



**Nguku v Jubilee Insurance Company of Kenya Limited (Cause
1004 of 2017) [2023] KEELRC 203 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 203 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1004 OF 2017
SC RUTTO, J
JANUARY 27, 2023**

BETWEEN

ROSEMARY WAMBUI NGUKU CLAIMANT

AND

JUBILEE INSURANCE COMPANY OF KENYA LIMITED RESPONDENT

JUDGMENT

1. It is not in dispute that the claimant was employed by the respondent as a Medical Claims Assessor with effect from 31st August, 2006. She rose through the ranks and at the time of her exit from the respondent's employment, she was holding the position of Claims Manager. It is also common ground that at all material times relevant to the claim, the claimant was a director of Ivory Health Solutions Ltd, which is a medical services company, that had entered into a Service Agreement dated 1st December, 2015, with the respondent. In terms of the Service Agreement, Ivory Health Solutions Ltd was to provide medical healthcare services to the respondent's members.
2. All seemed well in the employment relationship until turbulence set in sometimes in November, 2010 when the respondent commenced investigations in respect of the claimant's association with Ivory Health Solutions Ltd. Specifically, there were allegations of fraud and conflict of interest on the part of the claimant.
3. The claimant avers that despite providing the information requested regarding the alleged conflict of interest, the respondent resorted to harassing and intimidating her on allegations of involvement in fraud based on some anonymous emails that were never disclosed to her. That as a result, she was forced to resign from her employment on 8th December, 2016. She has termed her exit from the respondent's employment as constructive dismissal and consequently seeks against the respondent:



- a. a declaration and finding that the respondent's acts of harassment and intimidation amounted to constructive dismissal or termination of the claimant's employment which was unfair, wrongful and unlawful;
 - b. an order that the respondent do pay the claimant Kshs 5,310,960/= being equivalent of 12 months salary as compensation for unfair, wrongful and unlawful dismissal;
 - c. Kshs 1,191,561.40 being 70 days accrued leave;
 - d. Kshs 442,580/= being one month's salary in lieu of notice;
 - e. Kshs 513,960/= being the claimant's bonus for the year 2016;
 - f. Kshs 36,667/= being unpaid leave allowance;
 - g. Overtime for 14,996 days at such rate as the Court may deem fit to order;
 - h. General damages;
 - i. Interest on (b) to (f) above at court rates from the date of filing the suit until payment in full;
 - j. Costs of the suit; and
 - k. Any other relief that this Honourable Court shall deem fit to grant.
4. Opposing the claim, the respondent denies that that the claimant diligently and faithfully served in her role as alleged as she ultimately engaged in conduct that put herself in a position of direct conflict with its interests. That in an attempt to evade culpability and/or a finding of culpability, she hastily tendered her resignation not once but twice on 8th December, 2016 and 9th December, 2016. The respondent further contends that the claimant failed to make full and candid disclosure of her interest in Ivory Health Solutions Ltd as required under the Code of Ethics Policy.
 5. The respondent further states that the claimant received all her dues which consisted salary for the month of December, 2016, parking Allowance, accrued leave (70 days) less one month's salary in lieu of notice. To this end, it maintains that the claimant is not entitled to the prayers sought in the claim and prays that the same be dismissed with costs.
 6. The matter proceeded for part hearing on 17th May, 2022 when the claimant testified and closed her case. Further hearing was deferred to 19th July, 2022 when the respondent had the opportunity to present its case, thus marking the end of the trial.

Claimant's case

7. The claimant testified in support of her case and at the outset, adopted her witness statement to constitute her evidence in chief. She further sought to rely on her bundle of documents and supplementary documents, which she produced as exhibits before Court.
8. Reiterating the averments contained in her claim, the claimant told Court that she is a director of Ivory Health Solutions Ltd and was also gainfully employed by the respondent with effect from 31st August 2006, until her forced resignation on 8th and 9th December, 2016.
9. That the respondent forced her resignation which she verily believes amounted to constructive dismissal. Recalling the events preceding her exit from the respondent's employment, she stated that on 31st October, 2016, she was on her way to All Saints Cathedral for a BSF meeting when she was called by the respondent's CEO Mr. Patrick Tumbo, who at the time, was out of the country. That Mr. Tumbo



- informed her that he had received an anonymous email, which was also copied to the respondent's Chairman, alleging that there was fraud involving her as the Claims Manager and a provider of services in which she was a director and that she should expect to be called for investigations by the anti-fraud team. He further told her that he would show her the email upon his return to the country.
10. That on or about 2nd November, 2016, the respondent commenced investigations against her on allegations that she was involved in fraud as she had failed to disclose her interest in Ivory Health Solutions Ltd where she was a director. That she was not provided with a copy of the complaint made to the respondent but when Mr. Tumbo returned to the country, he showed her the email on his computer which was titled "GRAND THEFT" and alleged something to the effect that "the Claims Manager Rosemary Nguku who was a director of Ivory Health Solutions Ltd was involved in the fraud under the watch of her boss Catherine Karori and the Operations Manager Sammy Gakundi."
 11. It was her evidence that she fully co-operated with the investigator, Mr Kiplimo Kebenei and provided all the information requested for. That she informed the investigator that fraud was a different matter from conflict of interest and that she had disclosed her directorship in Ivory Health Solutions and in fact, witnessed the Agreement as a director of the company.
 12. That Mr Kiplimo Kebenei informed her that a report on the investigations would be presented and shared with her within a month. That the report was not provided to her and that she only saw a copy of the report dated 8th November 2016 when it was produced by the respondent in a court matter being CMCC No. 3163 of 2017 Ivory Health Solutions Ltd Jubilee Insurance Company of Kenya Ltd for recovery of outstanding amounts from the respondent.
 13. That instead of providing her with the report, the respondent and its employees, agents and servants resorted to harassing and intimidating her. She termed the investigations as a clear calculated scheme to oust her from her employment without any payment. That this was despite her dedicated service to the respondent for more than 10 years, including 70 leave days that she had not taken because of the demands of her duties.
 14. She further stated that the respondent was made aware of the fact that she had an interest in Ivory Health Solutions Ltd from the onset and during the investigations carried out whereby she reaffirmed this interest. In her view, the respondent was feigning ignorance of the fact that she had at all material times disclosed her interest in Ivory Health Solutions Ltd.
 15. That as a matter of fact, she had witnessed the signature of Dr. Richard N. Kuria, a director of Ivory Health Solutions Ltd, in the Service Agreement between Ivory Health Solutions Ltd and Jubilee Insurance Company of Kenya Ltd in her capacity as a director. That the business was a family business and she never missed work because of Ivory Health Solutions.
 16. That in addition, senior officials of the respondent's organization including the Group Chief Executive Officer - Mr Patrick Tumbo, General Manager Medical Business - Ms. Catherine Karori and General Manager Life Business-Azim Dawood, had personally and their children, been treated at Ivory Health Solutions, under the respondent's cover. That Ms. Catherine had also visited her and her husband at their home prior to the investigations.
 17. That from the commencement of the investigations, she was stressed and unable to work effectively because of talk in the office that she was involved in fraud and that she was a thief. That everybody sidelined her and there was so much going on at the time.
 18. It was her further testimony that on 8th December, 2016, she was told by her boss Ms. Catherine Karori to resign. That she did a letter of resignation dated 8th December, 2016 and handed it to the Human



Resource Manager with a copy to the said Catherine Karori. It was her testimony that she resigned because Ms. Catherine asked her to do so.

19. That later that evening at about 7:30pm whilst on her way home from work, she was called by the Human Resource Manager by the name Mr. Robert Owuor, who told her that she did not have to give notice and that she had to leave immediately. That the following day being, 9th December, 2016, she did another letter of resignation in lieu of notice and thereafter, cleared on 14th December, 2016.
20. According to the claimant, her resignation was a result of the harassment, intimidation and pressure to leave her employment, as Claims Manager.
21. That following her forced resignation on 8th and 9th December 2016, the respondent continued to subject her to further harassment and intimidation through a sham disciplinary hearing on 16th December, 2016. That the Group CEO Mr. Tumbo and the Human Resource Manager requested her to go to the office on 16th December, 2016 to collect the letter of acceptance of her resignation and for an exit interview. That when she got to the Human Resource office, she was given the letter of 13th December, 2016 acknowledging her resignation. That in the acknowledgment to the respondent's letter dated 13th December 2016, she made it clear that she had declared and disclosed her interest in Ivory Health Solutions.
22. That it was while at the Human Resource office, that that she was told that there was a disciplinary committee waiting for her and was given a letter dated 15th December, 2016. That she did not acknowledge the letter as she had been forced to resign and her resignation accepted by the letter of 13th December, 2016 and received in the same office.
23. That out of respect for Mr. Tumbo and Ms. Catherine Karori, she gave a written statement. That in the statement she protested against the fraud accusations, as she had done in her letter of 9th December, 2016. That she stated that the respondent's actions amounted to constructive dismissal as her resignation was not done out of her free will but the mental torture that she was going through following the purported investigations.
24. That as a result of her unlawful constructive dismissal, she suffered mental torment and trauma and was forced to seek medical intervention and psychiatric treatment.
25. That further, the respondent without any reason, unlawfully withheld her final dues accruing from her gainful employment of 10 years, 3 months and 9 days.
26. That she is aware that the alleged fraud by Ivory Solutions was a matter that was determined by the Court in CMCC No 3163 of 2017 Ivory Health Solutions Ltd vs Jubilee Insurance Company of Kenya Ltd. That in the suit, the respondent's witnesses confirmed in evidence that there was no fraud. That the Court found and held that the respondent having conducted background checks was at all material times aware that she was a director of Ivory Health Solutions and entered judgment for the plaintiff against the respondent herein, on 7th May 2019.

Respondent's case

27. The respondent called oral evidence through Ms. Beatrice Njoroge who testified as RW1. She identified herself as the respondent's Senior Human Resource Business partner. Similarly, she proceeded to adopt her witness statement and bundle of documents filed on behalf of the respondent, to constitute her evidence in chief. She stated that she was not at the respondent company at the material time and that her evidence was based on the records held by the respondent.



28. RW1 testified that in her role as a Claims Manager, the claimant had the responsibility of assessing medical claims lodged by customers/service providers with the respondent. That the assessment involved considering whether the services had been offered to the respondent's clients, whether the claims made were supported by relevant invoices and generally making a decision as to approval of claims.
29. That on 14th November, 2016, a case of suspected fraud with respect to two of the respondent's service providers was reported to the respondent. That one of the service providers was Ivory Health Solutions Limited, with which the respondent had engaged under the terms of a Service Agreement dated 1st December, 2015.
30. That pursuant to the Service Agreement, Ivory Health Solutions agreed to provide healthcare services to the respondent's clients/members for which it would submit a claim to the respondent in respect of the services provided.
31. That the report made to the respondent was in the form of a tip-off which alleged that the claimant, through Ivory Health Solutions, in which she was a director, was defrauding the respondent. That the allegation further mentioned that in a span of just ten (10) months, Ivory Health Solutions had been paid more than Kshs. 25.1 Million, which is an astronomical amount by any measure.
32. That in accordance with the Service Agreement, any fraud by a service provider entitled the respondent to terminate the Agreement. That in order to establish whether indeed there had been a fraud perpetrated and its extent, the respondent conducted investigations pursuant to Article 7 of the Service Agreement.
33. That the investigations unearthed a plethora of irregularities on Ivory Health Solutions account bordering on fraud, including inter alia issuing duplicate invoices, submitting claims not supported by the respondent's prescribed database system and submitting claims for services not rendered.
34. It was RW1's further evidence that it also turned out that the claimant was at all material times, a director of Ivory Health Solutions. That at no point in time, either before or after the execution of the Service Agreement, did the claimant disclose her interest in Ivory Health Solutions or inform the respondent that she was a director of the said company.
35. That the claimant also sat in meetings on 1st December, 2015 and 18th December, 2015 in which matters concerning providers were discussed, including the accreditation of Ivory Health Solutions. That nowhere in the record of the minutes did the claimant inform the attendees that she had an interest in Ivory Health Solutions. That further, the claimant failed to make full and candid disclosure of her interest in Ivory Health Solutions as required under the terms of her Letter of Appointment, the respondent's Human Resources Policies and Procedure Manual and the Code of Ethics Policy.
36. That in light of these discoveries and the position occupied by the claimant as a director of Ivory Health Solutions and an employee of the respondent, there were clear circumstances of conflict of interest.
37. RW1 contended that, it is indisputable that the claimant had by her conduct, placed herself in a position in which her personal interests and the respondent's interests were in direct conflict. That as the respondent's Claims Manager, it was the claimant's primary responsibility to process and /or oversee the processing of medical claims lodged by various service providers, such that when it came to Ivory Health Solutions, the claimant was in effect processing and/ or overseeing the staff in the Claim's Department who were processing her own company's claims. That the claimant could not possibly have been objective and/or impartial when it came to processing and/or settling of claims for Ivory Health Solutions.



38. That further, the respondent's interests were prejudiced leading to substantial losses incurred from irregular payments to Ivory Health Solutions at the behest, oversight, direction and/or influence of the claimant.
39. RW1 further stated that the respondent and its officers throughout the period of investigations acted in a professional manner where the relevant parties, including the claimant, were contacted and informed of the nature of the investigations.
40. She averred that the respondent did not at any time harass or intimidate the claimant such as to present a hostile working environment during this period. That however, before being confronted with the findings of the said investigations and in an attempt to evade culpability and/or a finding of culpability, the claimant hastily tendered her resignation twice on 8th December, 2016 and 9th December 2016.
41. That the claimant having breached the provisions of her Letter of Appointment, Human Resources Policies and Procedure Manual and the Code of Ethics the respondent was indeed justified in terminating her from employment, which the claimant then obviated by tendering her resignation. That the claimant's letter of resignation dated 8th December, 2016 conveyed a glowing tribute to the respondent. That she was grateful, happy and positive and there was nothing to show that she was coerced or was influenced.
42. That by a letter dated 13th December, 2016, the respondent accepted the claimant's resignation and noted that her resignation was accepted subject to its right to pursue legal recovery from her and/or Ivory Health Solutions of any amounts found to have been unprocedurally paid.
43. That the respondent thereafter through its letter dated 15th December, 2016, invited the claimant to attend a disciplinary hearing on 16th December, 2016. That the claimant attended the said meeting during which, she was informed that it was not a disciplinary hearing but rather an exit interview given that she had resigned on 8th December, 2016.
44. That subsequent to the exit interview, the respondent paid out to the claimant all her dues. That therefore, she is no entitled to any of the reliefs sought as she was not unfairly dismissed.

Submissions

45. Upon close of the trial, both parties filed written submissions. It was submitted on behalf of the claimant that the respondent did not act in accordance with justice and equity. That for a whole month, the claimant was put under a cloud of suspicion. That the evidence and order of events prove that there was a concerted discussion by the management of the respondent to cause her to tender her immediate resignation.
46. It was further submitted that there were no valid reasons for the respondent to terminate the employment of the claimant. That the respondent's own evidence in CMCC No. 3163 of 2017 Ivory Health Solutions Ltd vs Jubilee Insurance Company of Kenya Ltd was emphatic that there was no fraud. That the Judgment in the said matter has not been set aside on appeal and the mere fact that an appeal has been filed challenging the judgment, does not in any way invalidate its judgment.
47. In further submission, it was stated that by inviting the claimant to a sham disciplinary hearing, without notice and after accepting her forced resignation, the respondent was trying to regularize her unlawful termination. Placing reliance on the cases of John Kimingi vs Damco Logistics Kenya Limited (2021) eKLR and Leah Shigadi Sinoya vs Avtech Systems Limited (2017) eKLR, it was argued that the respondent created a hostile working environment for the claimant that culminated in its decision to separate from her thus coercing her resignation. The claimant further buttressed its submissions on



the cases of Nathan Ogada Atiagaga vs David Engineering Limited (2015) eKLR, Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga (2015) eKLR and Florence Nyaboke vs Mogere Amosi Ombui & 2 others (2014) eKLR.

48. Citing the provisions of Sections 107 and 109 of the *Evidence Act*, it was further submitted by the claimant that it was the respondent's burden to prove that it paid her dues upon termination from employment.
49. On its part, the respondent submitted that the burden of proof in constructive dismissal rests on the claimant. That the claimant had failed to prove on a balance of probability that she was forced to resign. That the respondent's actions with respect to the claimant were in line with the employment contract between the parties and in compliance with the law. It was further argued that it is the claimant who breached the terms of her employment contract and resigned to obviate any disciplinary proceedings. That further, the claimant has failed to prove that she was constructively dismissed by the respondent. In support of its position, the respondent placed reliance on various precedents including Nathan Ogada Atiagaga vs David Engineering Limited (2015) eKLR, Edward Machuka Nyamora vs Kenya Animal Genetic Resource Centre (2018) eKLR, Geoffrey Muriithi Muthee vs XPLICO Insurance Co. Limited (2022) eKLR, John Kimani Mwegu vs central bank of Kenya & Board of Trustees of Central Bank Pension Fund (2019) eKLR and Sophie Muthoni Njagi vs Rift Valley Railways (Kenya) Limited (2020) eKLR.

Analysis and Determination

50. In view of the claim before Court, the evidence on record and the opposing submissions, the following issues stand out for determination:
- i. Whether there is a case for constructive dismissal;
 - ii. Whether the claimant's terminal dues were paid;
 - iii. What reliefs if any, are available to the claimant?

Constructive dismissal?

51. It is the claimant's case that her resignation was as a result of harassment, intimidation and pressure to leave employment. The respondent holds otherwise and contends that the claimant hastily tendered her resignation in an attempt to evade culpability and/or a finding of culpability.
52. The term constructive dismissal is defined by the Black's Law Dictionary (10th Edition) as follows:
- “An employer's creation of working conditions that leave a particular employee or 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.”
53. The Court of Appeal in considering this issue in the case of Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] eKLR cited with approval the case of Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, in which Lord Denning MR expressed himself 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 that 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 (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1).”

54. The Learned Judges of the Court of Appeal proceeded to establish the following as the guiding principles in determining a case for constructive dismissal:
- 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 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 i.e 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 to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.
55. What can be deduced from the foregoing is that constructive dismissal arises where there has been repudiation of a fundamental term of the employment contract. This would be as a result of the employer's behavior which create working conditions that leave an employee with little or no choice but to resign.
56. Turning to the case herein, the claimant's resignation was communicated to the respondent through a letter dated 8th December, 2016 whose contents I will reproduce hereunder:

“Human Resource Manager,

Jubilee Insurance Company of Kenya

Box 30376-00100,

Nairobi

Dear Madam/Sir,

RE: RESIGNATION FROM JUBILEE INSURANCE COMPANY

I am writing to inform you that I will be resigning from the Head of Claims position. My last working (sic) will be on 7th Jan. 2017.

I would like to thank you for having me as part of your team. I am proud to have worked for Jubilee Insurance Company for a decade. I appreciate the time and patience you have shown



in training me. I have learnt a lot about the management and leadership and these skills will serve me well in my career.

Please acknowledge this letter as my official letter of resignation. I will do my best to ensure that all of my projects are completed and ensure a smooth transition. I have been fortunate to have been a part of this great team, and I wish you continued success.

Sincerely

Rosemary Wambui Nguku”

57. This was followed by another letter of resignation dated 9th December, 2016 which was to take effect immediately. The claimant stated in part:

“ following my resignation on 8th December, 2016, I would wish to leave with immediate effect (w.e.f 9/12/2016) in lieu of notice as it is provided in the contract.

Recently, there was an issue that was raised in regard to “Grand theft in the medical department” and my name was mentioned. This insinuation is very difficult to reconcile with and the most reasonable thing for me is to leave immediately. There was no basis where the above suggestions were found and it is sad to note that all this was acted upon on an anonymous email. I would wish to state that I have never defrauded Jubilee having worked here for 10 years and for your information, fraud and conflict of interest are two different issues. I am therefore offended and I am emotionally and mentally disturbed to an extent I am unable to carry on with my office work. I carry my dignity seriously and for that reason I shall not be in a position to work in this company any longer.

As I leave, I believe the report to the investigations shall be shared with the concerned parties.”

58. It is essential to note that the claimant’s letter of resignation was accepted on 13th December, 2016 by the respondent’s Human Resource Manager.

59. The question thus, is whether the claimant’s resignation was actuated by circumstances that can be construed as amounting to constructive dismissal. To drive the point home, the claimant highlighted various issues which she alleges amounted to her constructive dismissal. Briefly that:

- a. The respondent was at all material times aware of the fact that she had an interest in Ivory Health Solutions Limited;
- b. Prior to approval, the respondent conducted a thorough audit of Ivory Health Solutions and was well aware that she was a director;
- c. Senior officials of the respondent as well as their family members had been treated at the facility;
- d. Following her forced resignation on 8th December, 2016, the respondent continued to subject her to further harassment and intimidation by purporting to conduct a sham disciplinary hearing;
- e. On 16th December, 2016, she attended the disciplinary hearing and recorded a statement and protested that the respondent’s actions amounted to constructive dismissal; and
- f. The respondent has to date not communicated to her the outcome of the sham disciplinary hearing.



60. Applying the principles established in *Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga* (supra), and in light of the definition of the term constructive dismissal, the claimant ought to demonstrate that there was a fundamental breach of her employment contract and that the respondent created a hostile working environment that was so intolerable that she had no option but to resign.
61. Such a fundamental breach or action on the part of the respondent is demonstrable by a single incident or a continuing pattern of behaviour which might be serious enough to entitle the employee to consider himself or herself dismissed from employment.
62. More importantly, the employee ought to prove causation and demonstrate that the actions of the employer resulted in his or her resignation.
63. In the instant case, the claimant first resigned through her letter dated 8th December, 2016. Therein, she did not state the real reason behind her resignation. In her evidence before Court the claimant stated that she was advised to resign by her immediate boss, Ms. Catherine Karori. Be that as it may, she did not state as much in her letter. Quite to the contrary, she expressed her gratitude to the respondent and gave her best regards. As a matter of fact, she did not cite intimidation and harassment on the part of the respondent.
64. In her subsequent letter of resignation dated 9th December, 2016, the claimant made reference to the then pending investigations against her and Ivory Health Solutions. It was also her testimony before Court that her second letter of resignation was at the behest of the then Human Resource Manager by the name Mr. Robert Owuor. Yet again, she did not state as much in her letter. As stated herein, she only referred to the allegations of fraud and the ongoing investigations.
65. Turning to the said investigations, it is apparent that the same were yet to be completed at the time the claimant tendered her resignation. It can very well be said that the claimant resigned in the middle of an investigation process. The claimant cited harassment and intimidation on the part of the respondent and termed the investigations as a scheme to oust her from employment.
66. In my considered view, an employer is entitled to carry out investigations into any matter that arises within the context of the employment relationship. In this case, the investigations were against the claimant and Ivory Health Solutions Ltd and had been precipitated by allegations of fraud and conflict of interest.
67. On her part the claimant has not denied being a director at Ivory Healthcare Solutions Ltd. She contends that the respondent was aware of her interest as she signed the Service Agreement in her capacity as director and as a matter of fact, senior members of the respondent had been attended to, at the said Health facility. Therefore, according to her she had made sufficient disclosure of her interest in the said Ivory Health Solutions Ltd.
68. On the other hand, the respondent maintained that there was no disclosure on the part of the claimant as required by her letter of appointment, its Code of Ethics Policy and the Human Resource Policies and Procedure Manual. To this end, the respondent exhibited a copy of its Code of Ethics Policy and the Human Resource Policies and Procedure Manual (HR Manual). I have reviewed the said policy documents and it is clear that there is a requirement of disclosure of conflict of interest. The said disclosure is to be made to the respondent's CEO and the Directors of the Board.
69. The claimant testified under cross examination that she was not aware of the existence of the policy documents and the requirement for disclosure of conflict of interest. This does not seem plausible at all. She was not a junior employee in the respondent company and indeed, was in the higher echelons of the organisation. If in her position she was not aware of the existence of such policies, how then was



she to effectively supervise her subordinates? It is therefore highly doubtful that she was not aware of the requirements in the said policy documents.

70. The fact that the claimant was a Claims Manager and at the same time a director at Ivory Health Solutions which was one of the respondent's providers, placed her in a position where there was a potential conflict of interest. In this regard, the claims lodged by Ivory Health Solutions would require her approval or approval by persons she was supervising. In other words, in the normal course of her duty, it was more than probable that the claimant would be required to make decisions regarding approval or disapproval of claims in respect of Ivory Health Solutions. Further, there is evidence of her participation in meetings in which the issue of service providers including Ivory Health Solutions was up for discussion.
71. In light of the foregoing, there was need for the claimant to disclose her interest as required by the respondent's policy.
72. From the record, there is no evidence that the claimant made the disclosure as required under the respondent's policy documents and her only contention was that the respondent was well aware of her directorship in Ivory Health Solutions. The fact that the respondent was aware of her directorship in the said company, did not preclude disclosure. It was a procedural policy requirement which was binding on all employees of the respondent. By failing to comply with the said policy requirement, the claimant was at fault.
73. That said, I do not find the respondent blameless in the circumstances. Through its officers, the respondent executed the Service Agreement with Ivory Health Solutions. Notably, the claimant executed the Service Agreement in her capacity as director in the said Ivory Health Solutions. Therefore, the respondent through its officers, knew of the claimant's directorship. Nonetheless, they still carried on with the performance of the contract and gave the impression that they had no issue with the claimant's directorship at Ivory Health Solutions Ltd. In as much as the claimant did not disclose her interest formally, she did not conceal it either. So why did the respondent commence investigations upon being tipped off? Was it due to the fact that a whistle blower had raised the issue or was it because there was mention of fraud?
74. In my view, the respondent appears to have been jolted to action when the name "Grand Fraud" came up and Kshs 25.1 million was mentioned. That is what triggered the investigations.
75. Notwithstanding the respondent's prior knowledge of the claimant's directorship at Ivory Health Solutions, it was well within its right to undertake investigations. This is particularly noting the claimant's position as Claims Manager in the respondent company, as well as her directorship in Ivory Health Solutions. Therefore, any allegation of fraud was a red flag that any prudent employer in such circumstances could not ignore.
76. The fact that the claimant was undergoing investigations on an issue she felt she was not to blame for, cannot be termed as constructive dismissal. Besides if the claimant was displeased with any aspect of the investigation process, she could have lodged her complaint with the respondent. In any case, bolting out in the middle of an investigation process through resignation does not amount to constructive dismissal.
77. On this issue, I wish to echo the sentiments expressed by the Court in the case *Stella W. Muraguri vs Edward Kamau Muriu & 4 others Cause 2027 of 2015*, thus:

“44. To my mind, not every involuntary resignation amounts to constructive dismissal. The threshold for constructive dismissal is achieved where the



involuntary resignation has a direct causal link with the employer's conduct, which may reasonably be described as intolerable. It cannot be said to be constructive dismissal, when an employee resigns to get out of a tight spot." Underlined for emphasis

78. In addition to the foregoing and as stated herein, in a case of constructive dismissal, there must be a causal link between the employer's conduct and the reason for which an employee terminates the contract.
79. The claimant was therefore bound to prove that there was a link between the respondent's conduct and the reason for her resignation. I cannot help but find that she has failed to prove as much. Here is why? for starters, the claimant did not state the reason behind her resignation in her letter of 8th December, 2016. She only made reference to the ongoing investigations in her letter of 9th December, 2016 but by then she had already resigned. In any event, I have found that the respondent was well within its right to undertake the investigations.
80. The total sum of my consideration is that the claimant has not proved on a balance of probabilities that she was constructively dismissed from employment.
81. I find it worth mentioning that the subsequent disciplinary hearing convened by the respondent on 16th December, 2016, against the claimant was of no consequence. It served no purpose since the employment relationship had been extinguished the moment the claimant resigned on 8th December, 2016. Thereafter, the respondent had no hold on the claimant.

Whether the claimant's terminal dues were paid

82. It is the claimant's case that the respondent has withheld her dues. The respondent has stated that upon the claimant's exit, it paid out all her dues. To this end, it exhibited a copy of the claimant's pay slip for December, 2016. Nonetheless, it is evident that as at January, 2017, the claimant was still following up on her terminal dues. This can be confirmed by the emails exchanged between the claimant and one Robert Owuor on 12th and 16th January, 2017.
83. Besides the claimant's pay slip for December, 2016, the respondent did not prove that it had paid her terminal dues. By all means, a pay slip is not fool proof that the claimant's dues were transmitted to her. In addition, RW1 testified under cross examination, that it is possible that the claimant's dues had not been paid. If indeed, the dues were paid out to the claimant, nothing would have been as easy as evidencing the same by way of a cheque or a bank transfer. In absence of cogent evidence, I am lead to conclude that the claimant's terminal dues were not paid and she is entitled to the same.

Reliefs

84. As the court has found that the claimant was not constructively dismissed, the claim for compensatory damages and one month's salary in lieu of notice cannot be sustained.
85. With regards to the claim for untaken leave days, this was acknowledged as outstanding by the respondent and indeed, was part of the claimant's terminal dues. As such, she is entitled to the same.
86. The claimant has prayed for bonus in the sum of Kshs 513,960.00. It is notable that the claimant did not state the type of bonus she was claiming. This is considering that the respondent's HR Manual provides for three types of bonuses. Further, the claimant did not base this claim on a precise calculation as to demonstrate the manner in which the figure was arrived at. This was only done in the claimant's submissions and as it is trite law that submissions are not evidence, this relief collapses.



87. The claim for overtime of 14,996 days is declined for reasons that the claimant did not prove the hours she worked overtime and was not compensated accordingly.
88. My position is fortified by the determination by the Court of Appeal in Patrick Lumumba Kimuyu vs Prime Fuels (K) Limited [2018] eKLR, where the learned Judges cited with approval the case of Rogoli Ole Manadiegi vs General Cargo Services Limited (2016) eKLR, as follows: -

“Addressing a similar issue this Court in its decision in Rogoli Ole Manadiegi vs. General Cargo Services Limited (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”

89. I will hold similarly as the claimant has not proved and established the days worked in excess of the legal maximum.

Orders

90. The upshot of the foregoing is that the claim is dismissed in its entirety save that the claimant is entitled to payment of her terminal dues which shall be subject to interest at court rates from the date of filing the suit until payment in full.
91. There will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Muthui

For the Respondent Mr. Mbaluto

Court assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

