



REPUBLIC OF KENYA



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**Musiomi v Regency Sacco Society Limited (Cause 1256 of 2016)  
[2023] KEELRC 3415 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3415 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1256 OF 2016  
K OCHARO, J  
NOVEMBER 23, 2023**

**BETWEEN**

**DIANA M MUSIOMI ..... CLAIMANT**

**AND**

**REGENCY SACCO SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant commenced this suit vide a Memorandum of Claim dated 27<sup>th</sup> June 2016, which was later amended on 30<sup>th</sup> December 2016. In the amended Memorandum of Claim, she sought: -
  - a. A declaration that the actions of the Respondent to send the Claimant to compulsory leave without pay amount to constructive dismissal;
  - b. A declaration that the decision to have the Claimant sent on leave without full pay is null and void;
  - c. Payment of the Claimant's salary arrears as from the month of September 2015 up to date being Kenya Shillings Six Hundred and Fifty Five Thousand, Nine Hundred Shillings (Kshs. 655,900/-);
  - d. Payment of the Claimant's salary arrears to the hearing and determination of this suit;
  - e. Compensation for unfair/unlawful dismissal amounting to the Claimant's salary to retirement amounting to Thirteen Million, Two Hundred and Four Thousand, Seven Hundred (Kshs. 13,204,700/-).
  - f. Costs of this suit.
  - g. Any other relief that this Honourable Court may deem fit and just to grant.



2. In response to the Memorandum of Claim, the Respondent filed a Statement of Response and Counter-Claim dated 11<sup>th</sup> December 2017. In the statement of response, the Claimant's claim and entitlement to the reliefs sought were denied, while in the Counterclaim, the Respondent sought against the Claimant Kshs. 23,000,000, an amount it alleges to have lost due to her fraudulent schemes.
3. On 27<sup>th</sup> February 2020, the Claimant filed a Reply to Statement of Response and Defence to Counterclaim dated 20<sup>th</sup> February 2020.
4. The Claimant's case was heard on the 24<sup>th</sup> of April 2022, while the Respondent's was on the 18<sup>th</sup> of May 2022. Subsequently, this Court gave directions for the parties to file their respective submissions. The Claimant filed her submissions dated 22<sup>nd</sup> June 2022, and the Respondent filed theirs dated 29<sup>th</sup> July 2022.

### **Claimant's case**

5. The Claimant's case is that she was employed by the Respondent on 15<sup>th</sup> October 2003 on a permanent basis as an Accounts Assistant earning a salary of Kshs. 11,000/- and a house allowance of Kshs. 2,000/- Further, on 25<sup>th</sup> November 2008, the Claimant was re-appointed to the same position following a meeting held by the Respondent on 12<sup>th</sup> November 2008, for a basic salary of Kshs. 39,372/- and a house allowance of Kshs. 7,478/-.
6. The Claimant states that on or about 29<sup>th</sup> August 2015, she took her annual leave, and when she resumed work on 17<sup>th</sup> September 2015, she was not allowed to resume duty on the basis that there was an ongoing audit. She was instructed to take 20 more days even though she had already utilized all her leave days. She went back to work on 14<sup>th</sup> October 2015 only to be sent away for the same reason. She was therefore constrained to continue being on leave. Thereafter the Respondent didn't correspond to her at all. Further, it failed to pay her during the period.
7. Holding that the Respondent's decision to send her on indefinite leave without pay was unlawful, illegal, and contrary to the Employment Act 2007, she on the 26<sup>th</sup> of October 2015 protested the decision and demanded her unpaid salaries. Rather than responding to her demand letter and remitting her unpaid salaries, the Respondent issued the Claimant with a demand letter dated 6<sup>th</sup> June 2016 demanding outstanding loan arrears of Kshs. 404,500/- as of April 2016, an incorrect amount.
8. The Claimant states that the demand by the Respondent was borne of malice and ill will, and is geared to deflect her pursuit for her unpaid salaries.
9. The Claimant states further that in the circumstances of the matter, she was constrained to file the suit herein, and an interlocutory application for reinstatement pending the hearing of the suit. Her application was successful, the court ordered her resumption of duty. However, the Respondent failed to allow her back in adherence to the order, alleging that it was undertaking re-organization of her office, a process that was until further notice. This, the Respondent communicated through its letter dated 22<sup>nd</sup> July 2016. To date, the Respondent hasn't called her back to work.
10. The Claimant states that the Respondent's action of; sending her on forced leave without pay contrary to the law; condemning her unheard; fabricating reasons to warrant termination of her employment; and failing to reinstate her into employment notwithstanding a court for the reinstatement, amounted to constructive dismissal.
11. Cross examined by Counsel for the Respondent, the Claimant stated that she resumed duty on the 7<sup>th</sup> of October 2015 from her annual leave that she had taken on the 9<sup>th</sup> of September 2015, only to be



- directed to proceed for a further leave pending an ongoing audit exercise. She was informed that the further leave was to be without pay.
12. Referred to the minutes of a committee meeting of the Respondent of 28<sup>th</sup> September 2015, she testified that the same were reflective of the fact that in the meeting, he had been accused of laxity, negligence and failure to perform her duties passionately. However, she was not issued with any letter as a result of the deliberations.
  13. The Claimant further testified that the court order was issued on the 21<sup>st</sup> of July 2016. However, she was not aware that the same was vacated on 31<sup>st</sup> July 2016, as Counsel suggested to her.
  14. The Claimant states that the audit report that the Respondent has presented as evidence was never served on her at any time. That though the report adversely mentioned her, she was not at any moment questioned on the transactions that formed the basis of the accusations against her. She does not agree with the findings in the report.
  15. She further testified that she was charged with the responsibility of appraising and processing loans.
  16. The Respondent had a product called “express advances”. Money for such advances would be withdrawn by any member of staff through a bulk cheque and then the facility sum released to the member of the Respondent.
  17. She further testified that true, through his letter [one of the exhibits by the Respondent] Fidelis Samuel Nzioka asserted that though he had applied for a loan of Kshs. 430,000, he was only given Kshs. 200,000 and promised that the balance was to be released later. Further, the documents tendered by the Respondent indicate that the loan was released fully to him under two cheques. His loan was processed by her colleague, Mr. Kimanga.
  18. She testified that Jeremiah Kibet applied for a loan of KShs. 60,000. The loan was processed and a cheque No. 7772 for the amount was raised by her. In the list presented by the Respondent, it is indicated that he received KShs. 164,000 through cheque No. 7672. The amount that was disbursed under this cheque was for another loan that he took under the building product, different from the loan for Kshs. 60,000. They withdrew the money and credited it into his account per the Respondent’s practice.
  19. Asked about the Kshs. 600,000, the Claimant stated that the Respondent’s documents indicate she withdrew from its account, Further, the same was so withdrawn for disbursement to members who had sought “Express advances”. The Counterfoil for the withdrawing cheque is clear on this. Further, the sum of 350,000 also reflected on the documents, wasn’t part of the Kshs. 600,000.
  20. That the audit report indicates *inter alia* that Kshs. 3,300,000 was not accounted for. However, this is a figure she could have easily explained had she been asked to.
  21. As at the time she was leaving the Respondent’s employment she owed it Kshs. 300,000.
  22. In her evidence under cross examination, the Claimant testified that at the time of separation, she had savings of Kshs. 250,000 in the Respondent’s accounts.
  23. Testifying on the audit, the Claimant stated that best audit practices required that she be given a chance to give explanations to the auditors on the matters that were being raised against her.
  24. The Claimant testified that the order of reinstatement was not obeyed at all. Though it was lifted later, it was when it had not been complied with.



25. For express loan accounts, there was a well-maintained record. The money would be withdrawn under one cheque, and then disbursed to individual loan accounts. The total sums disbursed would always balance with the withdrawn sum.

### **Respondent's case**

26. The Respondent admits presented one witness Joseph Kibagendi to testify on its behalf in this matter. The witness urged this Court to adopt his witness statement that was filed herein on the 18<sup>th</sup> of December 2017 his evidence in chief. He stated the Claimant first came into the employment of the Respondent on the 15<sup>th</sup> of October, 2015 as the Society Accounts Assistant on a permanent basis.
27. The witness stated further that in the year 2015, the Claimant proceeded on annual leave twice to wit; 28<sup>th</sup> May 2015, -30<sup>th</sup> May 2015 and 19<sup>th</sup> September 2015- 7<sup>th</sup> October 2015. Further, the Claimant absconded duty by failing to resume work as and when she was supposed to. Therefore, she caused her contract of employment to come to termination by this action. Her claim for constructive dismissal is therefore unfounded.
28. He further stated that on or about October 2015, the Respondent engaged the services of an external auditor to carry out a forensic financial audit. The audit revealed an elaborate scheme that had been orchestrated by the Claimant to defraud the Respondent and its members. The Respondent lost over KShs. Twenty-three million [23,000,000] thereby.
29. The witness further stated that while in the employment of the Respondent, the Claimant fraudulently and deceitfully incurred unauthorized expenditures and misappropriated the Respondent's funds, which actions amounted to dishonesty.
30. The forensic audit brought forth the fraudulent acts of the Claimant ranging from; intentionally failing to reflect payroll deductions for loans taken up by members of the Respondent; intentionally failing to account for the loans given to staff members' paid loans and interest accrued from the loans; intentionally failing to advise the bank to reverse cheque payments which had been countermanded by the Respondent and or her in her capacity as the officer of the Respondent; intentionally cashing cancelled cheques and failing to account for the proceeds therefrom; intentionally making unauthorized withdrawals from the Respondent's bank account and failing to account for the same.
31. He testified that he couldn't tell whether or not the Claimant did duly offset her indebtedness to the Respondent.
32. The witness testified that the Respondent has never terminated the Claimant's employment, as such she remains an employee of the of the Respondent.
33. The witness further stated that the Claimant was sent on leave when he came into office as a new vice Chairman. When the audit was being carried out he was not an official of the Respondent Sacco.
34. The witness reiterated that the Claimant absconded duty. She never resumed duty after 21 days of leave. The Respondent was not able to take her through a disciplinary process as she was not available following the fact that she absconded duty.
35. He asserted that the forensic audit was carried out at a time when the Claimant had not proceeded for leave.
36. The Claimant's suit should be dismissed with costs and that judgment be entered in its favour for the reliefs sought in the Counter-claim for the Respondent against the Claimant.



## Claimant's Submissions

37. The Claimant submitted that by sending the Claimant on an indefinite unpaid leave, the Respondent constructively dismissed her. The fact that she was sent on leave in the said manner was not disputed by the Respondent. Further, the Respondent's letter dated 22<sup>nd</sup> July 2016 and the minutes of its committee speak to the leave. The action by the Respondent amounted to an unfair labour practice contrary to Article 41 of the Constitution.
38. The Claimant urged this Court to rely on the decision in the case of Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR and find that she met the test set out therein to demonstrate that she was constructively dismissed.
39. The Claimant argued that the testimony of the Respondent's witness cannot be relied on as he was not an official of the Respondent as of 2016. He was not involved at all in the matters in controversy herein. That he was not an official then is a fact he admitted in his evidence under cross examination.
40. Further, the witness contradicted himself during his oral testimony when he stated that the Claimant was present during the audit process contrary to paragraph 7 of the Respondent's Statement of Response where it was stated that the Claimant had absconded duty during the audit. The said witness also stated that the findings of the audit report were communicated to the Claimant but failed to produce a letter evidencing the communication.
41. On whether the termination of the Claimant's employment was lawful, the Claimant submitted that the burden of proving that the reason for the termination was valid and that the statutory procedure was followed lay on the Respondent. To buttress this point reliance was placed on the Court of Appeal decision in the case of Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR. The Respondent failed to discharge the aforesaid burden as it took the position that it never terminated the services of the Claimant.
42. On the appropriate remedies, the Claimant submitted that having proved that she was constructively dismissed by the Respondent, she should be availed of the remedies sought. The remedies sought are those the law contemplates under Section 49 of the Employment Act 2007,

## Respondent's Submissions

43. The Respondent identifies three issues for determination; whether the Respondent unfairly / unlawfully terminated the Claimant's employment contract; whether the Claimant fraudulently and deceitfully incurred unauthorized expenditures, misappropriated funds and breached fiduciary duty owed to the Respondent; and whether the Claimant owes the Respondent an outstanding loan of KShs. 312,500.
44. The Respondent submitted that the Claimant's claim is anchored on the doctrine of constructive dismissal and that it denied that it did constructively dismiss her. For a claim for constructive dismissal to succeed, the Claimant must demonstrate that he or she was forced to resign his or her employment as a result of the creation of a hostile working environment by the employer. To support this point reliance was placed on the cases of Milton M. Isanya v Aga Khan Hospital Kisumu [2017] eKLR and Nathan Ogada Atiagaga v David Engineering Limited [2015] eKLR.
45. The Respondent states that they neither created a hostile working environment nor left the Claimant with no option but to resign. The Respondent insists that the Claimant failed to return to work after she proceeded on her annual leave from 19<sup>th</sup> September 2015 to 7<sup>th</sup> October 2015, thereby absconding



- duty and terminating her services with the Respondent without notice. On a balance of probabilities, the Respondent managed to demonstrate that indeed she absconded duty.
46. It was submitted that the law on unfair termination is contained in Sections 41,43,44, 45 and 47 of the *Employment Act* 2007. The Respondent states that the employment services of the Claimant were not terminated as alleged. Additionally, in her evidence during examination in chief, the Claimant admitted that she was neither issued with a termination letter nor was subjected to any form of disciplinary action. This fortifies the Respondent's position that she absconded duty.
47. The Respondent submitted that it took the action advising the Claimant to stay home vide the letter dated 22<sup>nd</sup> July 2016 out of necessity. It had taken the decision to undergo a reorganization, a decision that was influenced by the closure of Laico Regency Hotel and the declaration of all its [Laico's] employees redundant. The employees were its members. Further, its operations were grounded by the Claimant's laxity, negligence and misappropriation of the Respondent's assets. Due to the reorganization, all employees of the Respondent were sent home and as of now, the Respondent is no longer in business.
48. On the misappropriation of the Respondent's funds and breach of fiduciary duty, it was submitted that an audit was conducted in July 2015 when the Claimant was still its employee, and the Claimant participated in the said audit by giving the auditors access to the necessary documents and responding to their queries. The findings of the audit revealed an elaborate scheme orchestrated by the Claimant to defraud the Respondent and its membership resulting in the loss of millions of shillings, and its eventual closure. The Claimant's fraudulent acts as particularized in the Statement of Response and Counterclaim were clearly proved through the forensic audit report.
49. The documents tendered as evidence by the Respondent helped it to sufficiently demonstrate the instances of fraud, deceit, dishonesty and breach of trust on the part of the Claimant. For instance, one Fidelis Samuel Nzioka applied for a loan of Kshs. 430,000/-, and received Kshs. 200,000/-. Kshs. 230,000/- was unaccounted for despite a cheque being drawn in favour of the Applicant, and him purportedly signing for the same. Similarly, one Jeremiah Kibet applied for a loan of Kshs. 60,000/-, but a cheque number 7672 of Kshs. 164,000/- was drawn in his name. Jeremiah Kibet still received the approved loan under cheque number 7677, which was encashed by the Claimant on 4<sup>th</sup> October 2013. In another instance, cheques 7673 and 7674 were listed under one Jeremiah Cheptarus with no figures against them and no beneficiaries thereto. Cheque number 7673 was encashed for Kshs. 850,000/-. On 15<sup>th</sup> April 2015, the Claimant withdrew Kshs. 600,000/-, of which 350,000/- was used to organize the Annual General Meeting. Kshs. 250,000/- was unaccounted for.
50. The Respondent states that per the Forensic Audit, the Claimant's culpability for defrauding the Respondent arose in that she failed to forward the names of loan beneficiaries to payroll to effect loan deductions causing a loss of Kshs. 1,331,781/-; she failed to advise the bank to cancel cheques not reversed by the bank causing a loss of Kshs. 30,000/-; she failed to account for money withdrawn causing a loss of Kshs. 3,638,009/-; and she disbursed loans to beneficiaries not in the balance list causing a loss of Kshs. 305,260/-. The total loss caused by the Claimant was Kshs. 6,799,050/-.
51. On the outstanding loans of Kshs. 312,500 claimed by the Respondent, the Respondent submits that the Claimant defaulted in her loan repayment and as of 21<sup>st</sup> August 2015, she was in arrears of Kshs. 312,500 and the same continues to accrue interest at 12% p.a. That the loan contract was independent of the employment contract. The failure to comply with the loan contract led to the issuance of a demand notice to the Claimant. This Court is urged to compel the Claimant to pay the outstanding loan amount together with interest of 12% p.a. until payment in full.



## Issues for Determination

52. I have carefully considered the pleadings, oral and documentary evidence, and submissions filed by both parties, and the following issues emerge for determination, thus;
- a. Whether the Claimant absconded duty or was constructively dismissed from employment;
  - b. Whether the Claimant's termination from employment was unfair and unlawful;
  - c. Whether this Court should grant the prayers sought by the Respondent in its Counter-Claim dated 11<sup>th</sup> December 2017;
  - d. Whether the Court should grant the prayers sought by the Claimant.

### **a. Whether the Claimant absconded duty or was constructively dismissed from employment.**

53. It is not in dispute that the Claimant was employed by the Respondent vide a Letter of Appointment dated 5<sup>th</sup> August 2003 to the position of Society Accounts Assistant, at a starting basic salary of Kshs. 11,000/- per month and a house allowance of Kshs. 2,000/- per month. On 1<sup>st</sup> November 2008, the Claimant was issued with a second Letter of Appointment dated 1<sup>st</sup> November 2008, varying her basic salary to Kshs. 19,640/- per month and house allowance to Kshs. 3,730/- per month. As at August 2016, her basic salary was Kshs. 39,372/- and House Allowance was Kshs. 7,478/-, making up a gross salary of Kshs. 46,850/-, per the copy of Pay slip for August 2016 produced by the Claimant.
54. It is also not in dispute that the employment relationship between the parties herein ended. However, the circumstances of the separation are in contest. The Claimant contended that she was sent on indefinite unpaid leave, while the Respondent insisted that she failed to resume work on 8<sup>th</sup> October 2015, hence absconded her duties and, as a consequence terminating her employment contract.
55. Upon reviewing the documents produced by both parties before this Court, I note that the Claimant did indeed take her annual leave from 28<sup>th</sup> May 2015 to 30<sup>th</sup> May 2015 (three days), and again from 19<sup>th</sup> September 2015 to 7<sup>th</sup> October 2015 (20 days). This is evident from the Leave Requisition Forms that were placed before this Court by the Respondent. Cumulatively she took twenty-six [26], therefore, which aligns with her leave entitlement of twenty six [26] working days provided for in her Letter of Appointment dated 1<sup>st</sup> November 2008.
56. Further, Minute 2 of the Minutes of the Sacco Joint Committee Meeting which was held on 29<sup>th</sup> September 2015, tendered as evidence by the Claimant, clearly indicate that the Claimant's leave was extended by twenty more days. Considering this minute, the Court is not persuaded that the Claimant was supposed to resume duty on 8<sup>th</sup> October 2015, but failed to.
57. In addition to the foregoing, this Court has carefully considered the Respondent's letter dated 22<sup>nd</sup> July 2016, that was addressed to the Claimant in reaction to the Court's interim order for reinstatement. The Respondent noted that the Claimant resumed duty but went ahead to advise her to stay at home until further notice, due to an ongoing re-organization. In my view, the letter gives an impression that the Claimant was resuming duty from an absence thereof which was with the authority of the Respondent, otherwise, the Respondent could have raised the issue of absconding in the letter. Further, the absence from duty after this date, 22<sup>nd</sup> July 2016 was clearly with the authority of the Respondent.
58. In light of the above premises, this Court is persuaded that the Claimant has proved on a balance of probabilities that she was indeed sent on indefinite unpaid leave by the Respondent, beginning on 8<sup>th</sup>



October 2015, when her official annual leave ended. The Respondent's position that she absconded duty is unconvincing. It is hereby rejected.

59. My above stated finding is further reinforced by the fact that the Respondent did not at all place evidence before this Court demonstrating that it made efforts to establish the Claimant's whereabouts if at all she had absconded. An employer asserting that his or her employee absconded duty is enjoined to demonstrate that it made efforts to trace him or her for purposes of inquiring why the absence from work, and letting him or her know that disciplinary action was contemplated, if the assertion is to succeed. In the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR, the Honourable Court held that: -

“ 10. Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR).”

60. Having found that the Claimant did not abscond duty as alleged by the Respondent but was forced to go on indefinite, unpaid leave, the next question this Court has to consider is whether this conduct of the Respondent amounted to constructive dismissal of the Claimant. For clarity of record, the Respondent's conduct in issue is two-legged. The first leg is the indefinite leave. The second leg, not paying the Claimant during the period of the leave.

61. What constitutes constructive dismissal has not been codified in Kenya. However, jurisprudence by Courts both within the Kenyan jurisdiction and outside on the concept is ample. In *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal held that:

“What is the key element and test to determine if constructive dismissal has taken place” The factual circumstances giving rise to constructive dismissal are varied. 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 give rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test.”

Further, it held that the principles that should be considered are as follows:

- 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."

62. On the international scale, the Supreme Court of Canada in *David M. Potter Appellant v. New Brunswick Legal Aid Services Commission* 2015 SCC 10 while exploring the subject of constructive dismissal in circumstances where the Claimant was also suspended indefinitely, held that: -

"(31) The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination. In *Farber*, the Court surveyed both the common law and the civil law jurisprudence in this regard. The solutions adopted and principles applied in the two legal systems are very similar. In both, the purpose of the inquiry is to determine whether the employer's act evidenced an intention to no longer to be bound by the contract.

(32) Given that employment contracts are dynamic in comparison with commercial contracts, courts have properly taken a flexible approach in determining whether the employer's conduct evidenced an intention no longer to be bound by the contract. There are two branches of the test that have emerged. Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal: J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at p. 5-5; P. Barnacle, *Employment Law in Canada* (4th ed. (loose-leaf)), at §§13.36 and 13.70. Typically, the breach in question involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial: see, e.g., G. England, *Individual Employment Law* (2nd ed. 2008), at pp. 348-56. In the words of McCardie J. in *Rubel Bronze*, at p. 323, "The question is ever one of degree."

(33) However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable: see, e.g., *Shah v. Xerox Canada Ltd.* (2000), 131



O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.). This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evidenced an intention no longer to be bound by the contract.

- (34) The first branch of the test for constructive dismissal, the one that requires a review of specific terms of the contract, has two steps: first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an essential term of the contract (see *Sproat*, at p. 5-5). Often, the first step of the test will require little analysis, as the breach will be obvious. Where the breach is less obvious, however, as is often the case with suspensions, a more careful analysis may be required."
63. There is no doubt that for as long as a contract of employment subsists the employer remains under the statutory and common law obligation to remunerate his or her employee. Payment of remuneration is so central to a contract of employment that without it, the contract could not legally be considered a contract of employment. It is vitally important that the contractually agreed remuneration is paid on the appointed date of every month. Any unjustified delay concerning the payment of remuneration will result in a breach of duty to remunerate the employee.
64. Delays by an employer or failure to make payment of an employee's wage or salary not only causes social and economic hardship and thus constitute a breach of the employer's obligation under the law, but also has the unpleasant effect of consigning the employee to a state of slavery or servitude contrary to Article 30 of the *Constitution* of Kenya, 2010. It also amounts to working under unreasonable conditions contrary to Article 41.
65. It can also amount to a repudiation of the contract of employment which may justify constructive dismissal. The Claimant asserted that the Respondent didn't pay her salary with effect from September 2015 to date. The Respondent maintained that it did not terminate. However, it did not discount the Claimant's assertion regarding non-payment of her remuneration and the attendant effect, repudiation of the contract. In my view, the action constituted a breach of the contract. The breach was repudiatory in nature, one that signified the Respondent's intention not to be bound by the fundamental terms of the contract any longer.
66. In applying the test this very Court in *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR stated: -
- "79. In order for a claim for constructive dismissal to succeed where the Court applies this test, it must be concluded that the employer's conduct or unilateral change, constitute a breach of the contract of employment, and second if it constitutes such a breach, it must be found to substantially alter an essential term of the contract...
82. The instant claim is anchored on the fact that the 1<sup>st</sup> Respondent was in breach of a term[s] of the contract of employment that were between it and the Claimant. That the breach flowed from an act that was unilateral and substantial. A breach which was repudiatory in nature, evidencing its intention to no longer be bound by fundamental terms of the contract.



83. The Claimant contended that the 1<sup>st</sup> Respondent did not pay him his salary for a whole six months, commencing the first month of his employment with it till the time he resigned...
84. Remuneration is undoubtedly one of the most important terms of an employment contract. In fact, this Court has held before that the right to remuneration is the most important right of an employee, considering the immense protection that the *Employment Act*, 2007 accords, wages and salaries of employees. Where an employer substantially alters [including by a significant reduction, or change of the manner of payment] of an employee's compensation without their consent such alteration may amount to a fundamental breach of the contract. An employee whose compensation has been altered can successfully claim constructive dismissal.
85. I have no doubt in my mind that under the terms and conditions of the contract dated 1<sup>st</sup> November 2019, and the provisions of the *Employment Act*, the Claimant's salary was one that was payable at the end of every month, without any authority on the part of the 1<sup>st</sup> Respondent to unilaterally depart from this...
88. In the upshot and applying the contractual test, I come to the conclusion that by deciding not to pay the Claimant his entitled monthly salary as and when it fell due under the terms of the employment contract and the law, by effecting the non-payment of his salary without first consulting him and or communicating to him amounted to a unilateral act, and a breach of the terms of the contract in a substantial manner. There was a repudiatory breach of the contract therefore.
89. The Claimant was constructively dismissed. This places him on the path to entitlement of one or more of those reliefs normally attracted by a wrongful or unfair termination of an employee, recognized by law.

62. Applying the contractual test enunciated by the Court of Appeal in the *Coca Cola case* [*supra*], I find that the Claimant was constructively dismissed from employment.

**Whether the Claimant's termination from employment was unfair and unlawful.**

63. As constructive dismissal flows from conduct of the employer that is either unreasonable and or that amounts to a breach of a fundamental term[s] of the contract of employment, seldom can it be fair or lawful. I return that the termination was unfair and unlawful.

**c] Whether the Court should grant the prayers sought by the Claimant.**

64. Having reached the conclusion that the Claimant's employment was unfairly and unlawfully terminated, this Court must now consider whether the Claimant should be awarded the reliefs sought in her Amended Memorandum of Claim dated 30<sup>th</sup> December 2016.
65. It is now trite that an employee who is on administrative or disciplinary suspension remains an employee. Equally an employee who has been put by the employer on an indefinite leave remains in employment, as suspension or indefinite leave doesn't cause the employment relationship to terminate, unless they have been successfully made a basis for constructive dismissal. In my view, an employee under administrative suspension or indefinite leave is entitled to his or her remunerative



rights throughout the period of suspension or leave unless there is a specific ouster of the right by either statute. The Claimant is therefore entitled to what she could have earned throughout the period she remained on the indefinite suspension, up to the time she deemed herself constructively dismissed [ the date of her amended statement of claim]. Therefore, for the period 15<sup>th</sup> September 2015 to 27<sup>th</sup> September 2017, KShs. 1,105,660.

66. On the prayer for compensation for unfair termination, Section 49 of the Employment Act 2007, authorizes this Court to grant such compensation up to a maximum of 12 months' gross salary. I have considered the circumstances of the Claimant's termination from employment particularly the Respondent's brazen disregard for the provisions of the law and their conduct of sending the Claimant on forced indefinite unpaid leave for more than one year, the period that she worked for the Respondent being 13 years, and the fact that she didn't not in any proven manner contribute to the termination of her employment, and grant the maximum permissible compensation for unfair termination. Consequently, pursuant to section 49[1][c] of the Employment Act, she is awarded KShs. 562,250.
67. Per Section 51 of the Employment Act 2007, an employee is entitled to a Certificate of Service upon termination of his/her employment as of right. The Claimant should therefore be issued with one within 30 days of this judgment.

**Whether the orders sought in the Counterclaim should be granted.**

68. In its Counterclaim the Respondent sought a sum of Kshs. 23,000,000 from the Claimant. This figure was claimed as a special damage. Therefore, it needed to be proved specifically. I have carefully considered the material placed before me by the Respondent, it demonstrates not that it lost the amount and that the loss was attributed to the Claimant.
69. Further, the Respondent claimed a sum of Kshs. 312,500 from the Claimant, an amount it alleges was due and owing on her loan account as at 21<sup>st</sup> September 2015. The Respondent didn't place any record or statement before this Court whence from the indebtedness can be discerned. Further, in his evidence under cross examination, the Respondent's witness stated that he was not sure whether or not the Claimant owed the Respondent outstanding loan.
70. The Court notes that the Claimant's assertion that as at the time of separation, she had shares in the Respondent's account which could have been used to offset her loan was not in any manner challenged by the Respondent.
71. By reason of the premises I come to the conclusion that the Respondent's Counterclaim was wholly unproved. It is hereby dismissed with costs.
72. In the upshot judgment is hereby entered in favour of the Claimant in the following terms: -
- a. A declaration that the Claimant was constructively dismissed from employment.
  - b. Unpaid salary for the period 15<sup>th</sup> September 2015 to 27<sup>th</sup> September 2017; KShs. 1,105,660/-.
  - c. Compensation for unfair termination pursuant to the provisions of Section 49 (1) (c) of the Employment Act 2007 equivalent to 12 months gross salary; KShs. 562,200/-.
  - d. Interest at Court rates from the date of this Judgment until payment in full.
  - e. Costs of the Suit.
  - f. Certificate of Service be issued to the Claimant within 30 days of this Judgment.



73. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Ngome for the Claimant

Mr. Nyaranga for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

