



**Kamau v Panari Hotel (Cause 1874 of 2017)
[2023] KEELRC 2107 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2107 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1874 OF 2017
JK GAKERI, J
SEPTEMBER 20, 2023**

BETWEEN

SAMSON MAINA KAMAU CLAIMANT

AND

PANARI HOTEL RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim filed on 20th September, 2017 alleging constructive dismissal, discrimination and entitlement to terminal dues.

Claimant’s case

2. The Claimant’s case is pleaded as follows; That he was first employed by the Respondent in July 2007 and rose to the position of the Human Resource Manager by July 2010 when he joined another employer but was headhunted by the Respondent and was employed as the Human Resource & Administration Manager effective 1st April, 2013 at a consolidated salary of Kshs.245,000/=. Other allowances included transport, entertainment and cellular phone allowance totalling Kshs.55,000/= and 26 working days leave.
3. That after re-joining, the Respondent started displaying questionable tendencies such as no one to hand over, and no job description, and basic pay was indicated as Kshs.245,000/= while gross was Kshs.300,000/=.
4. That he was discriminated in that he was the only Senior Manager whose salary was not increased for over four (4) years despite approval of annual salary budgets but served diligently with perseverance and dispatch.



5. It is the Claimant's case that on 7th June, 2017, the Operations Manager convened a meeting attended by the Claimant and the Financial Controller. That some other unnamed Heads of Department were also invited in the identification of some unimportant positions to be terminated to cut the wage bill.
6. That while in the office over the lunch break, he read an email from the Managing Director directing him to attend an urgent meeting in his office later that day but was called at 3 pm by the Managing Director and the Financial Controller joined later and was informed that certain allegations of sexual harassment had been made about him by a female employee but his request for the evidence was not honoured on the premise that the accuser had to be protected.
7. The Claimant avers that he was given the option to resign or be summarily dismissed.
8. The Claimant avers that being placed between a rock and a hard place, he chose resignation, typed the resignation letter in his office and handed over the same to the Managing Director who received it and was advised to clear and leave the hotel.
9. That the Respondent had no valid reason to terminate his employment. The Claimant finally avers that he was forced to resign.
10. The Claimant prays for;
 - a. A declaration that his dismissal from employment amounted to constructive dismissal and was unlawful and unfair.
 - b. A declaration that the Claimant was subjected to discrimination in respect of terms and conditions of employment contrary to the law.
 - c. The sum of Kenya Shillings 7,458,223.10 comprising;
 - i. Salary for June 2017 Kshs.70,000.00
 - ii. Pension for June 2017 Kshs.5,250.00
 - iii. Leave earned 2014/2015 (7 days), 2015/2016 (26 days), 2016/2017 (26 days), 2017/2018 (4 days) Kshs.726,923/=
 - iv. Leave travel Allowance 2015/2016, 2016/2017, 2017/2018 Kshs.10,400/=.
 - v. Compensatory leave Manager on Duty (5 – 10 pm), Kshs.12,500/=
 - vi. Overtime hours on duty 27th May, 2017 Kshs.17,500/=.
 - vii. Unpaid benefits 2013/2014 (April 2013 – August 2014)17 months remuneration benefits}50 months unpaid pension benefits } 1,141,250/=
 - viii. Termination notice Kshs.300,000/=
 - ix. Salary reviews for 4 years Kshs.1,574,400.00



- x. Damages for constructive termination
Kshs.3,600,000/=.
- d. Damages for discrimination.
- e. Certificate of service.
- f. Costs of this suit.
- g. Interest at court rates.

Respondent's case

11. By its Memorandum of Response filed on 18th January, 2013, the Respondent admits that it employed the Claimant on 1st April, 2013 as the Human Resource & Administration Manager at a gross salary of Kshs.300,000/=.
12. It is the Respondent's case that by a letter dated 31st May, 2017, it engaged Mr. Edward Mwiti of Mwiti Associates (HR Consultants) to conduct confidential inquiry of a claim of sexual harassment by one Doris Mweni John by the Claimant.
13. The Respondent avers that after Doris had attended an interview, the Claimant gave her his number and asked her to call him but she did not but two weeks later, she was requested to take her certificates to the Claimant and was employed in January 2017 as a waitress on probation.
14. That the advances begun in February 2017 whereby the Claimant would call or text the waitress for coffee dates or meetings but she declined and was worried about her future employment.
15. That the Claimant would demand that food be delivered to him by the waitress.
16. That the waitress confided to one Mr. Martin who advised her to discuss the issue with the Operations Manager Mr. Kitungo but Martin informed Mr. Kitonga about it who escalated the same to the Managing Director who talked to the employee.
17. It is the Respondent's case that the Claimant had already issued a warning letter to the employee for allegedly reporting to work late but the employee appealed and the warning was withdrawn but the Claimant reinstated it ostensibly to punish the employee.
18. The Respondent avers that the investigation revealed that the harassment started in February 2017 at the instance of the Claimant but the employee did not give in.
19. That the Claimant's phone messages were explicit.
20. That the investigation found that the employee was sexually harassed by the Claimant and action had to be taken against the Claimant.
21. That after the Managing Director received the Report, he summoned the Claimant and intimated to him his intention to commence disciplinary proceedings against him where he would be afforded the opportunity to be heard but offered to resign immediately and the request was accepted.
22. That the Claimant's request for waiver of the resignation notice was also accepted and as a consequence the Claimant proceeded to his office and later handed in a resignation letter dated 7th June, 2017 and the Managing Director accepted the same on the same day.
23. It is the Respondent's case that the Claimant was taken through the investigation report and its findings and was not coerced to resign as he did so to avoid being taken through a disciplinary process.



24. The Respondent denies having discriminated the Claimant on salaries and the evidence relied upon by the Claimant was not consistent with a claim for constructive dismissal and he was working well until he was invited to discuss the investigation report.
25. That the Claimant as the Human Resource Manager ought to have acted in good faith towards his employer and employee but breached the code of conduct as well as the duty of trust, good faith and fidelity.
26. That the Claimant was paid the sum of Kshs.733,086.00 less statutory deductions.
27. The Respondent prays for dismissal of the suit.

Claimant's evidence

28. On cross-examination, the Claimant confirmed that he was advised to resign or be dismissed and opted to resign and maintained that he resigned from employment and had no evidence to show that he had been coerced to do so and the resignation letter made no reference to coercion.
29. The witness confirmed that before he resigned, there was a discussion and an agreement.
30. That he did not respond to the Memorandum of Response.
31. The Claimant admitted having received the Managing Director's email dated 6th June, 2017 at 14.39 pm to discuss about the allegations on sexual harassment.
32. The witness confirmed that the Investigators Report was filed on 27th May, 2019 and he read it.
33. The Claimant admitted meeting the Managing Director on 7th June, 2017 but denied having met the Investigator but admitted that the report showed that he met him on 3rd June, 2017 when he alleged to have been on leave.
34. He admitted having known one Doris James, the employee.
35. From the call logs on record, the Claimant identified his cell phone number as 0722478651 and admitted it was his line.
36. The witness testified that he had no comment on the messages from his cell phone number.
37. He denied having known that an attachee named Diana Mutuma had complained about sexual harassment.
38. The witness further admitted that his counsel wrote to the Respondent on 12th July, 2017 and the Respondent responded on 24th July, 2017 and admitted that the Mr. Kamau referred to by the letter was him.
39. Strangely, the witness admitted as having been aware of the alleged sexual harassment allegations by an employee. That he was subjected to a disciplinary action and resigned in writing and it took effect immediately.
40. The Claimant admitted that he had no evidence to substantiate the claim for leave and discrimination and did not request for the documents.

Respondent's evidence

41. RWI, Mr. Patrick Marekia, the Respondent's Managing Director adopted the investigators report and on cross-examination confirmed that he learnt of the allegations from Mr. Kitonga, the Operations



- Manager and appointed an investigator to have the matter verified and the consultant delivered a report. That he was not present during the investigation.
42. That he saw the call logs in the victims phone (Doris James) who transferred them to Mr. Mwititi and himself.
 43. The other call log came from the principal of the college where Diana Mutuma attended.
 44. The witness confirmed having talked to Doris James after the matter was reported to him.
 45. That he received the investigation report in early June 2017 and it was not dated.
 46. He denied having forced the Claimant to resign.
 47. The witness testified that there were no salary increments between 2013 and 2017 for any employee but was unsure as to whether the Claimant proceeded on leave adding that the Claimant had access to all documents as head of Human Resource.
 48. The witness confirmed that he had a meeting with the Claimant on the day he resigned and the only issue for discussion was the investigation report as the Claimant had no critical performance issues.
 49. That he showed the Claimant the report and since it was serious he had envisaged a disciplinary process but the Claimant opted to resign but requested for waiver of notice which was accepted.
 50. On re-examination, the witness testified that he received the call logs from Doris James and one Thomas Dudah and did not deem it necessary to report the matter to the police.
 51. That he sent the email to the Claimant on June 6th, 2017.
 52. That the sexual harassment policy did not preclude the appointment of an independent investigator as opposed to a Committee which the Claimant was supposed to appoint, yet the allegations related to him.
 53. RWII, Catherine Mwikali John confirmed that she was engaged in July 2022. That her only evidence was confirmation that Doris James could not attend the hearing owing to indisposition.

Claimant's submissions

54. Counsel for the Claimant isolated three issues for determination on whether the resignation amounted to constructive dismissal, whether the Claimant was discriminated as regards terms and conditions of service and entitlement to terminal dues.
55. Counsel conceded that the Claimant was paid the sum of Kshs.510,224.00 as salary for June 2017, accrued leave, leave allowance, one-day duty manager and notice waver. The sum was paid in March 2018 and the Claimant did not contest the amount paid.
56. As to whether the resignation amounted to constructive dismissal, counsel submitted that the circumstances in which the Claimant resigned on 7th June, 2017 shows that he was constructively dismissed by the Respondent.
57. As regards discrimination, counsel urged that the Respondent adduced no evidence that the Claimant was not discriminated and relied on the sentiments of the Court in *Jemimah Akoth Nyandera Onyosi and 6 others V Kenya National Trading Corporation (2014) eKLR* where the court awarded Kshs.100,000/= for discrimination.
58. It was urged that the Claimant was discriminated.



59. On reliefs, salary for June 2017 was admitted as paid but the Claimant prayed for pension, balance of accrued leave, balance of leave travelling allowance, compulsory leave, overtime and all other prayers including costs.
60. Arguably, the Claimant was introducing new allegations by way of submissions.

Respondent's submissions

61. As to whether the Claimant was constructively dismissed, counsel relied on the enunciations of the Court of Appeal in *Coca Cola East & Central Africa V Maria Kagai Ligaga* (2015) eKLR on the tests applicable and the guiding principles in making the determination of constructive dismissal.
62. Counsel urged that the conduct of the employer was the central consideration in constructive dismissal.
63. Reliance was also made on the sentiments of Maureen Onyango J. in *Catherine Kinyany V MCL Saatchi & Saatchi* (2013) eKLR where the learned judge held that the Claimant had voluntarily resigned.
64. Finally, the decisions in *Peterson Guto Ondieki V Kisii University* (2020) eKLR and *Edwin Beiti Kipchumba V National Bank of Kenya* (2018) eKLR were cited to submit that the burden of proving constructive dismissal is borne by the employee and resignation was a unilateral act and its efficacy was not dependent on the conduct of the employer.
65. Counsel submitted that the Claimant had voluntarily resigned.
66. On the alleged discrimination, counsel submitted that the Claimant's allegation that he was the only Manager whose salary was not increased during the currency of his employment was untrue, as the issue had not previously been raised with the employer, a fact the Claimant admitted during the hearing, and was therefore an afterthought.
67. Counsel maintained that the Claimant resigned voluntarily to avoid disciplinary action following allegations of sexual harassment by a junior employee which amounted to misconduct.
68. That copies of the letters attached belonged to unionisable employees and/or employees who were not Managers.
69. Counsel further urged that the letters were authored by the Claimant and were unsigned thus their authenticity could not be guaranteed.
70. Reliance was made on the sentiments of the Court of Appeal in *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (2018) eKLR on the definition of discrimination.
71. On the reliefs sought, counsels submitted that the Claimant admitted having been paid Kshs.733,086.00 and received Kshs.510,244/= after deductions.
72. Counsel urged that the amount paid included salary for June 2017. Counsel urged that the court had no jurisdiction on the prayer for pension as provided by Section 46 of the [Retirement Benefits Act](#), 1997.
73. The Supreme Court decision in *Albert Chaurembo Mumba & 7 others V Maurice Munyao & 148 others* was also relied upon to buttress the submission.
74. According to counsel, pension payments are accessible through the scheme administrator.



75. On leave earned and not taken, counsel submitted that neither the particulars nor evidence was tendered and the same applied to leave travelling allowance. Being claims for special damages, they had to be pleaded and proved as authoritatively determined by judicial pronouncements.
76. It was submitted that the Claimant did not dispute the amount paid as leave and was not entitled to overtime pay as held in *Albert Ouma Akeyo V Maguna Adu Celf Selection Stores* (2013) eKLR.
77. On unpaid benefits (April 2013 to August 2014), counsel urged that the Claimant did not plead the benefits he was claiming as the statement of claim made no reference to allowances.
78. On salary review, counsel urged that the Claimant had not provided a basis for the claim as his contract had no specific clause on salary increase or review.
79. Reliance was made on the sentiments of Radido J. in *Isabel Wayua Musau V Copycat Ltd* (2013) eKLR on the need to establish a basis for a claim for salary increment as it had no statutory basis in the *Employment Act*, 2007.
80. Counsel urged that since the Claimant resigned voluntarily, he was not entitled to compensation for constructive dismissal as was the holding in *Douglas Omunyin Otungu V Board of Trustees Redeemed Christian Church of God* (2022) eKLR where the court declined to award compensation.
81. Counsel urged the court to dismiss the suit with costs.

Determination

82. After careful consideration of the pleadings, evidence on record and rival submissions by counsel, the following issues commend themselves for determination;
 - i. Whether the Claimant's employment was constructively terminated.
 - ii. Whether the Claimant was discriminated by the Respondent on terms and conditions of employment.
 - iii. Whether the Claimant is entitled to the reliefs sought.
83. As to whether the Claimant was constructively dismissed from employment, counsels have adopted contrasting positions. While the Claimant's counsel argues that the Claimant was constructively dismissed, the Respondent's counsel maintains that the Claimant resigned voluntarily to avoid disciplinary action for allegations of sexual harassment of a junior employee. The starting point is an elucidation of the principle of constructive dismissal as articulated by the courts.
84. It requires no emphasis that the most authoritative formulation of the concept of constructive dismissal was by Lord Denning MR in *Western Excavation (ECC) Ltd V Sharp* (1978) QB. 761 as follows;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once . . .”



85. In *Milton M. Isanya V Aga Khan Hospital Kisumu* (2017) eKLR, Onyango J. stated as follows;
- “In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate the employment but frustrates the employee to the extent that the employee tenders resignation.”
86. Finally, in *Nathan Ogada Atiagaga V David Engineering Ltd* (2015) eKLR, the court stated that;
- “Constructive dismissal occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntarily, it is in effect a termination. . .”
87. The concept of constructive dismissal which has no statutory underpinning was domesticated in Kenya by the Court of Appeal in its decision in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (Supra) cited by the Respondent’s counsel and affirmed the contractual test as follows;
- “ . . . The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied . . .
- The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment – this is the contractual test. The contractual test is narrower than the unreasonable test. The dicta in *Western Excavation (ECC) Ltd V Sharp* (1978) 1CR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law . . .”
88. The court went further and articulated the legal principles relevant in the determination of constructive dismissal such as the fundamental terms of the contract of employment, whether a repudiatory breach of the fundamental term has taken place, conduct of the employer must be fundamental and go to the root of the contract, causal link between the employer’s conduct and the termination of contract, employee left with or without notice, employee must neither have accepted, waived, acquiesced nor conducted himself as to be estopped from asserting the repudiatory breach and the employee’s burden of proof of the repudiatory breach.
89. I will now proceed to apply the foregoing principles of law to the facts of the instant suit.
90. This case turns on the question whether the circumstances in which the Claimant resigned from employment amounted to constructive dismissal.
91. The gravamen of the Claimant’s case is that his resignation was actuated by the frustrations at the work place including being denied an assistant, the large quality of work notwithstanding, being denied leave days, non-renewal of staff contracts and pressure to illegally retrench employees as captured in paragraph 23 of the statement.



92. In addition, he alleges that his allowances of Kshs.55,000/= was not paid until September 2014 when the anomaly was rectified (paragraph 21). The Claimant's written statement affirms that the anomaly on allowances was rectified in September 2014.
93. As regards the assistant, volume of work or non-approval of contracts, the Claimant adduced no evidence as to the period he stayed without an assistant and the attempts he had made to have one recruited as the Human Resource Manager. There is no write up on record by the Claimant making a case for an assistant on the basis of quantum of work or any other ground.
94. On non-renewal of contracts, the Claimant adduced no evidence on who the employees were and the recommendations he had made for renewal of the contracts as the Human Resource Manager.
95. It was his duty to assess the human resource requirements of the organization and make concrete proposals on the requirements for optimal performance.
96. In the absence of the proposals on the assistant, renewal of contracts and the volume of work, analogous to the allowances, the Claimant appear to have accepted or acquiesced to the state of affairs, if the allegations were untrue and did not leave when he ought to have left and is thus estopped from asserting those allegations.
97. Be that as it may, the Claimant's resignation letter which he admitted as having typed in his office, signed and handed over to the Respondent's Managing Director depicts a completely different picture. It makes no reference to any form of frustration or Respondent's conduct inimical to the existence of an employment relationship. The letter is so forthright and clear and leaves no room for inference of a fundamental breach of contract or repudiatory breach.
98. The letter addressed to the Managing Director states as follows;
- “Dear Mr. Marekia,
- RE: Resignation
- Please accept this letter as my immediate resignation from the position of HR & Administration Manager – Panari Hotel without penalty on notice as discussed and agreed.
- If there are any areas in particular you would like me to focus on my hand over, please let me know.
- I am grateful for the period I have worked for the Panari Hotel and wish you all the best.
- Yours sincerely
- Signed
- Samson M. Kamau
99. In the court's view, this is not the type of letter an overworked and frustrated employee would write as his or her resignation letter.
100. By his letter, the Claimant indicated that the resignation was immediate, was ready and willing to handover and thanked the Respondent for the opportunity he had been accorded to work for the Respondent.
101. Instructively, although the Claimant stated that he was coerced to write the letter, he confirmed on cross-examination that he had no evidence of the alleged coercion.



102. More significantly and as adverted to above, his statement is explicit that “I proceeded to my office where I typed and signed my resignation letter and handed it over to the managing director who duly received it.”
103. Significantly, the Claimant adduced no evidence that he had been asked to write a resignation letter within a particular time frame. It is evident that he had sufficient time to call his counsel for consultations on the way forward, if indeed he was being forced to resign on undisclosed allegations of sexual harassment.
104. The Claimant adduced no evidence as to by whom and how he was coerced not only to type a resignation letter but, sign it in his office and hand it over to the Managing Director, as from his statement, it is evident that he and the Managing Director were neither sharing offices nor computers.
105. Relatedly, although the Claimant denied having had a meeting with the Investigator on 3rd June, 2017, he admitted on cross-examination that he was aware of the allegations of sexual harassment made against him. He also admitted having met the Managing Director on the date he resigned.
106. RWI testified that he showed the Claimant the investigation report and intimated to the Claimant that he would face disciplinary action as a consequence of which the Claimant offered to resign and the two discussed the waiver of notice which is evident from the Claimant’s letter.
107. The letter is explicit that the resignation was discussed and agreed upon which rules out any semblance of coercion.
108. This position is further reinforced by the Respondent’s acceptance of resignation letter dated 7th June, 2017.
109. Puzzlingly, although the investigator’s report was filed as early as 2019, the Claimant made no attempt or effort to deny the fact that he had a meeting with the Investigator on 3rd June, 2017 in his office along Thika Road and recorded a statement.
110. If indeed the alleged meeting did not take place, the Claimant had sufficient time to object to the contents of the report as a fabrication and sought to cross-examine the maker.
111. In a similar vein, the Claimant refused to answer questions on the report stating that he had no comment.
112. Equally questionable is the Claimant’s refusal to deny the contents of the email from the Managing Director to him dated 6th June, 2017 at 14.39 pm whose opening sentence is the meeting between the Claimant and the Investigator explaining why the Managing Director wanted to meet him.
113. If the Claimant did not meet the Investigator, how did he learn about the allegations against him and why did he not respond to the Managing Director’s email to deny having met the Investigator?
114. In the court’s view, the Claimant was untruthful in an endeavour to discredit the Investigator’s report.
115. Finally, the Claimant’s assertion that the Managing Director did not show him the Investigator’s report on 7th June, 2017 is also puzzlingly as it would be difficult to justify his resignation and he would have had an exceedingly strong case for wrongful dismissal, if such a consequence ensured in this case.
116. Needless to gainsay, RWI, the Managing Director of the Respondent confirmed on cross-examination that he had no critical issues on the Claimant’s performance on 7th June, 2017. The agenda of the meeting was specific to the allegations.



117. Finally, the fact that the resignation letter makes reference to an agreement on notice would appear to imply that the resignation was indeed discussed and agreed upon between the Claimant and the Managing Director.
118. For the above stated reasons, the court is satisfied that the Claimant has failed to prove on a balance of probabilities that the Respondent's conduct amounted to a fundamental or repudiatory breach of the contract of employment and thus he was constructively dismissed.
119. The court is further guided by the sentiments of Onyango J. in Catherine Kinyany V MCL Saatchi & Saatchi (Supra) as follows;
- “From the foregoing, there is no evidence of constructive dismissal. For a claim of constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it extremely hard for the Claimant to continue working . . .
- I therefore find that the Claimant voluntarily resigned from employment.”
120. These sentiments apply on all fours to the facts of the instant case.
121. As to whether the Claimant was discriminated on the terms and conditions of employment, counsels have adopted opposing positions.
122. In his written statement, the Claimant stated that he faced outright discrimination as he was the only Senior Manager whose salary was not increased during his employment despite approval of annual salary budgets.
123. Strangely, the Claimant adduced no evidence as to who the other Senior Managers were, when they were employed or when their salary was increased, by how much and he was left out.
124. As the Human Resource Manager, the Claimant had access to human resource records of staff and was the custodian and cannot be deemed not to have known all the Senior Managers by name and position. The latter would have been sufficient to demonstrate the nature and character of the salary differentiation not necessarily as proof of discrimination.
125. The copies of documents on pages 35 and 45 of the Claimant's list and bundle of documents dated 19th September, 2017 are not on the Respondent's letterhead nor authenticated by anyone and in the court's view, their authenticity and credibility is questionable and thus unsafe to rely on.
126. Equally, the Claimant's written statement makes no reference to them as supportive evidence.
127. The same would appear to apply to the four letters on pages 22 – 25 of the Claimant's bundle intended to show that the four members of staff namely;
1. Lillian Osore – Room steward
 2. Veronica V. Kigwei – Room steward
 3. Wahome W. Peter – Plumber
 4. Vincent Otieno Maurice – Carpenter received a modest salary increments of Kshs.886/= on 22nd January, 2015.
128. Worthy to note, the four employees were neither Managers nor Senior Managers.



129. More significantly, however, the letters were prepared by the Claimant and none of them has any form of authentication.
130. Relatedly, RWI confirmed on cross-examination that there were no salary increments for any employee from 2013 to 2017, evidence the Claimant did not controvert.
131. Finally, the Claimant did not demonstrate that the annual salary budgets approved by the Respondents board of directors had salary increments.
132. From the foregoing, it is clear to the court the Claimant did not adduce credible evidence of the alleged discrimination.
133. In *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others (Supra)*, the Court of Appeal stated as follows;

“ . . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions . . . whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description . . .

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . a failure to treat all persons equally where no reasonable distinction can be found between those forwarded and those not favoured.”

134. The Claimant relied on the provisions of Section 5(3) of the *Employment Act*, 2007 to allege that he was treated in a discriminatory manner. This Section outlaws discrimination whether directly or indirectly ;
- a. On the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.
 - b. In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

135. Section 5(7) of the Act provides that;

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

136. In *Samson Gwer & 5 others V Kenya Medical Research Institute & 3 others (2020) eKLR*, the Supreme Court considered the question of burden of proof under Article 27 of *the Constitution* of Kenya, 2010 and stated as follows;

Section 108 of the *Evidence Act* provides that;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side and Section 109 of the Act provides that; The burden of proof as to any particular fact lies on the person who wishes



the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

137. In *Raila Odinga & Others V Independent Electoral and Boundaries Commission & others* (2013), the court restated the rule on shifting of the burden of proof as follows;

“ . . . a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden . . . ”

138. In *Samson Gwer & 5 others case* (Supra), the court stated as follows;

“In the foregoing context, it is clear to us that the Petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court in discharge of the evidential burden establishing their treatment at the hands of the 1st Respondent as unconstitutional. Only with this threshold transended, would the burden fall to the 1st Respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that by no means, did the burden of proof shift to the 1st Respondent.”

139. The court dismissed the appeal by the appellants who had been awarded compensation by the Employment and Labour Relations Court for discrimination. The Court of Appeal had set aside the judgement and decree on the grounds inter alia that the appellants had failed to prove that differentials in pay amounted to discrimination.

140. The Court of Appeal stated as follows;

“For the doctors to succeed on their claims of racial discrimination, it was incumbent upon them to prove that they were treated differently and to their prejudice on account only to their skin colour or racial extraction. They need to prove . . . ”

141. These authorities are clear that for the burden of proof to shift to the Respondent, the Claimant must place before the court sufficient material to demonstrate the alleged differential treatment by the employer.

142. In the instant case, the Claimant attached unauthenticated letters showing salary increments of Kshs.886/= in January 2015.

143. The letter identified the employees as room steward, plumber and carpenter as opposed to the Senior Managers the Claimant alleged to have been discriminated against.

144. Even assuming that the letters were authentic, they cannot be relied upon as evidence in support of the alleged discrimination which was specific to Managers.

145. In the absence of material to demonstrate the persons or positions in respect of whom/which salary increments were made, the amount involved and when, the court is unpersuaded that the Claimant transended the requisite threshold for the burden to shift to the Respondent to explain the alleged salary differentiation and why it did not amount to discrimination.

146. For the foregoing reasons, it is the finding of the court the Claimant has failed to evidentiary demonstrate that he was discriminated on the basis of terms and conditions of employment.



147. Finally, the court is also guided by the sentiments of Radido J. in *Isabel Wayua Musau V Copycat Ltd (Supra)* as follows;

“It is clear in my mind for an (annual) salary increase or review to be legally enforceable, it must either be based on some statute or be expressed in a contract as an express term or in certain cases as an implied term . . .

Nowhere in its 93 substantive provisions does it (*Employment Act*) explicitly set out what I may refer to as a statutory right to an annual salary raise or increment.”

148. In sum, the Claimant has neither demonstrated his entitlement to a salary increment, nor the alleged discrimination.

Reliefs

- a. Having found that the Claimant has failed to prove that he was constructively dismissed by the Respondent, the declaration prayed for is unmerited and is declined.
- b. Having found that the Claimant has failed to establish that he was entitled to a salary increment or was discriminated on the alleged salary increments, the prayer for a declaration is unsustainable as is the claim for damages and both are declined.
- c. The sum of Kshs.7,458,223.10

149. As adverted elsewhere in this judgement, the Claimant admitted having been paid the sum of Kshs.510,224/= comprising;

1. 7 days salary upto 7th June, 2017 Kshs.56,386.00
2. Accrued leave days Kshs.418,849.00
3. Leave allowance Kshs.4,800.00
4. One-day duty Manager Kshs.8,054.00
5. Notice waiver Kshs.245,000.00

150. The payment was effected in March 2018 and the Claimant did not contest any of the amounts paid for the various items. Puzzlingly, the Claimant did not find it necessary to amend the claim so as to plead and prove the amount due.

151. As matters stand, some of the Claimant’s prayer have been paid. However, the court will dispose of all the prayers individually.

Salary for June 2017

152. The Claimant did not adduce evidence that the amount paid by the Respondent was less.
The prayer is declined.

Pension

153. The Claimant led no evidence of entitlement to the sum prayed for. Neither the written statement nor the oral testimony make reference to any outstanding pension.

The prayer is dismissed.



Leave earned but not taken

154. Although the statement of claim identifies the days being claimed for, neither the Claimant's statement nor the oral evidence make reference to the leave days for which payment was being claimed.
155. In sum, the Claimant led no evidence of unpaid leave days and how many they were or when they accrued.
156. It requires no belabouring that special damages must be pleaded and specifically proved by evidence.
157. The Claimant was paid Kshs.418,849.00 for pending leave days and did not contest the sum or establish the number of days outstanding.

The prayer is declined.

Leave travel allowance

158. The Claimant adduced no evidence of outstanding leave travel allowance and was paid Kshs.4,800/=, an amount he did not reject or contest.

The Claim is declined.

Compensatory leave

159. It is unclear to the court as to what the claim here comprises as no evidence was adduced to prove it or its basis though the Respondent paid the Claimant Kshs.8,054.00, an amount the Claimant did not contest.

The prayer is declined.

Overtime hours

160. The Claimant adduced no evidence of entitlement to overtime pay and when it accrued. Similarly, the contract of employment provided that;

“In consideration, the company shall pay a consolidated salary of Kshs.300,000/= per month in arrears each month and . . . It is also deemed to be inclusive of any compensation for extended or extra time you may be required to work at the dictates of your duty.”

161. The foregoing clause was implicit that the Claimant was not entitled to overtime pay. Equally, he was part of management as held in *Albert Ouma Akeyo V Maguna Andu Self Selection Stores Ltd (Supra)*.

The claim is declined.

Unpaid benefits (April 2013 to August 2014)

162. The Claimant adduced no evidence of the particulars of the alleged benefits and when they accrued and why he did not demand payment in late 2014, 2015, 2016, 2017 or before the suit was filed.
163. The court is in agreement with the Respondent counsel's submission that the Claimant did not plead the allowances referred to by counsel in his submissions having pleaded undefined remuneration benefits which are now claimed as allowances.
164. It is trite that a party is bound by its pleadings as held in legions of decisions such as *Raila Amollo Odinga V Independent Electoral & Boundaries Commission (Supra)* and *David Sironga Ole Tukai V Francis Arap Muge & 2 others (2014) eKLR* among others.



165. More significantly, the suit was filed on 20th September, 2017 more than 3 years after the alleged benefits became outstanding. The 17 months remuneration benefit claimed are statute barred by virtue of Section 90 of the *Employment Act*, 2007.

The prayer for Kshs.935,000/= is unsustainable and is dismissed.

166. As regards the alleged underpaid benefits of Kshs.206,250/=, the Claimant adduced no evidence on whether the amount was payable to a pension scheme or the National Social Security Fund.

167. The Claimant neither pleaded nor proved that the amount claimed as pension was unremitted to the relevant scheme or National Social Security Fund or was payable to him.

168. In the absence of relevant particulars, the prayer is declined.

Termination notice Kshs.300,000/=

169. Having found that the Claimant voluntarily resigned from employment, the prayer for notice pay is unsustainable and is declined.

Salary increment, Kshs.1,574,400.00

170. Having found that the Claimant failed to demonstrate either entitlement to salary increment nor the fact that his peers received salary increments from 2013 to 2017, the claim for salary increment is untenable and is disallowed.

Certificate of service

171. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

172. In the upshot, the court is satisfied that the Claimant has failed to prove his case against the Respondent and it is accordingly dismissed with no orders as to costs.

173. The Respondent is directed to issue the Claimant with a certificate of service within 30 days.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2023

DR. JACOB GAKERI

JUDGE

