



**Muikamba v Radio Africa Group Limited (Cause E245 of 2021)
[2023] KEELRC 1251 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1251 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E245 OF 2021
NZIOKI WA MAKAU, J
MAY 30, 2023**

BETWEEN

TERESIA WANJIRU MUIKAMBA CLAIMANT

AND

RADIO AFRICA GROUP LIMITED RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated and filed on 22nd March 2022, the Claimant avers that she was employed by the Respondent as a Classic 105 presenter and content creator pursuant to a 2-year contract commencing on 1st December 2019 and was set to lapse on 30th November 2021. She avers that in the entire duration of her employment, she served at the Respondent with diligence, dedication and commitment and as a result received excellent reviews even earning her a salary increment. The Claimant avers that sometime in 2018, while she was going through some medial difficulties, she began receiving severe, harsh, abusive treatment and harassment from the Director of Programs, Mr. Pete Sinclair. Particulars whereof are detailed under Paragraphs 7 and 9 of the Statement of Claim. The Claimant avers that Mr. Sinclair consistently hurled insults and obscenities at the Claimant creating an untenable hostile working environment and despite the harassment being reported to the management through the Human Resource Department ("HR"), no active steps were taken to remedy the situation. The Claimant further avers that Mr. Sinclair's harassment and insults became more gross and personal after she lodged the complaint with the HR demonstrating that Mr. Sinclair was indeed untouchable and operated with impunity within the Company. The Claimant avers that owing to the fact Mr. Sinclair's heinous acts had created a hostile working environment making it intolerable for her to continue her obligations and owing to the lack of protection from the Respondent, the Claimant had no choice but to tender her resignation letter on 17th September 2020 confirming that her last day of employment would be on 25th November 2020. The Claimant was clear that the hostile working environment created by Mr. Sinclair and the Respondent's failure to take any steps to remedy the situation were the reasons for her resignation. The Claimant avers that soon after the Claimant's



resignation letter was submitted, it was also discovered that there were similar complaints that had been lodged by other members of the Drive Team against Mr. Sinclair and that in an apparent panic to avoid a public relations nightmare, the Respondent proceeded to schedule a meeting on 30th September 2020 with the Drive Team with a view of remedying the situation. She avers that during the meeting, it became apparent that the staff members were frustrated due to being forced to work in an abusive harsh hostile environment that had been created by Mr. Sinclair particulars of which were documented and recorded in the Minutes prepared. The Claimant avers that after the said meeting, other meetings between the Claimant and the Respondents were scheduled and held, key of which was a meeting with the Chief Executive Officer, Mr. Patrick Quarcoo, wherein he acknowledged that the conduct of Mr. Sinclair was unacceptable and committed to address and resolve all of the Claimant's grievances. The CEO implored the Claimant to retract her resignation letter as his commitment aforesaid would have obviated her reasons for resigning.

2. The Claimant avers that based on the CEO's assurance whom the Claimant respects and feeling assured and confident that all her outstanding issues would be resolved, the Claimant proceeded to retract her resignation vide a letter dated 12th November 2020 and continued with her obligations as per her contract of the employment under the understanding that the impasse between her and the Respondent had been fully resolved. The Claimant avers that on 25th November 2020 she was surprised to receive a letter from the Respondent indicating that the Claimant's resignation had been accepted and that the retraction would only be considered after a new contract varying her current contract was negotiated. This essentially reneged on the discussion and/or agreement prior to the retraction of the resignation and the letter confirmed that the Claimant's last day of service would be on 30th November 2020 despite her previous resignation being effective on 30th November 2020. The Claimant avers that she requested to peruse the intended new contract but she was never issued with the same. It was not until 4th December 2020 that the Claimant was informed that the Contract was ready and was forced to read the Contract in Jemimah Ngode's Office. She avers that she was able to identify clauses that barred her from discussing the issues of harassment and bullying by Mr. Sinclair. The Claimant thereafter informed Jemimah Ngode that she would consider the same and forward her decision. The Claimant avers that she however could not in good conscience accept the new terms of the contract and owing to the fact that the Respondent had demonstrated through its conduct that it did not wish to remedy the situation, she was once again forced to issue a further resignation letter which effectively rejected the new terms in the Contract.
3. The Claimant avers that the conduct of Mr. Sinclair and the Respondent amounted to a fundamental breach of the Claimant's right and created an extremely hostile and untenable working environment constraining her to issue a resignation letter. The actions of the Respondent consequently not only amounted to constructive dismissal but equally amounted to unfair and unlawful termination laced with malice and unfair labour practices. She seeks judgment against the Respondent for *inter alia*:
 - a) A declaration and finding that the resignation of the Claimant was involuntary and consequently she was constructively dismissed by the Respondent which amounted to unfair, procedural and illegal termination.
 - b) A declaration be and is hereby issued to the effect that the Respondent was estopped from refusing to accept the retraction letter consequently the Claimant's contract of employment was valid and subsisting thereof.
 - c) A declaration that the Claimant was bullied, harassed and abused by the management of the Respondent.



- d) Aggravated damages and general damages for pain, suffering, mental anguish, anxiety and humiliation.
 - e) An order directing the Respondent to pay the Claimant Kshs. 2,160,000/- being the value of the unexpired contract together with interest at commercial rates calculated from the date of Judgment until full payment.
 - f) General damages for unlawful termination equivalent to 12 months' pay that is for wrongful and unfair termination amounting to Kshs. 3,502,738.68.
 - g) The Respondent be ordered to pay the Claimant two (2) months' salary in lieu of notice.
4. The Claimant testified as did the Respondent's witness, its Human Resource Manager, Jemima Ngode. Parties thereafter filed submissions.
 5. The Claimant submits that the following issues are for determination: a. Whether Kshs. 50,000/- received by the Claimant was a loan? b. Whether the Claimant was constructively dismissed and unfairly terminated? c. Whether the Claimant is entitled to the prayers sought? d. Who should bear the costs of the claim?
 6. It is not disputed that the Claimant received Kshs. 50,000/- from the Respondent's CEO via a cheque sometime in February 2019. However, she submits, the Respondent has mischievously referred to the aforesaid amount as a "staff loan". The Claimant submits that she testified that her stay at the hospital created a financial burden on her and her family and she sought assistance on the very escalating hospital bills from the CEO via WhatsApp. She submits that she confirmed during cross-examination that she received the funds from her direct boss and at no point was the amount deemed or agreed or ever identified to be a company loan. The Claimant submits that the Respondent however alleges that the aforesaid amount was a loan given to the Claimant but failed to tender any evidence in support of the loan facility and the same remain mere allegations. The Claimant submits that in fact, the Respondent's witness testified that she did not have any documentation to demonstrate that the same was a loan because the Respondent did not follow the company's due process and procedure in respect to issuing loans demonstrating that the Respondent had no intention of treating the funds received by the Claimant as a loan. On cross-examination, the Respondent's witness confirmed that she did not furnish this Court with any Loan Agreement and/or the Claimant's request or application for a staff loan. She further confirmed that the cheque issued to the Claimant was forwarded on 7th February 2019 and the Respondent sought for the recovery of the alleged loan on 8th October 2020. The Claimant submits that the Respondent's witness however failed to explain why it took the Respondent 1 year 8 months to seek the recovery of the loan and why the issue of the staff loan only came up after the Claimant tendered her resignation letter dated 17th September 2020 on 25th September 2020. The Claimant submits the Respondent relied on an email correspondence exchanged between the Claimant and the Finance Department titled staff loan wherein the Respondent initiated the recovery of the staff loan on 8th October 2020. The Claimant however confirmed during cross-examination that she challenged the issue of the amount being referred to as a staff loan and requested for a meeting with the Respondent's CEO wherein she raised the issue of Kshs. 50,000/- being referred to as a staff loan. She informed the Finance Department via an email dated 13th October 2020 that the meeting with the CEO was not conclusive and proposed to schedule another meeting. She submits that the issue of the staff loan is an afterthought after the Claimant tendered her resignation and proceeded to issue the Respondent with a Demand Letter. From the onset, the Claimant had not been told that the money would be treated as a loan and she was never requested to refund the aforesaid amount to the Respondent. The recovery of the loan only came up after her resignation which was 1 year 8 months



after the Claimant received the amount. The Claimant submits that the Respondent ought to have produced a Loan Agreement signed by the Claimant or the Claimant's request for a loan to be advanced to demonstrate that the same was a loan. An employer has a duty to keep all records of the employee and that would include the records of staff loan.

7. The Claimant cited sections 10(6) and 10(7) of the [Employment Act](#) that requires the employer to keep proper and accurate records of employment. The same provides that:

“The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

8. The Claimant submits that this essentially means that the burden of proving that the money given to the Claimant was a loan shifts to the Respondent. She cites the case of [Agatha Bugosi Said v Vegpro Kenya Limited](#) [2014] eKLR. The Claimant submits that at no point did she take a loan from the Respondent and does not owe the Respondent any monies. In a bid to frustrate the Claimant further, the Respondent instructed its lawyers to proceed and institute a suit registered as CMCC NO. E455 OF 2021: [Radio Africa Group Limited vs Teresia Wanjiru Mikamba](#) to recover an alleged principal amount of Kshs. 40,000/-. The claim in the lower Court was filed after this current claim and the Respondent was well aware that the Claimant has sought the Court's assistance to address the issue of the purported loan.

9. The Claimant submits that the [Black's Law Dictionary](#) (9th Edition) defines constructive dismissal as, “A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave.” That the concept of constructive dismissal was discussed in the case of [Coca Cola East Africa & Central Africa v Maria Kagai Ligaga](#) [2015] eKLR wherein the Court of Appeal found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. That although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The Court proceeded to outline and summarize the following legal principles relevant in determining constructive dismissal:

“The legal principles relevant to determining constructive dismissal include the following:

- 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 the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h) The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i) Facts giving rise to repudiatory breach or constructive dismissal are varied."

10. According to the Claimant, the fact that Mr. Sinclair created a hostile working environment is admitted by parties in their pleadings and testimonies. The Claimant submits that the Respondent's witness confirmed having received verbal complaints from the Claimant but that she could only take action once the complaints were documented only shows that the Respondent failed to protect the Claimant from Mr. Sinclair's abusive conduct and harassment. That there is a positive obligation on an employer to take immediate action after receipt of a complaint on bullying and harassment. Furthermore, the Respondent furnished this Court with the Minutes of the meeting wherein the agenda was "hostile working environment" and which also confirmed the accusations of bullying and harassment. That the Respondent's witness also confirmed that Mr. Sinclair's actions amounted to gross misconduct warranting a summary dismissal but that he was only issued with a warning letter and requested to apologize. The Claimant asserts that she however neither participated in Mr. Sinclair's disciplinary proceedings nor was aware of the same.
11. It is the Claimant's submission that the Courts have repeatedly opined that at the heart of constructive dismissal is the breach of the duty of trust and confidence, which makes it difficult for the employee to continue working and carrying out their obligations under the contract. She further submits that the basic ingredients in constructive dismissal as enumerated by Rika J. in the case of *Kenneth Kimani Mburu & Another v Kibe Mungai Holdings Limited* [2014] eKLR that: the employer must be in breach of the contract of employment; the breach must be fundamental as to be considered a repudiatory breach; the employee must resign in response to that breach; and the employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived. The Claimant submits that she has shown that the Respondent acted in a manner to make her employment conditions so intolerable so as to force her out of employment against her will. She urges the Court to make a declaration and finding that she was constructively dismissed due to the unfair, wrongful and illegal actions of the Respondent.
12. The Claimant submits that having demonstrated constructive dismissal, this Court ought to award her aggravated damages and general damages for pain, suffering, mental anguish anxiety and humiliation caused by the actions of Mr. Sinclair and the Respondent. The Claimant submits that the Respondent should further be estopped from refusing to accept the retraction letter, which position is buttressed in the case of *M/S Pathologist Lancet Kenya Limited v Christamarianne Mission Hospital* [2021] eKLR wherein the Court stated as follows:

"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. (See *Serah Njeri Mwobi v John Kimani Njoroge* (2013) eKLR)..."



13. The Claimant further urges this Court to be guided by the provision of sections 49(1)(a) and (c) of the Employment Act to award her the value of the unexpired contract together with interest as prayed, and general damages equivalent to 12 month's pay for constructive dismissal. That having shown she was unfairly terminated, she is entitled to two months' salary in lieu of notice. She seeks issuance of a certificate of service as under section 51 of the Employment Act for having served the Respondent since 2017. Lastly, that costs should follow the event since she was compelled by the actions of the Respondent to file the suit herein so as to receive her terminal dues as sought in the Statement of Claim.
14. The Respondent submits that the Claimant claims constructive dismissal and her case is that from early 2018 to late 2020 she was subjected to a hostile working environment. She says that this was why she resigned in September 2020. It is submitted that the Claimant's case does not tally with the evidence presented to Court. The Respondent submitted that between 2018 to 2020, the Claimant was subjected to various appraisals where she was invited to comment on her work environment and even renewed her contract with the Respondent in late 2019. It is submitted that at no point did she raise any issue concerning her work environment. The Respondent submitted that the Claimant did not make any formal or written complaint until 25th September 2020 when she was resigning. Further, it was submitted that the Claimant on 12th November 2020 informed the Respondent that she was satisfied with the remedial steps taken to address the issues she had raised in her resignation letter. The Respondent submits it offered the Claimant a fresh contract with the same terms she had, but she rejected it and said that she was grateful and wished the Respondent success in finding a perfect replacement for her.
15. It was submitted that this is not a case of constructive dismissal as the Claimant has attempted to fit her circumstance within the doctrine of constructive dismissal, but the facts do not support it. It was submitted that in determining this claim, the Court should consider the Claimant's conduct before her resignation, immediately after her resignation and when negotiating a new contract. It was submitted that by an employment contract dated 31st October 2017, the Respondent employed the Claimant as a Radio Presenter for a period of two years. This period was to run from 1st December 2017 to 30th November 2019. The Claimant was to earn a gross salary of Kshs. 140,000/-. The Respondent submits that in 2018, the Claimant fell ill and was admitted in hospital for an extended period and that unfortunately, due to the Claimant's medical expenses exceeding her medical cover, the Respondent advanced her a loan of Kshs. 50,000/- to cover the shortfall. The Respondent submits that her position in the Respondent was preserved and it was not advertised or offered to anyone else. In fact, when her contract came to an end on 30th November 2019, the Respondent offered the Claimant a new two-year contract with an improved gross salary of Kshs. 180,000/-.
16. It was submitted that in 2019, the Claimant was taken through an appraisal process. She was required to fill an evaluation where she was also asked about her working environment. The Respondent submits that during the appraisal and the renewal discussions of her contract, the Claimant did not raise any issue concerning harassment or a hostile working environment. The Respondent submits that the Claimant also did not make any oral, written, or formal complaint to the Respondent concerning her working environment. The Respondent submits that its witness testified that in late August 2020, the Claimant went to the HR office and complained about her supervisor Mr. Pete Sinclair stating that she was being harassed. The Respondent's witness explained to the Claimant that for the Respondent to institute disciplinary action against Mr. Sinclair, the Claimant had to make a formal written complaint. This complaint would be presented to Mr. Sinclair, and he would be required to respond to it. It is submitted that instead of making the formal complaint, the Claimant resigned. It is important to note that in her resignation letter of 17th September 2020, the Claimant complained that her competence was being questioned. The Respondent submits this was the first time the Claimant



formally complained concerning her supervisor. The Respondent immediately organised a meeting between the Human Resources Department and the team the Claimant was in, the drive show. The meeting took place on 30th September 2020 and the grievances of the drive show were noted. The Respondent submits that following the official complaint by the Claimant and the meeting of 30th September 2020, a notice to show cause was issued to Mr. Pete Sinclair on 7th October 2020 and by a letter dated 16th October 2020, the Respondent issued Mr. Sinclair with a Final Warning letter and directed him to apologise to the Claimant and her colleagues. The Claimant testified that Mr. Sinclair apologised to her.

17. The Respondent submits that on 12th November 2020, the Claimant wrote to the Respondent indicating that due to the steps taken by the Respondent to address her grievances, she was formally retracting her resignation. The Respondent responded on 25th November 2020 and informed the Claimant that her resignation had already been accepted but she would be issued a new contract once her notice period came to an end. The Respondent submits that on 1st December 2020, the Respondent offered the Claimant a new contract and that the new contract contained terms identical to the contract that had just lapsed. The Respondent submits that the Claimant however declined the offer on 7th December 2020 but did not indicate why she was declining the offer but stated it had been a pleasure working for the Respondent. She said she was grateful and wished them success in finding a perfect replacement for her.
18. The Respondent submits that the issues for determination are as to whether the Claimant was constructively dismissed and unfairly terminated?; whether the Kshs. 50,000 received by the Claimant was a loan?; and finally, whether the Claimant is entitled to the prayers sought and who bears the costs of the claim? The Respondent submitted that the Claimant was not constructively dismissed. It cited the decision of the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court held as follows on constructive dismissal:

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.
19. The Respondent cites the decision in *Western Excavating (ECC) Ltd. v Sharp* [1978] ICR 222 or [1978] QB 761 which was cited with approval on the meaning of repudiatory breach. It is submitted that 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. The Respondent submits that the issue before this Court is whether the Respondent conducted itself in a manner which significantly breached the employment contract it made with the Claimant or acted in a manner to show the Claimant that it no longer intends to be bound by one or more of the essential terms of the contract. The Respondent submits that the Claimant's case is that she was harassed or mistreated between early 2018 and September 2020. The Respondent asserts that the following questions flow from this allegation: a. Is there evidence of this prolonged harassment? b. Did the Claimant report the harassment in the manner she was required to do under her employment agreement? c. If it true the Claimant was harassed for so long, why did she not resign earlier and what are the ramifications? d. Was the harassment issue resolved to the Claimant's satisfaction? e. Why did the Claimant and the Respondent part ways?
20. As to the issue of whether there is evidence of prolonged harassment, the Respondent submits that the Claimant has made the following allegations of prolonged harassment: firstly she claims that when



she was unwell in early 2018, the Respondent's Human Resource Manager visited her and inquired when she would resume work. Secondly, the Respondent's Human Resource Manager requested her to obtain a sick note from the Hospital and forward it to her. Thirdly, the Respondent's Director of Programs Mr. Pete Sinclair actively sought someone to replace her. Fourthly, Mr. Pete Sinclair verbally abused and harassed her between 2018 and September 2020.

21. The Respondent submits that section 107(1) of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It asked what proof of this prolonged harassment has the Claimant presented before this Court and answered by submitting that there is none for the reasons that when the Respondent's witness went to visit the Claimant in early 2018, the Claimant was in a hospital room with other visitors. Ms. Ngode denies asking the Claimant when she would resume work. The Claimant has not called the other visitors who were in her room to corroborate her allegation on what Ms. Ngode said. Secondly, the Respondent confirms that after the Claimant was discharged in 2018, it requested for a doctor certificate but this was not a malicious request. It was made pursuant to clause 8.1 of the Employment Contract dated 7th December 2017. It was submitted that requesting an employee to comply with a contractual term is not evidence of harassment. Thirdly, the Respondent submits the Claimant failed to provide any evidence that the Respondent advertised her position while she was unwell or offered her position to another presenter. The Claimant testified that she heard this from a colleague but did not call this colleague to testify in these proceedings. The Respondent submits that this is hearsay and that the Claimant admitted that after she recovered, the Respondent offered her a new contract with an improved salary. There is no reason the Respondent would offer a new contract with improved terms to an employee it supposedly wanted to get rid of. d. The Claimant testified that she was verbally harassed for two years by Mr. Pete Sinclair. She did not state that this was an issue when commenting on her work environment in her appraisal form in 2019. She did not raise this issue when renewing her contract. The Respondent submits that in paragraph 10 of her Statement of Claim, the Claimant stated that she lodged a complaint with Respondent's Human Resource Manager Ms. Ngode. This is singular. In cross-examination the Claimant admitted that this was a verbal complaint. Ms. Ngode testified that the verbal complaint was made in late August 2020. This was two years after the harassment supposedly began. The Respondent submits that if there had been prolonged harassment as the Claimant claims, there would have been evidence of it and that there is no such evidence. Further, the Claimant had several opportunities to document this alleged harassment: a) in the appraisal forms of 2019, b) when renewing her contract and through c) written complaints or memorandums to the Respondent. The Respondent submits that the Claimant did not report the harassment in the manner she was required to do under the contract of employment. It submits that there is provision in Clause 18.2 of the Employment Agreements of 31st October 2017 and 10th December 2019 on steps to take where the employee is dissatisfied with any disciplinary decision. The Respondent submits that if the Claimant had any grievances under the agreements, she should refer them to the Board and this reference would be dealt by the Board. Clause 20.1 provided that a notice or other written communication had to be delivered personally or through the other means provided. This implies that such a notice should be written. The Respondent submits that this includes the reference made under clause 18.2 of the Employment Agreements.
22. The Respondent cited the case of *Samira Schwarz v Farzana Nauranga & 2 others* [2021] eKLR where it was held as follows:

The Claimant failed to record the verbal abuse whether through memos complaining of it or letters to HR raising the issue. The failure to do so means there is paucity of evidence to



find the Respondents breached the terms and conditions of service by failing to provide a conducive environment for its employees and in this case, the Claimant.

23. The Respondent submits that the terms of the contracts the Claimant made with the Respondent and the decision cited support the position that an employee who claims they are being harassed should record the harassment through memorandums or letters to the employer complaining about the harassment. The Respondent submits that this is not only for record purposes but also because an allegation is being made against a fellow employee or supervisor. Ms. Ngode testified that when the Claimant verbally complained to her in late August 2022, she requested her to make a formal complaint. She explained that the formal complaint would enable her to present it to the accused supervisor and there would be a formal paper trail. The Respondent submits that Claimant also believed in good order and formality because when she was being accused of wrongdoing she expressed her displeasure in the letter asserting she did not understand why her competency was being questioned. The Respondent submits that the Claimant clearly understood proper human resource procedure and the need to formalise communication. The Respondent submits that she however chose not to follow the same process she was advocating for when presenting her complaint of August 2022 and this inhibited the Respondent from immediately acting on it.
24. The Respondent submits that an issue did arise during cross examination of the Respondent's Human Resource Manager Ms. Jemima Ngode and the status of her practicing certificate when she was receiving the Claimant's verbal complaints. The Respondent cites the case of [*Jackline Ng'ongo Nyadeje v Board of Trustees, KCA University*](#) [2019] eKLR which held as follows on the practicing certificate of a Human Resource Manager:

The Claimant sought that the evidence of the Respondent's witness Patricia Opande be expunged from the record on the ground that the said witness did not have a practicing certificate as required by section 29(1) of the Human Resource Management Professional Act, 2012. A letter from the Executive Director of the Institute of Human Resource Management was filed in support of the assertion.

The letter indicated that though the witness was a full and registered member of the Institute, she had not taken out a valid practicing certificate.

The Act has not defined practice or the parameters within which having a practicing certificate would entitle one to practice, very much unlike for example, what is provided for in the *Advocates Act*, for advocates.

[Emphasis added]

25. The Respondent submits that the Court in the case above retained the evidence given by the Respondent's witness. It submits that nothing in the Human Resource Management Professional Act prevented Ms. Ngode from acting as the Human Resources Manager of the Respondent in 2020. It submits that the practice status of the Respondent's Human Resource Manager in 2020 had no bearing on her role and her ability to conduct her responsibilities and to give testimony to this Honourable Court.
26. The Respondent submits that the Claimant claims that she was harassed and faced a toxic work environment from early 2018 until late 2020 – a period of more than two years. It submits that despite this harassment, the Claimant continued to carry out her duties without complaint. She even renewed her contract on 10th December 2019. It submits that if the Claimant was continually harassed as she claimed, she is estopped from making a claim of constructive dismissal. The Respondent refers to the



case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court of Appeal held that one of the conditions for constructive dismissal was that:

The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.

27. The Respondent cites the case of *Joyce Sang v Sumaria Industries Limited* [2019] eKLR where it was held as follows:

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.

28. The Respondent submits that no explanation has been tendered by the Claimant why she did not leave despite being allegedly harassed from 2018 until 2020. It submits she continued working for the Respondent for a prolonged period without leaving employment and carried on as if all was well and did not make a formal complaint as per the terms of her employment contract and did not raise the issues she was facing during her appraisal. The Respondent submits the Claimant even renewed her contract and continued to work in what she describes as a toxic work environment. It submits that the Claimant lost the right to treat herself as discharged. The Respondent submits that the first official complaint concerning the conduct of Mr. Pete Sinclair was made in the Claimant's letter of 17th September 2020 which resulted in a meeting convened on 30th September 2020 between the Respondent's Human Resource Department, the Claimant, and the Claimant's colleagues in the drive show. The subject of the meeting was harassment in the workplace and following the meeting, a notice to show cause letter was issued to Mr. Pete Sinclair on 7th October 2020 to which he responded on 12th October 2020 and a final warning letter issued to Mr. Pete Sinclair on 16th October 2020. The Respondent submits that the Claimant confirmed that following the warning letter, Mr. Pete Sinclair apologised for behaving the way that he had. The Respondent submits that organisations such as the Respondent will have different kinds of people from different backgrounds and that an employer has no ability to fully control what these employees do at every given moment of time. The Respondent submits that the best an employer can do is screen them when they enter employment, set a code of conduct and act when an employee goes against that conduct. The Respondent submits that the true test to determine if an employer no longer intends to be bound by the fundamental terms of the contract is to assess how they react when an employee informs them of their grievances. The Respondent submits in this case acted immediately and firmly as confirmed by the Claimant herself in her letter of 12th November 2020 that her grievances had been addressed to her satisfaction. This, it is submitted, was why she stated that she was retracting her resignation. She did not say, as she now does, that she was unsatisfied, and Mr. Sinclair should have been fired. The Respondent submits that the Claimant stated that she was encouraged to withdraw her resignation by the Respondent's Chief Executive Officer. However, there is little evidence to support this as the letter of 12th November 2020 makes no reference to the alleged request to retract her resignation and the details of the meeting in the Claimant's witness statement are scanty. It submits that the Claimant does not state on which date and time the meeting took place, who else was in the meeting and if minutes were prepared. Further, after the Respondent confirmed that they were proceeding with the resignation on 25th November 2020, the Claimant did not respond and refer to the alleged assurances made. She also does not refer to the alleged request to retract her resignation when rejecting the new contract on 7th December 2020. She in fact seemed pleased with the Respondent in that letter of 7th December 2020. The Respondent submits that this does not denote an employee who had been deceived. It further submits that the Respondent



was entitled to reject the retraction of the resignation as this retraction was made 7 weeks after the Claimant's resignation. It is submitted that it was in good order for the resignation to run its course and the parties to enter a fresh contract. The Respondent cites the case of *Edwin Beiti Kipchumba v National Bank of Kenya Limited* [2018] eKLR where it was held as follows:

Case Law suggests for withdrawal of resignation to be acceptable, it must be made within a reasonable time from the date of resignation. The period between resignation and rescission of resignation must be short. The best practice taken from a succession of commonwealth judicial pronouncements, is that the Employer should allow a cooling-off period, to ascertain the circumstances of resignation. Timing of withdrawal is important, where resignation is made in the heat of the moment. If withdrawal of resignation is made weeks, months or years after resignation, it is likely not to be endorsed by the Courts.

[Emphasis added]

29. The Respondent submits that the issue of the harassment of the Claimant was promptly addressed by the Respondent, and this was done to the satisfaction of the Claimant and that given the date when the formal report was made by the Claimant and the speed in which the Respondent addressed the Claimant's grievances, there was no intention by the Respondent not to honour the key obligations of the agreement it made with the Claimant. The Respondent submits that following the successful resolution of the issue the Claimant had raised in her letter of 25th September 2022, the Respondent informed the Claimant that it would offer her fresh contract on 1st December 2022 which contract is identical to the contract the Claimant had terminated. The Respondent submits the contract and the offer were forwarded to the Claimant on 1st December 2020 the day after her previous contract came to an end. The Respondent submits that its witness testified that the Claimant went over the contract but refused to accept it and that the Claimant said that she needed to think about it. It submits that on 7th December 2020, the Claimant wrote a letter to the Respondent and thanked the Respondent for the offer but stated that she must decline it. It submits that she did not state why she was declining but indicated that it had been a pleasure working for the Respondent and was grateful and wished Respondent success in their efforts to find a perfect replacement. The Respondent submits that its witness testified that the Claimant joined Royal Media Services the next month, January 2021, and started presenting in the radio station hot 96. The Respondent submits that the Claimant's testimony is that she was given limited time to consider the contract, it contained terms which were unfavourable to her, and the letter of 7th December 2020 was a second resignation. The Respondent submits that there is however no evidence to support the Claimant's assertions because in her letter of 7th December 2020 declining the offer, she did not indicate any issues she had reviewing the contract or any clauses she was objecting to. It is submitted that the Claimant indicates in the said letter that she had given the offer a lot of thought and this would be unusual if she had limited time to consider the contract. The Respondent submits that the Claimant claimed, without more, that the contract which was presented to the Court by the Respondent had been altered but she has failed to even identify which clauses were allegedly altered. The Respondent submits that the Claimant used kind words to describe her relationship with the Respondent and her experience in the company. It submits that at the time of writing her letter of 7th December 2020, the Claimant was no longer employed by the Respondent and there was no reason for her to say these words if they were not true. It submits that the Claimant and the Respondent parted ways amicably and that the true reason the Claimant rejected the new contract by the Respondent is that she had already secured employment elsewhere and she had no interest in working for the Respondent. The Respondent urged the Court to find that this was not a case of constructive dismissal.



30. The Respondent submits that it is common ground that on or about 11th February 2019, the Respondent gave the Claimant Kshs. 50,000/- which was to go towards her medical expenses. The Respondent submits the Claimant claims that this was an *ex-gratia* payment advanced to her by the Respondent's Chief Executive Officer Mr. Patrick Quarcoo. The Respondent submits that its position was that this was a loan which the Claimant has not fully repaid to date. The Respondent submits that the sum of Kshs. 50,000/- was a loan for the reasons that contrary to the assertions of the Claimant, the sum of Kshs. 50,000/- was paid to her by the Respondent and not Mr. Patrick Quarcoo. The Respondent submits that by an email dated 8th October 2020, the Respondent reminded the Claimant of the loan and informed her that they would recover it via monthly instalments. The Respondent submits that on 13th October 2020, the Respondent proposed deducting Kshs. 5,000/- at the end of the month and the rest from the Claimant's final dues to which the Claimant responded that she was okay with that. The Respondent submits that the Claimant is estopped from denying that the Kshs. 50,000/- was a loan. The Respondent cites the Court of Appeal decision in [748 Air Services Limited v Theuri Munyi](#) [2017] eKLR which cited the case of [Serah Njeri Mwobi v John Kimani Njoroge](#) [2013] eKLR with approval where it was held that, 'The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.' The Respondent submits that the reason why no written agreement was made when the cheque of Kshs. 50,000/- was being issued was because the Claimant was in urgent need of the money and that to promptly assist the Claimant, the Respondent took the humanitarian step of skipping its usual process to have the funds availed to the Claimant. The Respondent submits that this was inadvertently not rectified once the Claimant was well although she admitted having received the loan. The Respondent submits that the Claimant took out a loan of Kshs. 50,000/- and the Respondent was entitled to pursue it as they have done in CMCC No. E455 of 2021 – [Radio Africa Limited versus Teresia Wanjiku Muikamba](#).
31. The Respondent submits that the Claimant has failed to establish that she left the employment of the Respondent because the Respondent showed that they did not intend to honour the essential clauses of the employment contract. The Claimant did not raise any issues concerning her working environment for two years and only raised them at the eleventh hour when she was resigning. These issues were resolved, and the Claimant admitted this in her letter of 12th November 2020. The Respondent offered her a new contract, but it was rejected by the Claimant. The Respondent urged the Court find that there is no evidence that the Respondent constructively dismissed the Claimant. The Respondent submits that the Claimant has pleaded for aggravated damages for pain, suffering and mental anguish but however, the Claimant has provided no evidence to substantiate this claim and more importantly such damages cannot be awarded by an Employment Court under section 49 of the [Employment Act](#), 2007. The Respondent submits that the Claimant has sought to have the Respondent's Chief Executive Officer estopped from denying that he made a statement requesting the Claimant to retract her resignation. This is a highly unusual argument. Estoppel prevents a party from acting contrary to their previous conduct or statement. The Claimant has however not presented any evidence of any conduct or statement by the Respondent's Chief Executive Officer. Her evidence is a letter she sent to the Respondent. The said letter does not refer to any conduct or statement by the Respondent's Chief Executive Officer. The Respondent submits that this argument is a disguised means through which the Claimant seeks to shift the burden of proof to the Respondent. The Respondent submits that the burden of proof rests on the Claimant to prove the facts she is alleging and that she has failed to discharge this burden. The Respondent submits that the Claimant seeks the value of the unexpired contract she terminated and relies on section 49(1)(a) of the [Employment Act](#) to make this claim. The Respondent submits this section does not concern the unexpired contractual



period but instead relates to the notice period. For this point, the Respondent cites the case of *Mary Mutanu Mwendwa v Ayuda Ninos De Africa-Kenya (Anidan K)* [2013] eKLR where it was held:

My answer is that indeed loss of earnings/income is a damage which can be awarded by the Court but such damage is capped at the equivalent of twelve months gross wages irrespective of the duration of a particular contract. I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definite contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of unserved contract and deny those in definite or 'permanent' contracts who are unfairly or wrongfully dismissed, say with a balance of thirty years to retirement differently.

32. The Respondent submits that the Claimant is not entitled to compensation of twelve months' salary for the alleged constructive dismissal because there is no evidence that the Claimant raised the issues she was facing with the Respondent for more than two years. Immediately the Claimant formally notified the Respondent of the issues she was facing, they were resolved promptly and to the Claimant's satisfaction. The Respondent submits the Claimant was offered a new contract with the same terms as her previous contract in an environment that she found comfortable but she rejected this contract. The Respondent submits that it invited the Claimant to collect her certificate of service in its letter of 8th February 2021, but she has chosen not to collect it to date. The Respondent urges the Court to find that the Claimant has failed to prove her case and the same should be dismissed with costs to the Respondents.
33. The Claimant sued her erstwhile employer after her contract with the Respondent terminated. She seeks a myriad of reliefs chief of which is a declaration that her resignation was constructive dismissal as well as prayers for damages. She also seeks unpaid wages for voice over services as well as an order directing the Respondent to provide copies of the Claimant's employment records including but not limited to copies of her appraisal records, copies of any grievances and/or complaints against her, copies of any warning letters, copies of her contracts of employment, evidence of payment of her statutory dues and payroll records for the purposes of this suit and the Claimant's records.
34. The Claimant asserts constructive dismissal. This as held in preceding cases such as the Maria Ligaga case and others, entails the employer creating such an environment that the employee has no option but resignation. In this case, the Claimant did not show the toxic environment caused her to terminate her contract. Indeed, only one incident was reported and action was taken promptly resulting in an apology and a rather feeble warning. The conduct of the Claimant in not raising any issue previously indicates either acquiescence or the absence of such alleged violations which would have created the basis for a finding that the toxic work environment brought on by a misogynist and racist employee was the cause for her termination. While the Court agrees that in any employment space people come from different backgrounds with the result that employees may not behave toward each other as expected, it does not excuse racism or misogyny exhibited by its employee Pete Sinclair. It is my finding that in accordance with the evidence adduced, the Claimant left employ with the Respondent for greener pastures despite the Respondent offering an enhanced package. The Claimant having left the Respondent voluntarily did not establish the elements necessary for her to recover damages from the Respondent.
35. The Claimant did not avail records in relation to the voice over services but as the Respondent did not oppose this by way of proof or payment of the sum due for the voice over, the Claimant is entitled to the sum of Kshs. 6,000/- for the voice over non-payment. The Respondent has refused to issue the Claimant the certificate of service as the employer does not seriously expect its former employee to go and fetch the certificate. It could have been mailed to her. This was not done. The Claimant was



informed of the deduction of the amount given to her to clear her bill as if it were a loan. No documents were issued to the Claimant prior to the disbursement and no communication was given to show that the Respondent was offering the sum as a loan. Despite the Claimant seemingly having resigned herself to pay the sum, this was unconscionable for the Respondent to seek to recover the sum the Claimant believed had been advanced ex gratia. Correspondence between the parties suggests there was a meeting and discussion between the Claimant and the CEO Mr. Patrick Quarcoo. Unfortunately, the Claimant did not follow up said meeting with any email or correspondence to cement any discussions as may have been held. As such her allegations that there was a compulsion to accept terms that were unpalatable to her were not proved. She did resign and without drawing a nexus between her resignation and the conduct of Mr. Sinclair, the claim of constructive dismissal is unproved. As the termination was not found to be unlawful the Claimant will be entitled to the following reliefs:-

- i. Issuance of her Certificate of Service which must accord with section 51 of the [Employment Act](#).
- ii. Payment of Kshs. 6,000/- for voice over services.
- iii. Refund of any sum deducted in respect of the 50,000/- advanced to her.
- iv. Employment records held by the Respondent in respect of the Claimant including her appraisals, contracts of service as well as any complaints/allegations made against her or by her.
- v. Costs of the suit limited to the lower scale.
- vi. Interest on the sum in (ii) and (iii) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE

