capricious, and in defiance of the law, and therefore an infringement on the Claimant's right encapsulated in Article 41.
119. In my view, considering the conduct of the Respondent, this is a matter where general damages for breach of the Claimant's right to fair labour practice should be right and fair to be awarded.
120. I now turn to consider whether the petitioner's constitutional and statutory right against discrimination under Article 27 of *the Constitution* and Section 5 of the *Employment Act* was violated.
121. The *Employment Act* 2007 prohibits unfair discrimination at the workplace. Alleging that he was discriminated against by the Respondent, the Claimant anchored his case on the provisions of Section 5[5] of the Act, and Article 27 of *the Constitution*. He contended that he; was treated differentially in the course of his employment in a manner that amounted to discrimination; and suffered pay discrimination.
122. In my view, the provisions of Section 5[7] of the Act do not in any manner take away the responsibility of the employee asserting discrimination to first establish prima facie that there was discrimination before the burden shifts to the employer to prove that discrimination didn't occur as alleged by the employee. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, on the burden of proof in discrimination cases, the Supreme Court of Kenya held;

“In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharging of the evidential burden establishing their treatment at the hands of the 1<sup>st</sup> Respondent as



unconstitutional. Only with this threshold transcended, would the burden fall to the 1<sup>st</sup> Respondent to prove the contrary. In light of the turn of events at both the superior courts below, it is clear to us that, by no means, did the burden of proof shift to the 1<sup>st</sup> Respondent. .... In spite of the commonplace that proof of “indirect discrimination” is difficult, the Petitioners ought to have provided sufficient evidence before the Court, to enable it make a determination. The 1<sup>st</sup> Respondent, by a more positive scheme, went ahead to counter the bare allegations. The Petitioners failed, in this regard, to discharge their initial burden of proof.”

123. In *Simon Gitau Gichuru v Package Insurance Brokers* [2021] KESC 12 [KLR][22 October 2021][Judgment] the Supreme Court held:

“ 44. The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disapprove the allegations of discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Sub- section 7 provides:

“ [7] In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

46. This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. According to Section 5[7] of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the Appellant discharged the burden to shift it to the Respondent who failed to discharge on their part.”

124. According to the International Labour Organization, Discrimination [Employment and Occupation] Convention 111 the term discrimination includes;

“(a) any distinction, exclusion, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity, or treatment in employment or occupation;

Such other distinction, exclusion, or preference which has the effect of nullifying or impairing equality or opportunity in employment or occupation as may be determined by the member concerned .....

125. In the case of *Peter K Waweru V Republic* [2006] eKLR, defined discrimination [and I agree], thus;

“Discrimination means affording treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not



made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex.... a failure to treat all persons equally where no reasonable distinction can be found between the favoured and those favoured.”

126. Before I delve further into this issue, I remind myself that mere differential or inequality of treatment does not perse amount to discrimination. The Court of Appeal in Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR, held:

“Mere defferentia or inequality of treatment does not perse amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on the any rational basis having regard to the object which the legislation has in view.”

127. The Claimant asserted that the Respondent had an entrenched practice of paying employees of Chinese extraction allowances which it wasn't paying its employees of African extraction. He was specific on those allowances, house allowance and transport allowance. I have carefully considered the cross examination of the Claimant by Counsel for the Respondent on, and the evidence by all the Respondent's witnesses which never touched on or attempted to disabuse, the Claimant's evidence on this, and conclude that the evidence was not shaken or rebutted.

128. This Court hasn't lost sight that Section 31 of the *Employment Act* bestows upon an employee the right to reasonable accommodation or in lieu reasonable house allowance by the employer. In my view, therefore, a corresponding duty on the employer to provide. To an extend therefore, if an employer doesn't discharge this legal duty in favour of section of its employees, but for one section of its employees, duty falls upon him to provide a rational basis for the action. Where the employer fails to, as is in this case, an easy conclusion ensues, the act is arbitrary, unreasonable, and consequently discriminatory.

129. Faced with the Claimant's assertion, nothing could have been easier than for the Respondent as the Custodian of employment records of its employees under Section 74 of the *Employment Act*, to place forth documents to discount the assertions.

130. The Claimant contended that the Respondent's CEO got into the habit of hauling insults at him and therefore mistreating him, a thing that he wasn't doing to employees of Chinese extraction. The Respondent's witnesses were not able to sufficiently challenge the Claimant's evidence, I hold, largely because they weren't the right persons to testify on the aspect. It was not denied that the CEO who was at the center of the accusations raised against the Respondent by the Claimant remained in the employment of the Respondent at all material times. This as was admitted by RW2, in his evidence under cross examination. This was a crucial witness that the Respondent inexplicably didn't call. I hesitate not to make an adverse inference, had it called him to testify, his testimony couldn't have, aided its case, but instead prejudiced it.

131. It was common cause that at separation, the Claimant was serving under the contract that was entered into, on the 1<sup>st</sup> April 2015. Further, the contract provided for the Job description of the Claimant under clause 3. His duties and responsibilities were put forth thereunder in detail. Undeniably, through its letter dated 2<sup>nd</sup> November 2016, the Respondent communicated its decision to give him new duties and withdraw all other duties in the contract.



132. For clarity of record and easy understanding of the letter and how it related to the Claimant’s claim for discrimination, it becomes imperative that I quote it in extenso, thus;

“The Management of StarTimes [K] Ltd has decided to exercise its right of decision to change your duties from the currently allocated responsibilities and assign you new duties under your current contract.

Commencing 2<sup>nd</sup> November 2016 and up to expiry date of your current signed contract your duties shall be as follows;

- I. Competitor market activity observation and collection of information on the competition in the market.
- II. Conducting comprehensive analysis of competitor activity in the market vis a vis activity by StarTimes sales and Marketing teams.
- III. Planning of StarTimes Sales promotion activities for the whole country.

All other duties as indicated in your current contract are therefore withdrawn forthwith and will be reporting to the Sales Vice President and to the CEO on duties allocated. ....”

133. According to the Claimant, the duties that were taken away from him, were bestowed on Mr. Wang, who was his understudy. The action by the Respondent benefited Mr. Wang, but unjustifiably prejudiced him.

134. Hereinabove, I have found that the Respondent’s action was not aligned with the dictates of section 10 of the *Employment Act*. That the Respondent didn’t provide this Court with any rational basis for the unilateral change of the Claimant’s terms of employment contrary to the requirements of the law. The action was unreasonable and arbitrary.

135. I have carefully considered the evidence by the Respondent’s witnesses. Surprisingly, not even the Human Resources Manager [Rw2] deemed it fit to testify on as to who the duties that were taken away from the Claimant were deposited. Further, on the impact of the Claimant’s remuneration. I come to the inescapable conclusion that the Respondent failed to discharge his legal duty under Section 5[7] of the *Employment Act*.

136. In conclusion, considering the foregoing premises, I hold that the Claimant has established the elements of discrimination as brought out in the authorities hereinabove set out, and more especially the unconstrained definition in the case of Peter Waweru [supra]. He was discriminated against on the prohibited ground of race.

#### **Of the other reliefs sought**

137. I have already rendered myself on the Claimant’s claim for constructive dismissal, breach of his right under Article 41 (fair labour Produce) and Article 27 (against discrimination), and damages awardable to the Claimant. Outstanding therefore under this issue is a determination on the sought relief of gratuity/pension, and loss of earnings due to the amended contract, KShs.712,659.00.

138. Time and again this court has held that gratuity is different from service pay contemplated under section 35 of the *Employment Act*. Gratuity flows from a contractual term while service pay is a statutory benefit. The Claimant’s Counsel argued that the Claimant is seeking Gratuity/Pension pursuant to the provisions of the *Employment Act*. With great respect, the submission is misplaced.



The Employment Act does not at all provide for gratuity. See *Bamburi Cement Ltd vs. William Kimanzi* (2016) eKLR.

139. I am in agreement with the submissions by Counsel for the Respondent that the Claimant did not place forth any evidence to justify his claim for gratuity.
140. In the upshot, I decline the prayer for gratuity/pension.
141. Lastly, the Claimant sought for loss of earning for 6 months. In essence, I see the Claimant as claiming for remuneration for the remainder of his contract period. Having ordered compensation under the head “damages for constructive dismissal.” I am of the view that to make an award under this head shall amount to over compensation. It is for this reason that I decline to award the Claimant the sum sought or any other.
142. By reason of the foregoing premises, judgment is entered for the Claimant in the following terms:
  - a. A declaration that the Claimant was constructively dismissed.
  - b. A declaration that the Claimant’s right not to be discriminated against on account of race under Article 27 of the Constitution was violated.
  - c. Compensation for the constructive dismissal pursuant to the provisions of section 49(1)(c) of the Employment Act, four (4) months gross salary KShs.458,400.00.
  - d. General damages for the violation of the Claimant’s right not being discriminated against, KShs.1,600,000.00 (one million six hundred thousand).
  - e. Interest on the sums awarded above from the date of this judgment till full payment.
  - f. Costs of this suit.

**READ, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence;

Mr. Kingori for the Respondent

Ms Wanjaa holding brief for Mr. Mugo for the Claimant

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the 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**

