



Kinyanjui v Walokana Multi-purpose Co-operative Society Limited (Cause E441 of 2020) [2024] KEELRC 2396 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2396 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E441 OF 2020
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

GRACE NINI KINYANJUI CLAIMANT

AND

**WALOKANA MULTI-PURPOSE CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 27th August, 2020 alleging constructive termination and discrimination.
2. The Claimant avers that she was employed by the Respondent as a petrol station attendant stationed at Walokana Petrol Station at Wangige Shopping Centre earning a salary of Kshs.7,500/=.
3. The Claimant avers that due to her exemplary and diligent performance, she was promoted to the position of a petrol supervisor on January 2017 and her salary increased to Kshs.12,000/= exclusive of house allowance.
4. The Claimant avers that for the entire duration she worked for the Respondent, she was underpaid and was not paid the salary for the months of April to May 2020 yet she reported to her place of work and served diligently.
5. The Claimant further avers that in December 2019 she learnt that she was pregnant and started regular clinical visits where she was advised by the Doctor to avoid contact/or exposure with chemicals and fossil fuel fumes which information she dully communicated with the Respondent.
6. The Claimant avers that in January 2020 she received communication from her supervisor that from the month of February 2020 she was expected to report to the petrol station as a petrol attendant.



7. It is the Claimant's case that the Respondent's action of demoting her to a petrol attendant and exposing her to long standing hours, fuel fumes and vigorous physical duties was unfair and unreasonable considering her condition.
8. The Claimant further states that she was discriminated against when a junior staff was promoted while she was demoted which she attributed to her pregnancy.
9. The Claimant further states that the Respondent victimized, embarrassed and mortified her by the demotion which caused her emotional anguish.
10. The Claimant averred that the Respondent orchestrated and devised all means possible to constructively dismiss the Claimant by creating a hostile environment
11. The claimant states that the new role of petrol attendant exposed her to fuel fossils that caused serious medical issues which included dizziness, constant headaches, drowsiness and vomiting. The claimant sought medical attention and was advised by a doctor to take sick off when she informed her supervisor she was directed to report to work or risk being terminated for insubordination and misconduct.
12. On the 1st April, 2020 through a letter the Claimant informed the Respondent that the working conditions were not healthy for her unborn child which the respondent responded to the letter without addressing the grievances raised by the Claimant.
13. The Claimant avers that on the 2nd of May she followed up the issue with Respondent and once again the same was ignored.
14. The Claimant avers that due to the unconducive working environment and for the sake of her unborn child she discharged herself from employment.
15. It is the Claimant's case that the Respondent failed to pay her salary for the months of April and May 2020 when she was gainfully employed by the Respondent.
16. The Claimant prays for;
 - a. A declaration that the Respondent violated and breached the Claimants Rights as enshrined in Article 27, 28 and 41 constitutions.
 - b. A Declaration that the Respondents actions amounted to constructive dismissal of the claimant based on pregnancy discrimination.
 - c. A declaration that the Respondent breached the Claimants right to equality and freedom from discrimination guaranteed under Article 27 of *the constitution* by demoting the claimant and constructively dismissing her on the basis of pregnancy.
 - d. General damages for breach of the Claimants right to dignity, equality and freedom from discrimination guaranteed under Article 27, 28 and 41 of *the constitution* by demoting the Claimant and constructively dismissing her on the basis of her gender and pregnancy.
 - e. Exemplary and/or punitive damages for violation of the Claimants right to fair labour practices and constructively dismissing the claimant on the basis of gender and pregnancy and payment of the Claimants terminal dues as particularized hereunder.
 - f. Salary for April and May 2020.....(16,428.30x 2) Kshs.32,826.60.
 - g. One month pay in lieu of notice.....Kshs.16,428.30.
 - h. Twelve months salary for unfair termination (16,428.30 x 12).....Kshs.197,139.60.



- i. Ex-gratia pay for 8 years worked (8,214.15 x 8).....Kshs.65,713.20.
- j. Maternity leave (16,428.30 x3months)Kshs.49,284.90.
- k. House allowance at 15% of the basic pay (15% x 16,428.30) 36 months Kshs.88,712.82.
- l. Underpayments 2013
 - i. December 2013; (11,838.65 – 7500) 1 monthKshs.4,338.65 2014
 - ii. January – May (11,838.65- 7500) 5 MonthsKshs.21,693.25
 - iii. June – December 13,259.30- 10,000)7 months Kshs.12, 870.55 2015
 - ii. January -May 11,383.65-10,000)Kshs.9,193.25
 - iii. June-December (13,256.30-10,000)Kshs.22,815.10 2016
 - ii. January-December 13,259-10,000 12 monthsKshs.6,296.50 2017
 - ii. June-December 15,646-12,000) 7 months ...25,522.00 2018
 - ii. January-May (15,646-12,000) 5 months...Kshs.18,230/=
 - iii. June-December 16,428.30-12,000) 7 months Kshs.30,998.10 2019
 - ii. January-December (16,428.30-12,000)Kshs.22,141.50 2020
 - ii. January-May (16,428.30 – 12,000)22
 - m. Certificate of service
 - n. Interest on the above at court. Rate until payment in full
 - o. Costs of this suit.

Respondent's case

- 17. By a Memorandum of Response dated 22nd October, 2020 and amended on 30th October, 2022, the respondent admits having employed the Claimant but denies the allegations in the statement of claim.
- 18. The Respondent avers that the duties of a supervisor included manning petrol pumps and pumping petrol during peak business hours when there is traffic surge.
- 19. It is the Respondent's case that it complied with safety and health guidelines that are required to operate a petrol station and none of the employees was exposed to fuel fumes as they are highly combustible and failure to control the same amounts to flaunting of health and safety guidelines.
- 20. The Respondent further states that the activities of the petrol station only increase during the peak hours and there is no vigorous and physical duties involved as the Respondent has installed modern automatic pumps.
- 21. The Respondent avers that it is an equal opportunity employer and has strict non-discrimination policies and has zero tolerance to any form of discrimination.
- 22. Further, the Respondent states that the claimant is guilty of fraud as she never received any medical attention. It is the Respondent's case that the sick sheet dated 10/02/2020 alleging that the claimant



- was attended to by Dr. Muriuki at Dagoretti Sub-County Hospital was disowned by the Hospital which also denied having such a clinician in its ranks.
23. The Respondent avers that the letter dated 28th April, 2020 was never in response to any recommendations received from any doctor/physician since the Respondent is a stranger to the alleged recommendations.
 24. The Respondent refuted the allegation that the Claimant was continually exposed to COVID-19.
 25. It is the Respondent's case that the Claimant has not made out any case warranting the remedies pleaded as the Respondent did not breach any provisions of the law.
 26. The respondent states that the Claimant absconded duty and the Respondent is innocent of the allegations of discriminatory labour practices, failure to create a conducive working environment and pay any accrued salary leading to constructive dismissal.
 27. The Respondent urges the court to dismiss the claimant's suit with costs.

Claimant's evidence

28. The Claimant testified as CW1. On cross-examination, the Claimant admitted that in the course of her employment, she was never denied leave by the employer. She stated that on occasions when she was on leave she was paid her salary and all other entitlements.
29. The claimant testified that she informed the supervisor that she was pregnant but had no evidence of how she did the same or when. That the communication was not official. It was her testimony that she was aware that she needed to apply for maternity leave a month to the due date.
30. The Claimant testified that she observed all the guidelines of COVID-19 and she did not contract COVID-19 nor did any of her colleagues.
31. The witness further testified that she attended Dagoretti Hospital because she had a pressing condition and was issued with a letter but no medicine was prescribed because she was pregnant.
32. It was the claimant's testimony that peak hours are from 6:00 pm to midnight and from 8:00 am to 10 am. She stated that during normal traffic the pump attendant was not expected to stand all the time but during the peak she was supposed to be there during the entire duration.
33. She also stated that after leaving employment she did not send a demand letter to the employer.
34. It was her testimony that she was not discriminated by the Respondent from 2013 when she joined until 2019.
35. In re-examination the witness stated that she joined the Respondent in 2013 as a fuel pump attendant and later promoted to be a supervisor.
36. She stated that she informed one of her colleagues, Leah in passing, that she was pregnant and was seeking a comfortable place but was told that the management had decided that she would be demoted to a pump attendant.
37. CW2, James Kamau, a clinical officer at Dagoretti Level 4 Hospital testified that he did not attend to the Claimant but she was treated by one Dr. Muriuki who used to work at the facility.
38. The witness testified that the document dated 10th February, 2020 was issued at Dagoretti Sub-District Hospital, Mutuini.



Respondent's evidence

39. RW1, Stephen Mutiso, a supervisor at the Respondent stated that he was a pump attendant for 3 years and had never been discriminated by the Respondent.
40. It was his testimony that during COVID-19 Pandemic, all employees used to receive masks and sanitizers.
41. Further, he testified that there was a lot of work in the morning and in the evening and minimal flow during the day.
42. On cross-examination, RWI stated that the work of a pump attendant and supervisor were not the same. He stated while a pump attendant mans the pump, the supervisor determines the fuel level at the beginning of the day, is the custodian of the cash collected and assists the pump attendants during tea and lunch hours.
43. RW2, Leah Kamau, a supervisor testified that the Respondent had leave application forms that the Claimant filled variously, such as the one for leave from the 15th February, 2021 to 16th June 2021.
44. The witness testified that the respondent had never denied anyone leave and it did not discriminate.
45. On cross-examination, the witness stated that the Claimant was once a pump attendant and a supervisor.
46. The witness stated that she was also at some point pregnant and understood that pregnant women have various dynamics and may be irritated by many things which depend on the person.
47. It was her testimony that she was aware that the Claimant was demoted on the basis of performance and complaints from members.
48. She testified that the Claimant did not share with her that she was having challenges that related to the pregnancy.
49. On re-examination, the witness stated that the members of the SACCO are the owners of the petrol station.
50. RWII testified that the Respondent had a container for employees to relax when not busy.
51. It was her evidence that the claimant did not avail any document stating that she had issues with fossil fuels.
52. RW3, Irene Wambui testified that she was a supervisor to the Claimant for a few days.
53. RW4, Francis Goko, the treasurer of the Respondent testified that the Claimant was pump attendant and her duties included; fuelling, cleaning screens, check oil, among others.
54. He testified that a supervisor does what a pump attendant does but also supervises the attendants.
55. It was his testimony that a pump attendant earns an average of Kshs.16,000/= depending on the years of experience while a supervisor earns a responsibility allowance over and above the salary.
56. On cross-examination, the witness stated that he was a pump attendant in 2017 and the Claimant was the supervisor but he was later promoted to be a supervisor.
57. RWIV, further testified that as a supervisor, his role was to supervise pump attendants, collecting cash and relieve attendants during peak hours.



58. The witness testified that he became aware of the Claimant's pregnancy through the letter dated 28th April, 2020. He stated that the respondent did not ask for documents unless the employee provided the same for a particular reason.
59. The witness testified that working as a pump attendant was considered lighter duty.
60. The witness stated that the Claimant was demoted because her performance had lessened but no letter was given to the claimant as the respondent had no human resource function.
61. The witness stated that the claimant deserted the place of work after 30th March, 2020 and did not resume duty.
62. The witness stated that the Sick sheet dated 10th February, 2020 and the sick off request came to his attention on 1st April, 2020.

Claimant's submissions

63. The Claimant's counsel highlighted the following issues for determination;
 - i. Whether the Respondent constructively dismissed the claimant from her employment.
 - ii. Whether the Respondent infringed upon the Claimants constitutional right to equality and freedom from discrimination, human dignity and fair labour practices guaranteed under Articles 27, 28 and 41 of *the Constitution*.
 - iii. Whether the court should award general and exemplary damages against the Respondent for the infringement of the claimant's constitutional and statutory rights.
 - iv. Whether the Respondent remunerated the claimant below the minimum wage and denied her other statutory entitlements/benefits and
 - v. Whether the Claimant committed any fraud as alleged by the Respondent.
64. The Claimant's counsel submitted that the Claimant's employment contract was altered when the respondent discovered that the Claimant was pregnant and was demoted from a supervisor to a pump attendant.
65. Counsel relied on the holding in *Kiilu v Isinya Resorts Limited (Cause E022 of 2021)* (2022) KEELRC 13240(KLR) where the court held;

“Demotion of an employee has the character of altering an employee's terms and conditions of service. Section 10(5) of the *Employment Act* provides that the terms of a contract of service cannot be altered without consultation with the employee”.
66. It is counsel's submission that the Claimant protested the Respondent's actions of altering the terms of service both verbally and in writing.
67. Counsel submits that the Respondent's defence that the Claimant was demoted due to poor performance was an afterthought to cover up the illegal action taken by the Respondent.
68. Counsel contends that the claimant was constructively dismissed as her terms of service were changed by the respondent without consulting or communicating with the Claimant.



69. Reliance was made on the holding in Coca Cola East & central Africa limited v Maria Kagai Ligaga (2015) eKLR where the Court of Appeal established the test and guiding principles of ascertaining whether constructive dismissal has taken place.
70. Counsel further submits that the Respondent pleaded that the Claimant absconded duty but did not prove that it took the necessary measures to reach out to the Claimant.
71. Reliance was made on the holding in Simon Mbithi Mbane vs Inter Security Services Ltd (2018) eKLR where the court stated that; “An allegation that an employee has absconded duty, calls upon an employer to reasonably demonstrate that efforts made to contact such an employee without success”.
72. Counsel submits that the last communication between the Claimant and the Respondent is the claimant’s letter dated 2nd May, 2020 that was unresponded to by the Respondent.
73. Counsel contends that the claimant did not desert work place and no disciplinary action was taken against her for the alleged desertion.
74. On the second issue, the counsel asserts that the Claimant was discriminated on the basis of her pregnancy hence her demotion from a supervisor to a pump attendant.
75. Reliance was made on the holding in G.M.V vs Bank of Africa Limited (2013) eKLR where the court held that;

“ . . . all the ladies are required to do is establish a prima facie case, through direct evidence or statistical proof that they have been discriminated against at employment on account of pregnancies. Courts have stated that the employee needs to:

Establish she belongs to a protected class
Demonstrate she qualified for the job she lost
Show she suffered adverse employment action directly as a result of her pregnancy. She must provide prima facie proof that other explanations by the employer are pretextual and the real reason for termination was pregnancy.
Lastly, the employee must as a minimum establish that there is nexus between the adverse employment decision and her pregnancy . . .”
76. Counsel submits that the Claimant’s demotion was informed by the pregnancy and not poor performance as alleged by the Respondent which was not proved.
77. According to counsel, the Respondent violated the claimant’s statutory and constitutional rights by demoting her upon learning that she was pregnant and urges the court to rely in the decision in G.M.V v Bank of Africa and award the Claimant damages amounting to Kshs.4,000,000/=.
78. Counsel further submits that the claimant is entitled to exemplary damages amounting to Kshs.3,000,000/=.
79. Counsel postulates that supervisors and pump attendants are part of the protected class under the *Labour Relations Act* and therefore through the Regulation of Wages (General) Order, the government sets the minimum wage.
80. It was also submitted that the claimant was not paid house allowance which is a statutory obligation under Section 31 of the *Employment Act*.
81. On the alleged fraudulent sick sheet, counsel submits the sick sheet dated 10th February, 2020 was not produced and does not form part of the exhibits and the respondent did not call any witness to confirm the forgery alleged.



82. Counsel urges the court to allow the Statement of Claim as the issues raised have been proven to the required standard.

Respondent's submissions

83. The Respondent's counsel submits that for the Claimant to prove that she was constructively dismissed she needed to meet the principles of constructive dismissal as set out in *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (2015).
84. Counsel submits that the claimant did not prove that the Respondent breached the employment contract.
85. According to counsel, the Claimant's resignation letter stated that she resigned due to exposure to fumes and COVID-19 as opposed to redeployment.
86. The respondent's counsel submits that the Claimant has not proved that the Respondent was aware of her pregnancy.
87. Reliance was made on the holding in *Winnie Treezer Ochieng v Label craft* (2021) eKLR where the Claimant alleged discrimination on the grounds of pregnancy and the court dismissed the Claim holding that there was no evidence that the respondent was aware of the claimant being pregnant and the employee must as a minimum establish that there is nexus between the adverse employment decision and her pregnancy.
88. Finally, counsel submits that having deserted the work place and worked as a pump attendant for close to four months, the Claimant is not entitled to damages.

Determination

89. The issues that commend themselves for determination are;
- i. Whether the Claimant was constructively dismissed.
 - ii. Whether the Claimant was discriminated on the grounds of pregnancy.
 - iii. Whether the Claimant is entitled to the reliefs sought.
90. As to whether the Claimant was constructively dismissed, parties have adopted opposing positions with the Respondent arguing that the Claimant deserted the workplace. The Claimant maintains that her employment was constructively terminated.
91. Counsel for the Claimant contended that the Claimant left after demotion to the position of pump attendant from a supervisor.
92. By letter dated 1st April, 2020, the Claimant requested for a transfer from the position of pump attendant on the ground on pregnancy. She complained of fuel smell and a paining left leg. It was not a resignation letter.
93. Needless to emphasize, the Claimant's request was rejected.
94. Uncontroverted evidence reveals that the Claimant did not report back to work after the end of March 2020.



95. The locus classicus rendition of the principle of constructive dismissal are the celebrated words of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (1978) QB 761 as follows;

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.

96. The principle of constructive dismissal was domesticated by the Court of Appeal in its decision in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR where the court affirmed the contractual test approach as follows;

“The second construction is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment – this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd V Sharp* (1978) 1CR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of the mixed fact and law. The criterion for evaluating the employer’s conduct is objective; the employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory. The employee must be able to show that he left in response to the employer’s conduct (i.e causal link must be shown i.e the test is causation).”

97. The Court of Appeal went further and formulated the guiding principles relevant in determining constructive dismissal. These include, the fundamental or essential terms of the contract of employment, whether there is a repudiatory breach, whether the conduct of the employer is fundamental and goes to the root of the contract, causal link between the employer’s conduct and termination of the contract, employer’s conduct was the effective cause, whether or not notice was given, employee must not have accepted, waived or acquiesced or conducted himself to be estopped from asserting the repudiatory breach and must have acted within a reasonable time of the breach and burden of proof by the employee.

98. Was the Respondent aware of the Claimant’s pregnancy?

99. The Claimant testified that she discovered that she was pregnant in December 2019 and had notified Leah Kamau, the supervisor. However, the Claimant did not disclose on when and how she did so. Leah Kamau, however, denied having been informed of the pregnancy of the Claimant. RWIV, Mr. Francis Goko, who became the Claimant’s supervisor after her demotion, testified that he learnt of the Claimant’s pregnancy after her letter dated 1st April, 2020. It is unclear to the Court why the Claimant



- did not notify the Respondent that she was pregnant in early 2020. How else could the Respondent have known that she was pregnant?
100. Noteworthy, the Claimant's letter dated 1st April, 2020 makes reference to her condition but makes no reference to the fact that she had reported her alleged condition to anyone. This was the first time the Claimant was making it official that she was pregnant which explains the request.
101. It is common ground that the Claimant was demoted to the position of pump attendant in early 2020. She did not adduce evidence on when the instruction came as it was not in writing and no reason was given.
102. The Respondent's argument that her performance had declined and members of the Sacco had complained cannot avail the Respondent as it was not proved and the Claimant was not subjected to a Performance Improvement Plan or disciplinary hearing for the alleged lesser than optimal performance.
103. From the evidence on record, it is discernible that the Claimant was not consulted when the issue of her performance was being discussed or in the demotion.
104. In determining this issue, the Court is guided by the sentiments of the Court in *Kiilu v Isinya Resorts Limited (Cause E022 of 2021)* [2022] KEELRC 13240 (KLR) (17 November 2022) (Judgment), where the court held that the claimant was constructively dismissed and observed as follows;
- “Demotion of an employee has the character of altering the employee's terms and conditions of service. Section 10(5) of the *Employment Act* provides that terms of a contract cannot be altered without consultation with the employee”.
105. Section 10(5) of the *Employment Act*, 2007 provides;
- “Where any matter stipulated in sub-section (1) changes, the employer shall in consultation with the employee revise the contract to reflect the changes and notify the employee of the change in writing.”
106. Arguably, the position an employee is appointed in is one of the fundamental terms of the contract of service as it is the basis on which an employee is remunerated. The position runs to the root of the contract and if unilaterally altered by the employer may constitute a repudiatory breach of the contract of employment as was the case here.
107. The Respondent neither informed the Claimant of the alleged poor performance nor its intention to demote her to the position of pump attendant.
108. In sum, it is the finding of the court that the Respondent's actions of altering the terms of contract of employment without consultations amounted to a constructive dismissal in the context of the rule in *Western Excavating (ECC) Ltd V Sharp (Supra)*.
109. As to whether the Claimant was discriminated on the basis of pregnancy, and as adverted to elsewhere, the Claimant alleges that she had informed her supervisor, Leah Kamau that she was pregnant and that is when she was demoted from a supervisor to a pump attendant. However, the Claimant admitted on cross-examination that she had no evidence to prove the fact of having communicated the same to Leah Kamau or any other person.
110. Needless to emphasize, both the provisions of Article 27(4) of *the Constitution* of Kenya and Section 5(3) of the *Employment Act* outlaw discrimination on the basis of pregnancy. Section 46 of the Act



makes termination of employment on the basis of an employee's pregnancy or reasons connected to pregnancy an unfair termination.

111. As regards the definition of the term discrimination, in *Rose Wangui Mambo & 2 others V Limuru Country Club & 15 others* (2014) eKLR citing *Peter K. Waweru V Republic* (2006) KLR, the court stated as follows;

“ . . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another 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 those favoured and those not favoured.”

112. The foregoing definitions of discrimination suggests that for a holding that there was discrimination to be made, it must be evident that the Respondent's treatment of a person or persons in similar circumstances was different without justification.
113. In the instant case, although the Claimant pleaded that after discovering that she was pregnant in December 2019, she notified her supervisor using the “appropriate company channels”, she admitted that she had no evidence of having done so and when, and in any case the alleged supervisor denied having been notified of the pregnancy. According to the Claimant, in January 2020, the immediate supervisor informed her that she was expected to report as a pump attendant from the month of February 2020 which was a demotion and it exposed her to fuel fumes and long working hours. The Claimant adduced no evidence of such communication or what other action she took to ameliorate the situation.
114. The Claimant's claim that the Respondent demoted her when it learnt that she was pregnant is unsubstantiated so is the allegation that the Respondent only promoted male employees and none of them had ever been demoted. The allegations were not supported by any evidence.
115. The Respondent on the other hand denied discriminating the Claimant on the basis of pregnancy and stated that it is an equal opportunity employer with a strict policy on non-discrimination of employees. Indeed, RWI, Mr. Stephen Mutiso testified that he was a supervisor and then became a pump attendant, a demotion.
116. Notably, the Claimant confirmed on cross-examination that she was not discriminated by the Respondent at any time during her employment.
117. The Respondent testified that the basis of the claimant's demotion was poor performance. However no evidence was tendered to confirm that the Claimant's performance was indeed unsatisfactory and the Claimant was neither warned nor subjected to disciplinary hearing.
118. From the pleadings and the evidence adduced in court by the Claimant and the respondent, it is discernible that the Claimant has failed to show the nexus between the demotion and the pregnancy and has thus failed to demonstrate that she was discriminated on the basis of pregnancy or any other ground.
119. Worthy of note, the Claimant sought to rely on a forged document in urging her case before this Court and was convicted on 12th March, 2024 for the offence of forgery contrary to Section 345 of the Penal



Code. Without the forged sick sheet dated 10th February, 2020, the Claimant cannot demonstrate that, she was indeed pregnant or had contacted a medical doctor before her letter dated 1st April, 2020.

120. The waterloo of this issue is the Claimant's failure to show that she communicated the fact of her being pregnant to the Respondent as the alleged appropriate channels were not identified.
121. Finally, on desertion or absconding duty, the Respondent adduced no evidence of the steps it took to have the Claimant resume duty or subject her to disciplinary proceedings for the alleged desertion.
122. See *Richard Maingi V Wells Fargo Ltd* (2017) eKLR, *Chispine Onguso Okinyi V Devki Steel Mills Ltd* (2018) eKLR, *Albanus Mbithi Mutiso V Fresh Breeze Ltd* Cause No. 851 of 2017 on the duty of an employer who alleges desertion.
123. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

a. Ex-gratia pay for 8 years

124. The Claimant adduced no evidence to prove entitlement to any ex-gratia sum of money from the Respondent.
125. As the name suggests, this is a sum of money given as a favour or out of a moral as opposed to a legal obligation.
126. Clearly, it can only be given at the instance of the employer.
127. The claim lacks supportive evidence or basis and is declined.

b. Maternity leave

128. The claimant did not allege or adduce evidence of having been denied permission to proceed on maternity leave in March, April or May or any other time during her employment.
129. On cross-examination, the Claimant confirmed that she was aware that she was supposed to apply for maternity leave one month to the date of birth.
130. Analogous to other rights, the right to maternity leave is not absolute.
131. Under Section 29(4) of the *Employment Act*, a female employee is required to give a reasonable written notice of her intention to proceed on maternity leave on a specific date.
132. Since the Claimant did not apply for maternity leave, and it was not denied, the claim for payment for maternity leave is in the Court's view patently unsustainable.
133. If the Claimant's testimony is to be believed that she discovered that she was pregnant in December 2019, by simple arithmetic, maternity leave could not have been due before July 2020 at the earliest.
134. Clearly, the claim lacks supportive evidence and is dismissed.

c. Underpayment

135. Regrettably, neither party has provided copies of payslips covering the entire period of employment to enable the Court appreciate the extent, if any of the alleged underpayment. However, since the Respondent did not evidentiary contradict the Claimant's figures, the Court considers the evidence uncontroverted.



136. In her evidence, the Claimant testified that from December 2013, her salary was Kshs.7,500/= and after 6 months, it rose to Kshs.10,000/= and rose to Kshs.12,000/= in January 2017 and does not appear to have exceeded this sum.
137. In addition, the Claimant relies on the relevant Regulation of Wages (General) Orders in computing the underpayment which is the correct procedure in determining the actual amount by which the Claimant was underpaid.
138. Having not claimed the underpayment within 3 years, the Claimant is only entitled to the amount underpaid for 3 years before the date of termination of employment, around the end of March 2020.
139. The underpayment is recoverable from April 2017 to March 2020.
- 2017
- April – May (13,259.30-12,000) 2 months =2,518.60
- June – December (15,646.00-12,000) 7 months =25,522.00
- 2018
- January – May (15,646.00-12,000) 5 months = 18,230.00
- June – December (16,428.30-12,000) 7 months =30,998.10
- 2019
- January – December (16,428.30-12,000) 12 months =53,139.60
- 2020
- January – March (16,428.30-12,000) 3 months =13,284.90
- Total = Kshs.143,693.2

d. Declaration

140. Having found that the Claimant was constructively dismissed when her terms of employment were altered without consultations, the declaration sought is merited.
141. However, the Claimant failed to establish a prima facie case that her right to equality and freedom from discrimination guaranteed under Article 27 of the Constitution of Kenya was violated.
142. The same applies to other alleged violations of the provisions of the Constitution of Kenya.

e. General damages

143. The Claimant tendered no evidence to demonstrate entitlement to general damages.
144. However, having found that the Claimant was constructively dismissed, the Claimant was entitled to compensation under Section 49(1)(c) of the Employment Act.
145. The Court has considered that;
- i. The Claimant had a warning letter.
 - ii. The Claimant served for a period of 6 years and four months which is not long.
 - iii. The Claimant did nothing to demonstrate her desire to remain in the Respondent's employment.



146. In the circumstances, the court is satisfied that the equivalent of 4 months gross salary would be adequate compensation for unfair termination, Kshs.65,713.20.

f. Withheld salary

147. From the evidence on record, it is clear that the Claimant did not render any service after 31st March, 2020 and was not on leave. The salary claimed was not earned and is thus not payable.

The claim is declined.

g. Salary in lieu of notice

148. The Respondent did not adduce any evidence of compliance with the provisions of Section 36 of the *Employment Act*, 2007. The Claimant is awarded one month's salary in lieu of notice, Kshs.16,428.30.

h. Unpaid House allowance

149. Under Section 31 of the *Employment Act*, an employer is obligated to provide housing to its employees or pay housing allowance to enable employee secure reasonable housing.

150. In the instant case, the Respondent adduced no evidence of having paid house allowance or shown that the Claimant's salary was consolidated. The Claimant is thus entitled to 15% of the basic salary as house allowance for the 3 years.

151. Shockingly, neither the Claimant nor the Respondent indicated the Claimant's salary as at the end of March 2020. However, the Respondent did not object to the sum of Kshs.16,428/= relied upon by the Claimant's counsel, Kshs.88,711.2.

i. Certificate of service

152. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.

153. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;

a. Declaration that the Claimant was constructively dismissed.

b. Equivalent of 4 months' salary Kshs.65,713.20.

c. Salary in lieu of notice Kshs.16,428.30

d. House allowance Kshs.88,711.2

e. Under payment Kshs.143,693.2

Total Kshs.314,545.9

f. Certificate of service.

g. Interest at Court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE



ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *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 *Civil 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.

DR. JACOB GAKERI

JUDGE

DRAFT

