



**Otieno v Mutsimoto Motor Company Limited (Petition E003 of 2022)
[2024] KEELRC 1663 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1663 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E003 OF 2022
DN NDERITU, J
JUNE 26, 2024**

BETWEEN

DAVID MUZUNGU OTIENO PETITIONER

AND

MUTSIMOTO MOTOR COMPANY LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The petitioner, an adult male of sound disposition, through S.K Mburu & Co. Advocates, commenced these proceedings by way of a petition dated 8th April, 2022 filed in court on 14th April, 2022 wherein he prays for -
 - a. That there be a declaration that the petitioner’s fundamental rights and freedoms under Article 27(1) & (2), 28 and 41(1) & (2)(a) of *the Constitution* of Kenya have been and were grossly violated by the respondent as contained in the body of the petition.
 - b. That general damages, exemplary damages and aggravated damages under Article 23(3) of *the Constitution* of Kenya for the unconstitutional conduct of the respondent be awarded to the Petitioner.
 - c. That a declaration be made to the effect that the Petitioner’s resignation herein was not voluntary and that the Petitioner was constructively dismissed by the respondent
 - d. That the petitioner be awarded 12 months’ compensation for the unlawful and unjustified termination as provided for under section 49 (c) of the *Employment Act* 2007, Laws of Kenya calculated as hereunder:

Position- Machine attendant

Basic salary - Kshs17,551.00



House allowance - Kshs2,635.65/-

Total - Kshs20,184.00/- X 12 months = Kshs242, 208.00

Total claims for compensation = Kshs242,208.00

- e. That the respondent to pay the Petitioner one month's pay in lieu of the notice as provided in the [Employment Act](#) 2007, totalling to Kshs20,184/- as follows:

Laws of Kenya are calculated as hereunder:

Position - Machine attendant

Basic salary - Kshs17,551.00

House allowance - Kshs 2,635.65/-

Total - Kshs20,184.00/-

Total claim for notice pay - Kshs20,184.00/-

- f. That costs of this petition be awarded to the Petitioner.
- g. That any further orders, writs, or directions as this Honourable Court may consider be granted to the Petitioner.
1. The petition is expressed to be anchored on Articles 22, 23, 27(1)(2)(4) & (5), 28, 41(1) & (2)(a) of [the Constitution](#).
 2. The petition is accompanied with a supporting affidavit sworn by the Petitioner on even date with several annexures thereto.
 3. The facts and the law relied upon are set out in the body of the petition and the same shall be recited and analysed in the succeeding parts of this judgment.
 4. The respondent, a duly incorporated and registered limited liability company in Kenya, was initially represented by Konosi & Company Advocates but subsequently appointed Kamau Ngigi & Co. Advocates to act for it vide a notice of change of advocates dated and filed in court on 20th January, 2023.
 5. In response to the petition, the respondent filed a replying affidavit sworn by Ken Korir, the respondent's human resource manager on 25th July, 2022 and filed in court on 28th July, 2022, with several annexures thereto. In the replying affidavit, the respondent prays that the petition is a non-starter, incompetent, an abuse of the court process, and devoid of any merit and prays that the same be dismissed with costs.
 6. On 28th September, 2022 it was by consent agreed that the matter do proceed for hearing in open court by way of viva voce evidence. The matter came up for hearing on 8th March, 2023 when the petitioner (PW1) testified and closed his case, while the respondent's human resource manager, Mr. Ken Korir (RW1), testified on the same day and the respondent's case was closed as well.
 7. Counsel for both parties summed up their respective clients' case and addressed the court by way of written submissions. Counsel for the petitioner, Mr. Mburu, filed his submissions on 24th April, 2023 while Mr. Kamau for the respondent filed his written submissions on 12th May, 2023.



II. The Petitioner's Case

9. The petitioner's case is based on the filed petition, the supporting affidavit and the annexures thereto, his testimony in court, and the written submissions by his counsel. The same is summarized as hereunder.
10. The petitioner was initially engaged by the respondent as a casual employee in Nakuru Town within Nakuru County around the year 2015 and thereafter he was employed on permanent basis on 7th January, 2020 as a machine-attendant vide a letter of appointment dated 6th April, 2020, allegedly based on his exemplary performance during his tenure as a casual.
11. The petitioner started with a gross monthly salary of Kshs14,861/- with a housing allowance of Kshs2,229/-

After completing his probation, his gross salary was increased to Kshs20,184/- comprised of a basic salary of Kshs17,551.00/- and housing allowance of Kshs2,632.65. He served as a machine-attendant, operating the deep drawing machine in the production of fuel filters.
12. The facts that led to the petitioner's alleged constructive dismissal or discharge are that on or about October, 2021 he fell ill while at work. The illness persisted and on or around 8th November, 2021, he visited the respondent's health facility where he was attended to and then referred to Nakuru Provisional General Hospital (PGH) for further tests. He was diagnosed with Tuberculosis (TB).
13. The petitioner pleads that he notified the respondent of his infectious illness and he was placed on sick-leave that commenced on 8th November, 2021. He later on sought for medical services at Jaramogi Oginga Odinga Teaching & Referral Hospital (JOOTRH) and he was placed on strict medication from 15th November, 2021.
14. After a lengthy recovery period, for which he pleads that he was on authorized sick-leave, the petitioner returned to work on 4th January, 2022.
15. However, a workers committee, an employees' welfare committee comprising of the respondent's members of management and employees, allegedly demanded from the petitioner that he resigns or face termination on medical grounds due to his allegedly highly contagious and infectious condition. The petitioner countered that he had been cleared by JOOTRH to resume his duties and that there was no contrary recommendation from any medical practitioner or a medical institution.
16. The petitioner pleads that he was subjected to immense pressure, duress, and coercion by the respondent, through the said committee, with constant bullying and lockouts from the workplace. This allegedly led him to give in to the respondent's demands, believing that he was a danger at the workplace. The petitioner pleads that he was given a paper and a pen and requested to write a resignation letter and he thus drafted a resignation letter dated 4th January, 2022.
17. The petitioner avers that his resignation was not voluntary and that the respondent constructively dismissed him based on his diagnosis with TB for which he claims that he was treated and healed from 15th November, 2021 to 4th January, 2022. He pleads that the constructive dismissal was based on unfounded fears and discrimination towards his illness which amounted to unfair labour practices. The Petitioner avers that he acted responsibly by informing the respondent of his infectious disease but the respondent acted in a malicious and discriminatory manner in dismissing him. The particulars of the constructive dismissal are pleaded as follows -

Particulars Of Constructive Dismissal



- a. Coercing, intimidating, pressuring, and victimizing the petitioner into resigning from his duties due to contraction of an airborne communicable Tuberculosis ailment.
- b. Keeping the petitioner from the workplace from 15th December, 2021 up to 4th January, 2022 despite a doctor's recommendation on his fitness for work without any justifiable reason
- c. Subjecting the petitioner to constant prodding and questioning for hours on end to compel him to resign from his duties
- d. Failing to implement a mechanism to accommodate employees suffering from infectious and highly communicable diseases.
- e. Stigmatizing, victimizing, humiliating and failing to assist the Petitioner herein on account of contraction of an infectious and highly communicable disease.
- f. Forcing the Petitioner into resignation to allegedly minimize the risk of an outbreak of Tuberculosis (TB) infections at the workplace.
- g. Failing to comply with the law relating to reporting of infectious diseases at the workplace and instead resorting to coercing the petitioner to resign from his duties.
- h. Using the respondent's work committee to coerce, pressure, humiliate, prod, victimize, stigmatize, and harass the petitioner into resignation.
 1. The petitioner avers that the procedure in terminating him as adopted by the respondent was discriminatory, thereby violating the provisions of the [Employment Act](#) (the Act) and Article 41 (1) of [the Constitution](#), constituted an unfair labour practice, and as such the petitioner's right to equality and freedom from discrimination as envisioned under Article 27 (5) of [the Constitution](#) of Kenya was allegedly violated. The particulars of the purported breach of the petitioner's right to equality and freedom from discrimination allegedly included -
 - a. Constructively dismissing the Petitioner based on his health status; and,
 - b. Constructively terminating the Petitioner on account of contraction of an airborne communicable disease.
 2. The petitioner avers that the respondent's actions violated his right to dignity as outlined in Article 28 of [the Constitution](#). The particulars of the alleged breach of the petitioner's right to human dignity are pleaded as -
 - a. Constructively dismissing the petitioner based on his health status in an undignified manner
 - b. Constructively terminating the Petitioner on account of contraction of airborne communicable disease in an undignified manner
 - c. Having little or no regard for the petitioner's dignity as a human being prior to and immediately after constructive dismissal
 - d. Humiliating the Petitioner on account of contraction of an infectious disease
 - e. Victimizing and subjecting the petitioner to stigmatizing on account of contraction of an infectious disease.



3. The petitioner avers that his termination was in violation of his right to fair labour practices as outlined in Article 41(1)(2) (a) of the Constitution. The particulars thereof are pleaded thus -
 - a. Failure to employ fair labour practices in terminating the petitioner's employment
 - b. Failure to follow the procedure that is laid down in the Employment Act, 2007 with regards to termination of Employment.
4. In his testimony in court, the petitioner reiterated the contents of the petition, his supporting affidavit, and his written statement, all filed in court, as his evidence-in-chief. He produced the documents listed and filed which were marked as exhibits 1 to 14.
5. In cross-examination, the petitioner admitted that he was initially employed as a casual but he was promoted to a machine-attendant in 2020. He reiterated that on 5th November, 2021, he fell ill and sought for medical attention at the Provincial General Hospital (PGH) Nakuru. He stated that he applied for sick-leave to go to JOORTH for further medication and the said hospital wrote a letter that he required more time (one month) to recover, and the respondent allowed him to take the extended sick-leave.
6. He stated that he reported back to work on 22nd December, 2021, on half-pay, but the hospital wrote another letter confirming that he was improving. However, that time when he reported back to work the respondent had closed for the Christmas holidays. He stated that he reported back to work on 4th January, 2022 and there was a meeting of the workers committee on that day. He admitted that he informed the committee that he was on treatment for TB as per the medical records that he availed.
7. He stated that he wrote the resignation letter dated 4th January, 2022 to the workers committee. The letter of resignation was marked petitioner's exhibit no. 11. He stated that he was paid while on sick-leave and that he was fit to return to work after recovery. Although he did not explain his reasons for resigning, he alluded to the fact that the machine that he was operating was dangerous to his health since he was on medication. He further stated that the drugs that he was using caused him dizziness and that he was put on medication for six months.
8. It is on the basis of the foregoing evidence and circumstances that the petitioner is seeking that judgment be entered in his favour as prayed in the petition. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

26. The respondent's case is entailed in the replying affidavit of Ken Korir (RW1), the human resources manager, his oral testimony in court, and the submissions by its counsel, as summarized hereunder.
27. In the replying affidavit it is deposed that the respondent is a reputable business that respects the rights of its employees within a well-stipulated legal framework. It is deposed that the petition was filed in bad faith and in an attempt to defame the respondent.
28. Further, it is deposed that the petitioner was initially engaged by the respondent as a casual and later on as a machine-attendant on permanent basis.



29. It is deposed that on 12th November, 2021 the petitioner applied for leave of absence to seek medication at JOOTRH, which leave was granted. On 15th November, 2021, the respondent received a letter stating that the petitioner had been diagnosed with pulmonary tuberculosis and he requested for two weeks off-duty and a month in sick-leave for recovery. The respondent responded to that letter on 29th November, 2021 granting to the petitioner one month sick-leave as sought for.
30. Further, the letter stated that the petitioner was still on anti-TB drugs until May 2022, requiring frequent clinic visits for review and refills. The respondent allegedly discussed the petitioner's sickness and absence from work during a workers committee meeting on 4th January, 2022, considering other employees' welfare and acknowledging petitioner's illness, and accepted his purported voluntary resignation, without notice, and the respondent informed the petitioner that once he had fully recovered he was free to visit the respondent for consideration for re-engagement.
31. On 10th January, 2022, the respondent calculated the final dues owed to the petitioner and he was paid his dues for which he acknowledged receipt vide a cheque issued to him in the sum of KShs18,723/=, less statutory deductions. He was also allegedly issued with a certificate of service dated 12th January, 2022.
32. It is deposed that despite the petitioner's doctor recommending the petitioner fit to resume duty, the petitioner could not effectively execute his duties as his position as a machine-attendant demanded him to be in good health and strength. Further, it is deposed that the respondent was cautious in determining if the petitioner was to remain in the workplace due to the need to protect other employees as it was under obligation, duty, and responsibility of ensuring their safety and health at the workplace.
33. It is deposed that the respondent was humane to the petitioner to the extent that in 2021 after the petitioner had depleted his leave days he was granted 43 extra days on half-pay. Further, the respondent allegedly re-engaged him after he gained full recovery and the recommendation for medication which was to lapse in May, 2022. The respondent denies breaching the petitioner's right to dignity and purports that the petitioner's resignation was voluntary. It is deposed that the respondent facilitated the petitioner's medical treatment during the entire period of his employment.
34. In his testimony in court RW1 reiterated the contents of the replying affidavit filed as summarized above and relied on the same as his evidence-in-chief. He also relied on and produced the documents annexed to the replying affidavit as exhibits 1 to 22.
35. He testified that the workers committee that handled the petitioner's matter comprises of five members, including the human resources manager as chair, three members chosen by the human resources department, and a union officer from the shop stewardship. The said committee met at least once a month to discuss and handle matters of workers' welfare. He stated that the petitioner was on sick-leave for a long time and he reported back on 4th January, 2022, when the committee was coincidentally holding new year's first monthly meeting to discuss workers' welfare.
36. He stated that the workers committee had no mandate for hiring or terminating employees as it is the management, through human resources, that was in-charge of hiring and firing. He stated that the respondent did not, constructively or otherwise, terminate or dismiss the petitioner. He further stated that the petitioner was neither discriminated nor harassed and that the respondent considered and recognized the petitioner as a reliable and hard-working employee who rose from a casual worker to a machine-attendant after six months of training.
37. He stated that as a qualified human resource practitioner he understands that an employer has a right to know and enquire about the health status of its employees as that helps in taking care of the health



- of the employees and supporting the employees seeking and or in need of medical interventions. He stated that he knew that the petitioner was unwell from the information from the correspondences that the respondent received from hospitals including PGH Nakuru and JOOTRH.
38. He stated that the petitioner was paid by the respondent while on extended sick-leave but that he resigned voluntarily on 4th January, 2022. He further stated that the petitioner was allowed time to consider and decide on whether he wished to resign or not, and that he voluntarily decided to resign. He therefore stated that this petition is improperly before the court as it is an afterthought intended to unjustly enrich the petitioner. He therefore prayed that the petition be dismissed with costs.
 39. In cross-examination, RW1 stated that he is a holder of a Bachelor's degree in human resources management and that he began working with the respondent on 12th January, 2022. He stated that he is in-charge of human resources management with the respondent whose primary business is assembling motor vehicle oil-filters and coolant systems with its headquarters in Nakuru with shops in Nairobi, Mombasa, and Kisumu.
 40. He stated that the petitioner was engaged as a machine-attendant vide a letter of appointment dated 6th January, 2020 signed by Mr Rajan P. Shah, the CEO, on behalf of the company. He stated that the respondent had not engaged a human resources manager before he joined the respondent and that he was not an employee of the respondent as of 4th January, 2022 when the petitioner resigned.
 41. He stated that the employees worked in three shifts, but two of the three shifts, each of comprising of about 78 persons, worked in the morning. He stated that the petitioner was in the morning shift on 4th January, 2022, in the assembly department with about 65 other employees present on that day.
 42. He stated that the petitioner was employed on 7th January, 2020, and that while there was a collective bargaining agreement (CBA) in place, it is unclear whether the petitioner was a member of a trade union.
 43. He further stated that the workers committee was intended to cater for the welfare of the workers as provided for in the internal management manuals and policies of the respondent. He explained that the committee comprised of nine members, two from management and seven employees. The members of the workers committee are inducted by the human resources management department usually every time that a CBA expired.
 44. He stated that he was not sure of the members of the committee who attended the meeting of 4th January, 2022 as there are no minutes available in regard to the said meeting and that he had by then not joined the respondent. He stated that the committee's recommendations were not final or binding and were sent to management for ratification before implementation.
 45. He stated that the respondent was informed of the petitioner's illness on 8th November, 2021 as per the medical reports produced. Although there are laws and policies in place for employers to follow in the case of infectious diseases, the management did not subject any workers to testing despite discussing the petitioner's condition. Furthermore, the committee responsible did not notify the Director of Safety at the workplace or the health department of the county or public health.
 46. He stated that the company doctor sent the petitioner for a second medical opinion and cleared him fit to resume work with medication. He clarified that the workers committee meeting held on 4th January, 2022 coincided with the date when the petitioner was resuming work. He stated that had the petitioner not resigned, he was free to resume his duties as the respondent had no intention or basis for terminating or dismissing him.



47. It is on the basis of the foregoing evidence and circumstances that the respondent seeks and prays that the petition be dismissed with costs. The submissions by counsel for the respondent shall be considered in the succeeding parts of this judgment alongside those by counsel for the petitioner.

IV. Submissions By Counsel

48. On the one hand, counsel for the petitioner identified two issues for determination - Whether the petitioner's resignation through the letter dated 4th January, 2022 was voluntary as urged by the respondent or involuntary as purported by the petitioner hence amounting to constructive dismissal; and, Whether the petitioner is entitled to compensation for unlawful termination and to the costs of the petition.
49. On whether the resignation was voluntary or involuntary, it is submitted that it is not in dispute that the petitioner was an employee of the respondent since 2015, first as a casual employee and later on permanently from 7th January, 2020 as a machine-attendant. He was, in the words of RW1, an exemplary employee and was selected for training and thereafter promoted based on his hard work. It is further not disputed that on or around 5th November, 2021 the petitioner was diagnosed with TB and was granted sick-leave to seek for medical intervention.
50. On 4th January, 2022, the petitioner resigned via a resignation letter of even date which resignation the respondent accepted on the same day. It is submitted that the ultimate question is whether the resignation was voluntary or involuntary as both sides hold diametrically opposed view points.
51. Counsel cited Catherine Kanaiza Aradi vs Little Lambs Company Limited (Little Lambs Children Centre) [2017] eKLR wherein involuntary resignation was described as resignation arising from difficult circumstances or conditions of work that make it difficult for an employee to continue working and which resignation amounts to constructive dismissal and unfair labour practices under Article 41 of *the Constitution*. Further, counsel cited Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] eKLR wherein the Court of Appeal cited the case of Western Excavating (ECC) Ltd vs Sharp [1978] 1 CR 22 in which Lord Denning held that if the employer is guilty of conduct which is in significant breach of the contract of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of contract, then the employee is entitled to treat himself as discharged from any further performance in obedience of the said contract. If he does so, then he terminates the contract because of the employer's conduct which amounts to constructive dismissal. Counsel also cited Wilber Opiyo Ogol vs Wells Fargo Limited [2022] eKLR on this same issue of involuntary resignation and constructive dismissal in firming-up his position. The court is urged to resonate with the reasoning in Kenneth Kimani Mburu & another vs Kibe Muigai Holdings Limited [2014] eKLR wherein constructive dismissal was described as a breach of duty, trust, and confidence by the employer.
52. In regard to the resignation letter, it is submitted that while the said resignation letter does not prima facie show any evidence of constructive dismissal or distress on the part of the petitioner the resignation was actually involuntary and as a result of the respondent's behaviour towards the petitioner which was aimed at forcing the petitioner out of his job due to his contracting an infectious illness.
53. It is submitted that the petitioner was given writing material on which to write the said resignation letter and that the contents thereof were dictated to him by a Mr. Chege culminating in his resignation allegedly due to his personal health. It is submitted that the respondent's quick acknowledgment of receipt of the resignation letter and the equally quick response thereto was cynical and hypocritical. Equally cynical and hypocritical, it is submitted, that the respondent allegedly waived the one-month notice on resignation. It is submitted that the fact that the respondent also failed to explain the



- circumstances under which the workers Committee obtained information about the petitioner's diagnosis, yet the respondent did not comply with statutory provisions regarding infectious diseases at the workplace, allegedly points towards an elaborate scheme by the respondent to dismiss the petitioner.
54. Counsel cited the Supreme Court in Simon Gitau *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019)* KESC (KLR) on the duty of an employer to accommodate an employee who is afflicted by a health disability. Further, counsel cited Bernard Gonzale Lando vs Mehta Electrical Limited [2015] eKLR on the same aspect. It is submitted that the petitioner acted responsibly by informing the respondent of his affliction by an infectious disease and stayed away from work until a health provider recommended his return. However, it is submitted that the respondent did not act responsibly as it did not hold a meeting to handle the issue but instead left the matter to the workers committee that kept the petitioner away from work for an extended period of time allegedly due to safety and health concerns for the other workers. In that regard counsel cited Mtawali Kedenge Mramba vs Nyati Auto Spares [2017] eKLR where the court stated that in situations such as those obtaining in this petition, an employer ought to act as required under the Act and the *Occupational Safety and Health Act*, 2007. It is submitted that there were no measures demonstrated to have been taken by the respondent to bring the issue to the attention of the relevant authorities charged with public health and or infectious diseases. It is submitted that the respondent offered no assistance to the claimant and adopted the wrong approach by stigmatizing and dismissing the claimant as a measure of minimizing the risk of the disease spreading amongst the other workers in the workplace.
55. Counsel cited Edwin Beiti Kipchumba vs National Bank of Kenya Limited [2018] eKLR wherein hasty acceptance of an involuntary resignation letter was condemned by the court. Further, in *Gichuru vs Package Insurance Brokers Ltd (supra)* the court opined that an employer should take all reasonable measures to accommodate an employee who is in bad health until such an employee recovers or is terminated in a lawful manner. Counsel also cited Peter Njeya Chembe vs Paddy Kenya Limited [2020] eKLR whereby it was held that an employee who was terminated on account of contracting TB was unfairly and unlawfully terminated.
56. Counsel also cited Kennedy Nyaguncha Omanga vs Bob Morgan Services Limited [2013] eKLR wherein the court held that treatment notes and sick-off sheets do not qualify as medical reports for purposes of termination of employment on medical grounds and as such it is submitted that the respondent was wrong and acted unfairly and unlawfully on relying on such documents in forcing the petitioner to resign.
57. Counsel cited Section 47(5) of the Act which provides that the burden of proving unfair termination of employment or wrongful dismissal rests with the employee while the burden of justifying the grounds for the termination of employment or wrongful dismissal rests with the employer. It is submitted that the petitioner was not issued and served with a notice of termination. It is submitted that the meeting of the workers committee held on 4th January, 2022 was deliberately and purposely convened to discuss the viability and safety of the petitioner to work while suffering with an infectious disease. It is submitted that the respondent terminated the petitioner without following the procedure set out in the Act and the *Occupational Safety & Health Act*. It is submitted that the petitioner was constructively dismissed on the recommendation of the said committee without due process.
58. It is submitted that the minutes of the workers committee meeting of 4th January, 2022 were important records that should have clarified the nature and the circumstances of petitioner's termination, yet the respondent did not avail those minutes in court. It is re-emphasized that to ensure procedural fairness under Section 41 of the *Employment Act*, the respondent was required to notify the petitioner of the disciplinary process and allow him to have a witness of his choice at the meeting, a union representative,



- if he was a member of a union, and for him to call and submit his evidence. Counsel urges the Honourable Court to find that the petitioner was constructively dismissed by the respondent upon being coerced and compelled to issue an involuntary resignation letter on the basis of him suffering from an infectious disease.
59. On compensation, it is submitted that the petitioner is entitled to compensation as provided for under Section 49 (c) of the Act. Counsel has submitted that the claimant deserves the maximum compensation equivalent of twelve (12) months' gross salary at Kshs242,208/=. Counsel has cited Paul *Wafula vs Century Feeds Ltd Nakuru E&LRC Cause No. 186 of 2018*(unreported) wherein this very court set out parameters for consideration when awarding maximum compensation under Section 49 (c) of the Act. Counsel also cited Bernard Gonzale Lando vs Mehta Electrical Limited (Supra) and Peter Njeya Chembe vs Paddy Kenya Limited (Supra) in support of that argument.
 60. On one month's pay in lieu of notice, it is submitted that the petitioner is entitled to one month's pay in lieu of notice based on Section 35 of the Act. Counsel cited *James Ochar Oyoo vs Sunripe Alpha Academy Nakuru E&LRC No. 112 of 2017*, urging the court to award to the petitioner Kshs20,184/= in lieu of notice.
 61. On the claim for violation of petitioner's constitutional rights, it is submitted that the decision by the respondent to constructively dismiss the petitioner violated his right to fair labour practices under Article 41(1) & (2)(a) of *the Constitution*. It is submitted that the respondent also breached the petitioner's right to equality and freedom from discrimination under Article 27 of *the Constitution*. Counsel cited Zipporah Machocho vs Badala Nursery & Primary School [2019] eKLR and Henry Simiyu Wanyonyi vs Unga Holdings Limited & another [2021] eKLR, both of which dealt with the issue of and compensation for discrimination on account of health status. Counsel also cited Gichuru vs Package Insurance Brokers Ltd(supra) on the same issue.
 62. It is submitted that the respondent also breached Article 28 of *the Constitution* and violated the petitioner's right to dignity. Counsel cited Wilson Macharia vs Safaricom PLC [2021] eKLR wherein the court made an award of Kshs6,000,000/- for discrimination. In Gichuru vs Package Insurance Brokers Ltd (supra) the court awarded Kshs2,000,000 while in Henry Simiyu Wanyonyi vs Unga Holdings Limited (supra) the court awarded Kshs2,000,000/= as damages in compensation for discrimination.
 63. On costs, the court is urged to exercise its discretion in favour of the petitioner.
 64. On the other hand, counsel for the respondent identified the issues for determination as - Whether the petition has met the threshold of a constitutional petition; Whether the petitioner was constructively dismissed from employment; and, Whether the petitioner is entitled to compensation as prayed.
 65. On whether the petition has met the threshold of a constitutional petition, it is submitted that the preamble in the title of the petition and in the petitioner's submissions state that it is a petition arising from an alleged constructive dismissal of the petitioner from his employment by way of involuntary resignation on 4th January, 2022, and breach of the petitioner's right to equality and freedom from discrimination, human dignity, and fair labour practices under Articles 27 (5), 28 and 41 (1) & (2) of *the Constitution*. It is submitted that the title betrays the petitioner's disguise of bringing a petition for a claim for dismissal from employment instead of filing an ordinary cause. It is submitted that as per the particulars of the alleged constructive dismissal, the petition does not meet the threshold that has been set in the obtaining jurisprudence regarding petitions that allege breach of *the constitution* and or violation of constitutional rights. Counsel cited Mumo Matemo vs Trusted Society of Human Rights [2013] eKLR and Trusted Society of Human Rights Alliance vs Attorney General & 2 others [2013] eKLR in support of that argument.



66. Counsel submits that while the petitioner's rights were allegedly violated under various Articles of *the Constitution* the claim is basically one based on alleged unfair termination. It is submitted that remedies for such alleged unfair termination may only be issued within the confines of Sections 49 & 50 of the Act.
67. Counsel cited *Evans Ladtema Muswahili vs Vihiga County Public Service Board & 2 other and Marley Ezekiel Ayiego (Interested Party) [2021] eKLR* wherein the court held that lack of evidence in support of a pleading renders a cause superfluous. Further, it is submitted that in *Gabriel Mutava & 2 Others V Managing Director, Kenya Ports Authority (2016) eKLR* it was held by the Court of Appeal that constitutional litigation is not a panacea for all manner of litigation and that since the dispute herein is of an employer-employee relationship the same ought to have been instituted through an ordinary cause in this court. Counsel also cited *Edward Karanja Chogo & 2 others V County Government of Kakamega [2018] eKLR* and *Kenya Agricultural and Livestock Research Organization (KALRO) vs Edison Sonje Taura & 3 others [2021] eKLR* in support of that same argument, that the subject matter hereof is purely between an employee and an employer and hence purely an employment relationship subject.
68. The court is urged to apply the doctrine of constitutional avoidance and strike out the petition as the same was filed in total abuse and disregard of the court process. Counsel has urged the court to adopt the definition in the *The Black's Law Dictionary 10th Edition* that constitutional avoidance is "the doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion." Counsel re-emphasized that the petition alleges wrongful and unlawful termination by way of constructive dismissal which is squarely in the realm of remedies provided for in the Act and the *Employment and Labour Relations Court Act*.
69. It is submitted that the petitioner should have filed an ordinary cause and not a constitutional petition alleging violation of constitutional rights and fundamental freedoms without supporting evidence. The court is urged to dismiss the petition in its entirety and to be persuaded by the holding in *Rodgers Mwema Nzioka vs The Attorney General & 8 others [2006] eKLR* wherein it was held that the applicant had trivialized the constitutional jurisdiction of the court by deliberately avoiding to pursue the available statutory remedies of compensation and instead opting for a groundless constitutional petition. It was further held that such manoeuvres constitute abuse of the court process.
70. On whether the petitioner was constructively dismissed from employment, counsel cited *Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] eKLR* on what constitutes constructive dismissal submitting that the petitioner admitted that he voluntarily wrote the letter of resignation dated 4th January, 2022 and thus the petitioner's alleged claim does not fall within the confines of constructive dismissal as there was clearly, factually, and evidentially no dismissal, constructive or otherwise.
71. Counsel re-emphasized that constructive dismissal occurs when an employee terminates his or her employment due to frustration caused by the conduct of an employer breaching fundamental terms of the contract of employment or making the work environment unbearable for the employee, thus forcing the employee to terminate the contract. It is submitted that in the instant case no evidence of constructive dismissal was presented to the court. Further, it is submitted the petitioner has not demonstrated a harsh or hostile working environment but instead he showed-cased seven years of his work, promotions, and salary increments that he ruined as a result of his voluntary resignation.
72. On compensation, it is submitted that on 10th January, 2022 the respondent calculated the final dues payable to the petitioner, and after considering statutory deductions, the petitioner was paid a sum of Kshs20,184/= which the petitioner signed for and he was issued with a certificate of service dated



12th January, 2022 in accordance with the law. It is further submitted that the petitioner voluntarily resigned from work and is therefore not entitled to compensation for the alleged wrongful, unfair, and or unlawful dismissal, constructive or otherwise. In that regard counsel cited *Katana Mwangandi vs Board of Governor Takaye Primary School* [2017] eKLR in support of that argument.

73. On one month's pay in lieu of notice, it is submitted that owing to the petitioner's condition notice was waived and in any event the respondent informed the petitioner that he was free to re-apply for re-engagement once he was recovered and fit to work. It is submitted that the petitioner is not entitled to such payment in lieu of notice and counsel cited *Robert Indiazi vs Tembo Sacco Limited* [2018] eKLR in support of that argument.
74. On costs, the court is urged to dismiss the petition with costs to the respondent.

V. Issues For Determination

75. The court has carefully and dutifully gone through the pleadings filed, including the affidavits, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The court identifies the following issues for determination -
- a. Is the petition properly before the court or is the same filed in abuse of the court process?
 - b. Was the petitioner constructively dismissed from his employment?
 - c. Were the petitioner's constitutional rights infringed or violated as pleaded?
 - d. Is the petitioner entitled to compensation as sought?
 - e. Who should bear the costs of this petition?

V. A Constitutional Petition Or An Ordinary Cause?

76. The nature of proceedings filed in court is deciphered and understood based on the pleadings and the remedies sought. Either way, the golden rule of evidence applies – he/she who alleges must prove. However, the law and rules of procedure apply in guiding parties and courts on which claim goes to which court. This goes to the root and foundation of litigation based on jurisdiction of various courts, court procedures, and process. A party who deliberately or otherwise fails to follow the laid down procedures and rules risks being found out of order and or in abuse of court process which may render the proceedings amenable to striking out for a variety of reasons ranging from lack of jurisdiction, irregular or unlawful pleadings, procedural impropriety, amongst many other reasons.
77. For reasons that are laid out in the subsequent part of this judgment, the court is of the considered view that the proceedings herein may very well have been dealt with in an ordinary cause as opposed to a constitutional petition. However, for substantive justice to prevail, the court shall consider the proceedings as filed and presented rather than opt for the draconian process of evaluating the petition for striking out on that ground, which for all intents and purposes is not a mere technicality. Nonetheless this is an issue that counsel and litigants ought to put into consideration before filing a matter in court.

V. Constructive Dismissal

78. The terms and conditions of employment of the petitioner are not really in contest. The petitioner was initially engaged by the respondent as a casual but subsequently graduated to a permanent employee as a machine-attendant as evidenced in a letter of appointment dated 6th January, 2020. His starting gross monthly salary was Kshs17,090/=, comprising of basic salary of Kshs14,861/= and housing allowance



of Kshs2,229/=. He was on probation from 7th January, 2020 to 7th April, 2020 and he was confirmed in a letter of confirmation dated 7th April, 2020. His gross monthly salary was later on increased to a sum of Kshs20,184/=, comprising of basic salary of Kshs17,551/= and housing allowance of Kshs2,632/=. That was the petitioner's last known gross monthly salary.

79. The crux of the matter and the bone of contention between the parties is whether the petitioner voluntarily resigned from employment or whether he was constructively dismissed or terminated. Loosely described, was the petitioner pushed out or did he jump?
80. Going by the evidence presented by the respondent before the court, and both sides agree on this, the petitioner was an efficient, reliable, and hardworking person. It is for that reason that the respondent selected the petitioner and trained him for six months for him to qualify as a machine-attendant and thereafter engaged him in that capacity on permanent basis.
81. However, in or about October, 2021 the petitioner fell ill and sought medical attention from the company's doctor, who referred him to PGH Nakuru. It was then discovered that the petitioner had contracted pulmonary TB, a highly infectious respiratory disease. He was immediately put on anti-TB medication and granted sick-leave by the respondent to seek further medication and treatment at JOOTRH and elsewhere.
82. On 4th January, 2022 the petitioner reported back to work after a long and extended sick-leave. On the same day, a committee comprising of members from management and employees, named workers committee, was meeting. According to the respondent the occurrence of the meeting on a date that the petitioner was to resume duty was coincidental, but according to the petitioner the meeting had been called and assembled to discuss his illness and health status with the intention of ensuring that he did not resume duty. According to the petitioner, the committee summoned him and explained that they were aware of his illness and he was allegedly directed to a different room as the committee went about its deliberations. The petitioner alleges that thereafter he was forced to resign. The petitioner alleged that he was given a pen and paper by a Mr. Chege, purportedly a member of the management and the workers committee, and he penned the letter of resignation alluded to above.
83. However, the respondent gave evidence that is diametrically opposed to that of the petitioner in regard to the resignation. RW1 stated that it was purely coincidental that the workers committee was meeting on the same date that the petitioner was reporting back to work following a long sick-leave. He stated that the committee was holding its first meeting in the new year and the issue concerning the petitioner came up as a by-the-way. In any event, he stated that the committee had no powers to hire or fire an employee or making any recommendations in that regard. He did not attend the meeting as he had by then not been engaged by the respondent. However, he did not avail the minutes of that meeting nor did he offer an explanation as to why the said minutes were not availed in court. However, the witness stated that as per the evidence he gathered the petitioner voluntarily resigned on that day and he was let go with the understanding that if his health improved he was free to apply for re-engagement.
84. The letter of resignation by the petitioner stated as follows -
David M. Otieno
Box
4/01/2022
To the Management
RE: Resignation Letter
Due to my personal health, I would like to resign for a time to make sure am well to do my normal work.



Hope you will help with that

Yours Faithfully

(Signed)

David Otieno\

85. However, the petitioner claims that he also wrote another letter of resignation on the same date allegedly dictated to him by Mr. Chege. He annexed a copy of the said second letter to his supporting affidavit to the petition which stated that due to his bad health he wished to resign from employment with immediate effect. However, the response by the respondent below clearly indicates that the letter of resignation that it responded to is the one reproduced above and not the other one alluded to by the petitioner.

86. The respondent replied to the petitioner's letter of resignation on the same day in the following terms –

04th January 2022

David Otieno

P/R No. 1100

Nakuru

RE: Resignation

We refer to your letter notification on your resignation dated 04/01/2022 and the same is accepted with regret.

However, you are required to give the company one month's notice in lieu which we are going to waiver due to the circumstances that have made you to resign.

Please arrange to clear by returning all company property in your possession after which you will be paid all dues owing to you by the company.

We wish you all the best with your treatment and when you are fit, please do come and see us to see if your position is still available.

Your final dues will be ready for collection by 31/1/22.

Yours Sincerely

Mutsimoto Motor Co. Ltd

(Signed)

Paul Chege for HR

cc Labour Office

Nakuru

87. In paragraph 31 of the supporting affidavit the petitioner claims that at the point of his resignation he was “hungry, under immense pressure, duress and coercion, worn down, mentally fatigued, stigmatized, victimized, traumatized and psychologically drained by the Respondents constant prodding, chiding, questioning and outright bullying as well as constant lock outs from the workplace under the guise of sick offs and leave days I proceeded to give in to the Respondents demands believing myself to be indeed a danger at the workplace as a result of contraction of Pulmonary Tuberculosis (TB) as constantly suggested and put across to me by the Respondents Work Committee.”



88. Going by the evidence on record, and that is the only tool that this court shall use in determining this petition, there was no bad blood between the employer and the employee herein. Once it was confirmed that the petitioner was suffering from the highly infectious disease, the respondent granted him a prolonged sick-leave to seek medical assistance and treatment. All along he was on the payroll of the respondent and it is stated that his medical bills were also paid by the respondent. It is a matter of common sense that the respondent was concerned, and rightly so, with the welfare, health, and safety of its workforce in the face of the highly contagious and infectious disease that afflicted the petitioner. Again, common sense dictates that the petitioner needed to be isolated to facilitate him in getting the urgent medical assistance and treatment that he was in dire need of.
89. It is on the basis of the foregoing that the petitioner was placed on sick-leave which was extended from time to time to enable him obtain and receive necessary medical attention and recover fully before resuming his duty as a machine-attendant.
90. The evidence on record is that the respondent is an assembler or manufacturer of motor vehicle oil-filters, cooling systems, and other small motor vehicle parts wherein workers execute their duties in large numbers in open spaces, requiring to mingle and team-up in various tasks in a factory set-up. The evidence on record is that the respondent had by then over 250 employees working in three shifts of over 75 workers per shift.
91. It is the view and holding of the court that the respondent acted reasonably and responsibly by allowing the petitioner to be on long sick-leave in view of the highly contagious and infectious disease that had afflicted him. Acting in any other way and allowing the petitioner to remain in the factory, at the risk of infecting other employees, would have been highly irresponsible and dangerous. As far as the court understands and conceives the locus (the workplace), it is a factory set-up whereby workers come into face to face or physical contact with each and or one another and reasonably there is no way in which the petitioner, a machine-attendant, would have worked in isolation.
92. In any event, and in good faith and empathetically, the respondent continued paying the petitioner as agreed even while he was away on the prolonged sick-leave.
93. On 4th January, 2022 the petitioner was reporting back to work after a prolonged sick-leave that had commenced sometimes on 8th November, 2021 or thereabouts. It is on the same date when the petitioner was reporting back to work that he allegedly resigned in circumstances that the parties cannot agree on. The petitioner alleges that he was put under pressure and coerced to resign but according to the respondent the petitioner voluntarily offered to resign as per the letter of resignation recited above.
94. Either both or one of the parties is not forthright in regard to the circumstances under which the petitioner resigned on 4th January, 2022. On the one hand, it is conceded by the respondent that the workers committee, a welfare committee comprising of members from management and the employees, was meeting on the same date being a first meeting for the new year, 2022. RW1 stated that the minutes of that meeting are not available and that he did not attend the meeting as he was by then not an employee of the respondent. On the other hand, the petitioner takes the position that the committee had deliberately met to push him to resign and that a Mr. Chege led the campaign on behalf of the respondent.
95. It is the petitioner's case that he was coerced and intimidated to resignation by the petitioner through the above committee and that the contents of his letter of resignation were dictated to him by the said Mr. Chege. The court presumes that the said Mr. Chege is the one and the same person who signed the letter of acceptance of the petitioner's resignation letter recited above, in the name of Paul Chege.



96. RW1 alleged that the issue concerning the health of the petitioner was discussed as a by-the-way during the said committee's meeting. The questions that linger then are - Why did the respondent not avail the minutes of that meeting? Why was the said Mr. Chege or indeed any other person who attended the said meeting not called as a witness by the respondent to indeed confirm what the agenda of the meeting was and what was deliberated upon? What was discussed as a "by-the-way" in regard to the health of the petitioner and his reporting back to work? These germane questions and others find no answer from the respondent.
97. Under Sections 10 & 74 of the Act it is the duty of an employer to keep employment records. Likewise, the minutes of the meeting alluded to above are and ought to be in the custody of the respondent and the only plausible and reasonable explanation as to why the same were not availed in court is that they are against the respondent's case. That is the right presumption in law – See Section 107 of the [Evidence Act](#).
98. While the evidence by RW1 is to the effect that the said committee had no powers to even make recommendations on hiring and or firing of workers, the respondent did not avail the terms of reference or the framework within which the committee operated. What is clear though is that the committee was constituted to among other reasons guard the welfare and safety of the workers. In my considered view, the fact that the petitioner was about to resume duty after a prolonged absence, suffering from a highly contagious and infectious disease, was a matter of concern for the welfare of the employees and no doubt the issue must have been prominent in the agenda of the committee's meeting of 4th January, 2022.
99. If the petitioner did not wish to resume duty, nothing would have stopped him from delivering a letter of resignation prior to reporting back to work on 4th January, 2022. The only logical, plausible, and reasonable explanation of the circumstances and events leading to the petitioner's resignation is that he met the committee members, led by a Mr. Chege, who convinced him to resign for the sake of the safety, health, and welfare of the other employees and that the petitioner was convinced as much and he proceeded to resign as per the letter cited above.
100. The letter of resignation by the petitioner and the response thereto by the respondent clearly show that the resignation was mutually agreed with the understanding that the claimant was free to seek re-engagement in future once he was fully recovered. In fact, the petitioner, in the paragraph of his supporting affidavit recited elsewhere in this judgment, admitted that he believed that he was indeed a danger to the health of the other employees. Indeed, he was a danger and a risk as he had not been at that point declared and certified as fully recovered from the highly contagious and infectious disease.
101. Can it be said in the circumstances narrated above that the petitioner was constructively dismissed? Was he coerced into resignation? Was he discriminated or his rights violated as alleged?
102. The Black's Law Dictionary 9th Edition defines constructive dismissal as -
- “A termination of employment brought about by the Respondent making the employee's working conditions so intolerable that the employee feels compelled to leave”
103. The Black's Law Dictionary 10th Edition provides that constructive dismissal is also known as constructive discharge and defines it as – An employer's creation of working conditions that leave a particular employee or a group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee leaves the employee almost no option but to quit.



104. In *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR the Court of Appeal had this to say about constructive dismissal -

“The key element in the definition of constructive dismissal is that the employee must have been entitled to 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 constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

105. The Court of Appeal in the above decision alluded to the following principles in determining whether constructive dismissal has occurred -

- a. What are the fundamental or essential terms of the contract of employment?
- b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
- d. An objective test is to be applied in evaluating the employer’s conduct.
- e. There must be a causal link between the employer’s conduct and the reason for employee terminating the contract, that is, causation must be proved.
- f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself in a manner as to be estopped from asserting a repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove a repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

106. It is on the basis of the above principles that the court shall weigh the evidence and circumstances disclosed in this petition with the aim of arriving at a fair and just determination as to whether the petitioner was constructively dismissed/discharged or whether he voluntarily resigned. Although the two terms – constructive dismissal and constructive discharge – have been interchangeably and synonymously applied in the above definition in the Black’s Law Dictionary 10th Edition, in my view there is a distinction in the grammatical meaning of the two phrases. In employment, dismissal is more of an order directed at an employee to leave or stop the engagement or employment. Discharge on the other hand is a polite or disguised way of telling an employee that they can or must leave the engagement or employment.

107. The Oxford Learners Dictionary defines the two words as follows, therein presenting the distinction alluded to above –

Discharge – “officially (someone) to leave somewhere, especially hospital.”



Dismissal – “Order or allow leave, send away, remove from employment, treat as unworthy of serious consideration.”

108. In the considered view of the court, and it is so held, the petitioner was constructively discharged as opposed to constructively dismissed and as such the court shall apply the former term in the context of this petition.
109. As noted elsewhere in this judgment, the respondent was supportive to the petitioner during the entire period of his illness. It allowed him an extended sick-leave on pay. However, it appears to this court that the respondent, through the workers committee opted to let the petitioner go and “convinced” or “cajoled” him to conceive that his continued employment constituted an immediate danger to the health of the other workers. While there is no evidence of coercion, duress, force, intimidation, or any other form of undue influence, the court is of the considered view that the respondent unduly persuaded the petitioner to resign through the workers committee. It is unfortunate that the respondent deliberately or otherwise failed to avail the minutes of the meeting of the committee held on 4th January, 2022 which in my considered view should have shed light on what exactly happened during that meeting and what deliberations were made and resolved in the matter of the return to work by the petitioner that morning.
110. In my view, and the court finds and holds so, the respondent cunningly convinced the petitioner to resign on the promise that he could always come back to work and apply for his job in future, once fully recovered, subject to availability of the vacancy, as per the response to the letter of resignation. Effectively, therefore, in my considered view, and I so find and hold, the respondent constructively discharged the petitioner by pushing and convincing him to write the letter of resignation which the respondent gladly and quickly acknowledged and accepted on the same day.
111. In my view, while the respondent had the greater concern for the health and welfare of the majority of the employees, hence the decision to constructively discharge the petitioner, the respondent clearly failed to take the petitioner through a legally competent and procedurally sound process of termination. Once the decision to terminate the petitioner on health grounds was made, and it appears to have been made on or prior to 4th January, 2022, the respondent ought to have applied Sections 35, 36, 38, 41, 43, 45, & 46 of the Act in making that decision and compensating the petitioner accordingly.
112. Since both parties agree, and that is the evidence on record, that the petitioner was a hard-working, reliable, and efficient employee, the only reason why he was unduly pushed and coerced to resign was his health status which the respondent considered to be risky and detrimental to the entire workforce. However, the respondent clearly and evidently failed to comply with the law in constructively discharging the petitioner. It is and should always be an implied term of each and every contract of employment that no employee shall be terminated against the provisions of the law. By constructively discharging the petitioner in the manner discussed in detail in the foregoing paragraphs of this judgment, the respondent was in fundamental breach of the contract of employment between it and the petitioner.
113. The court has so far said enough in demonstrating that the petitioner was constructively discharged by the respondent and that the discharge was wrongful, unfair, and unlawful.

V. Reliefs

114. Consequent to the finding and holding above, that the petitioner was wrongfully, unfairly, and unlawfully discharged, the court shall now consider each of the reliefs sought by the petitioner as hereunder.



115. Prayer (a) is for a declaration that the petitioner's fundamental rights and freedoms under Articles 27(1) & (2), 28, & 41(1) &(2)(a) of the Constitution were violated. The particulars of the alleged violations are set out in the body of the petition. Prior to the 2010 Constitution lawyers and citizens alike rarely referred to the constitution as the fundamental and primary tool for good governance, law, and order. Constitutional petitions in court were rare and far apart as practitioners of the law and the courts mainly mined from statutory law in their deliberations, arguments, and decisions. But then came the magic and salvation with the new Constitution of Kenya, 2010 that is so comprehensive, incorporating application of international law, treaties, conventions, and norms, in the day to day operations of governance, law, and order. Of course, the favourite provisions for most is the detailed and elaborate bill of rights and freedoms. This paradigm shift, almost overnight, changed the jurisprudential terrain in Kenya to the extent that the Constitution became the first port of call rather than the last resort.
116. The new jurisprudential terrain and dispensation alluded to above has tended to obliterate the now thin line between constitutional violations or breaches and statutory wrongs and the manner and method of litigating and remedying the said wrongs and or violations and breaches. It is for this very reason that the court has held above that while, prima facie, the claim by the petitioner herein is founded on an employment relationship, it would be grossly wrong to dismiss or strike the petition as that shall place the court within the confines of the now unpopular and condemned realm of technicalities.
117. However, the court must always be guided and guarded by the principle of constitutional avoidance that counsel for the respondent has so ably submitted on. In other words, where the statutory remedies can adequately remedy a wrong, the court need not resort to constitutional remedies.
118. The remedies that this court may grant and or issue are stated in Section 12(3) of the Employment and Labour Relations Court Act as follows –
- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—
- (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
 - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant.
119. It is the considered view and holding of this court that the constructive discharge of the petitioner, as discussed and held elsewhere in this judgment can and should be adequately remedied within the confines of the remedies stated above as read with Section 49 of the Employment Act.



120. The court holds the above view because while the petitioner pleaded particulars of alleged breach and violation of his constitutional rights, the same were not proved to the required standard. I do not think that there is any evidence pointing towards discrimination of the petitioner. The respondent appears to have been apprehensive towards the welfare and health of the entire workforce. The petitioner has not cited an incident of any other employee who suffered the same fit as himself but was treated and or handled differently. See *Anarita Karimi Njeru V Republic (No. 1) (1979) KLR 154* and *Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR* in regard of how to plead and prove constitutional rights violations or breaches.
121. In regard to violations of petitioner's rights under Article 41 of *the Constitution* the court takes the view that while the conduct of the respondent in the manner it handled the discharge of the petitioner from employment was against good and established labour practices, the same is remediable under the statutory law and as such the petitioner needed not resort to the constitutional provisions cited or to fundamentally premise the claim on the same.
122. The foregoing answers to prayers (a) and (b) and the two prayers are denied for all the reasons stated above.
123. Prayer (c) is for a declaration that the petitioner's resignation was not voluntary but that he was constructively dismissed. The court has found and held that the resignation by the petitioner was not voluntary but that he was constructively discharged. It is hereby so declared.
124. Prayer (d) is for compensation for the constructive discharge and the petitioner is seeking for an award equivalent to twelve months' gross pay. The court has in detail analysed and interrogated the circumstances leading to the constructive discharge of the petitioner in the foregoing paragraphs. The respondent hailed the claimant as a reliable, efficient, and hardworking employee. It is clear that were it not for the poor health on the part of the petitioner the parties herein were set for a lengthy and productive working relationship. There is no allegation or evidence of any misconduct on the part of the petitioner over six years or so that he served the respondent. There is no evidence that the respondent made any attempts to contact the petitioner after he was constructively discharged notwithstanding that in the letter accepting the "resignation" the respondent promised to keep chances of re-engagement open. During the hearing of the cause in court the respondent did not express its willingness to re-engage the petitioner. The petitioner did not contribute to his constructive discharge; he only suffered the misfortune of contracting a highly infectious and contagious disease.
125. The court notes that the alleged terminal dues paid to the petitioner were not terminal dues as such but salary for December, 2021 to which the petitioner was anyway entitled as he was legally an employee of the respondent up to and including 4th January, 2022.
126. Considering all that is stated above, the court takes the view that this is an appropriate case for an award of the maximum compensation under Section 49(1)(c) of the Act which is hereby awarded at Kshs242,208/= as prayed subject to statutory deductions.
127. Prayer (e) is for one month's gross pay in lieu of notice in the sum of Kshs20,184/= which is hereby allowed and awarded as prayed.
128. The petitioner is granted the costs of the petition.

V. Orders

129. Judgment be and hereby entered in favour of the petitioner against the respondent in the following terms -



- a. A declaration be and is hereby issued that the alleged resignation by the petitioner was not voluntary but amounted to constructive discharge by the respondent.
- b. The petitioner is awarded the following -
 - i. Compensation equivalent to 12 months' gross pay @ Kshs20,208/= per month Kshs242,208.00
 - ii. One month's pay in lieu of notice Kshs 20,184.00
Total Kshs262, 392.00
- c. The petitioner is awarded costs of the petition and interest on the amount awarded at court rates from the date of this judgment till payment in full.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 26TH DAY OF JUNE, 2024.

.....

DAVID NDERITU
JUDGE

