



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1463 OF 2018**

*(Before Hon. Justice Ocharo Kebira on 7<sup>th</sup> February 2022)*

**GEOFFREY MURIITHI MUTHEE..... CLAIMANT**

**VERSUS**

**XPLICO INSURANCE CO. LIMITED..... RESPONDENT**

**JUDGMENT**

**1.** The Claimant through a memorandum of claim filed herein on the 24<sup>th</sup> October 2018 sued the Respondent seeking for the following reliefs and orders:

- (i) A declaration and finding that the termination of the Claimant's employment with the Respondent was unlawful and unfair.*
- (ii) Special damages of Kshs. 12,640,797.30, as pleaded in paragraph 11.*
- (iii) Interest on (ii) above at court rates from the date of filing this claim until payment in full.*
- (iv) Costs.*
- (v) Certificate of service.*
- (vi) Any other relief that this Honourable court may deem fit to grant in the interest of justice.*

**2.** Contemporaneously with filing of the memorandum of claim, the Claimant filed his witness statement, and a list of documents under which the following documents were filed:

- (i)** Employment contract dated 28<sup>th</sup> May 2015.
- (ii)** Appointment letter dated 13<sup>th</sup> March 2017, appointing the Claimant as General manager – Finance.
- (iii)** Annual leave letter dated 8<sup>th</sup> June 2017.
- (iv)** Email correspondence dated 16<sup>th</sup> August 2018, by the Claimant.
- (v)** Claimant's letter dated 12<sup>th</sup> October 2018.
- (vi)** Claimant's latest pay slip.

**3.** Upon being served with summons to enter appearance, the Respondent did enter appearance, and file a reply to the memorandum of claim and counter claim.

**4.** In the reply to the memorandum of claim, the Respondent denied the Claimant's claim in toto and sought that it be dismissed with costs. In the counterclaim, the Respondent made no specific prayer. Like the Claimant, it did file a witness statement and list of documents and documents thereunder, contemporaneously with its pleadings.

5. On the 3<sup>rd</sup> December 2018, the Respondent filed a supplementary list of documents and documents thereunder. With leave of the court it filed a substituted witness statement of one Dancan Bosire dated 23<sup>rd</sup> November 2021.

6. The matter was heard on the 1<sup>st</sup> November 2021 and 30<sup>th</sup> November 2021 on the Claimant's and Respondent's case respectively. The court directed parties to file their respective submissions within given timelines. The Claimant did not oblige.

### **The Claimant's case**

7. At the hearing the Claimant testified. He urged the court to adopt the contents of his witness statement as part of his evidence in chief and admit the documents hereinabove mentioned as his documentary evidence. He made a brief oral testimony, that was aimed at clarifying certain aspects of the witness statement and the documents before he was cross examined by counsel for the Respondent.

8. He stated that through a letter dated 28<sup>th</sup> May 2015, the Respondent offered to employ him as a chief accountant an offer which he accepted. Consequently, he became an employee of the Respondent as such at a monthly salary of Kshs. 250,000.

9. He contended that due to his exemplary service, through a letter of appointment dated 13<sup>th</sup> March 2007, the Respondent appointed him as the General manager of Finance, with an increased monthly allowance of Kshs. 400,000 [Four hundred thousand].

10. It was his case that he continued to serve and diligently so in the new position till 8<sup>th</sup> June 2014 when he proceeded on annual leave that had accumulated, [36 days] and when he resumed duty the Respondent wrongfully and unlawfully instructed the Principal Officer to prohibit entry into his office.

11. He asserted that the decision to instruct him to proceed for annual leave and immediately thereafter bar him from resuming his official duties was actuated by malice and it amounted to constructive termination of employment.

12. The Claimant further stated that the Respondent's action leading to the constructive dismissal, were not only unfair and in breach of the Respondent's statutory duty owed to the Claimant, but also is in breach of its own human resource policy/manual, regarding hearing and determination complaints.

13. He asserted that he was not accorded any opportunity to be heard as required by the law. The Respondent did not act in justice and equity.

14. The Claimant seeks for unpaid salary for the period April 2017 to September 2018, computed at Kshs. 400,000 per a month, less Kshs. 652, 536 which he was paid in the course of this period at various times, thus:

a) 31<sup>st</sup> August 2017 ----- 322,536.75

b) 30<sup>th</sup> September 2017 ----- 200,000.00

c) 31<sup>st</sup> October 2017 ----- 50,000.00

d) 31<sup>st</sup> November 2017 ----- 80,000.00

15. He further claimed for compensation for unfair termination, to an extent of twelve months' salary. Unpaid leave, Kshs. 293,333.30 and service pay for 2.5 years.

16. Cross examined by counsel for the Respondent, the Claimant's stated that his witness statement was received in court on the 24<sup>th</sup> October 2018, it was filed contemporaneously with the statement of claim. He admitted that the statement is not dated.

17. On the leave that he mentions in her witness statement, he stated that it was for a period of 36 days, and it was compulsory in nature. He never applied for it.

18. He stated that he got a letter dated 8<sup>th</sup> June 2017, which indicated that he had an accumulated 36 untaken leave days, and which instructed him to utilize the days.

19. Referred to the letter for salary review dated 31<sup>st</sup> July 2017 [Document 3 in the Respondent's supplementary bundles], he asserted that he was seeing the letter for the 10<sup>th</sup> time in court. There had been no communication to him about salary cut.

20. The Claimant stated that he did write an email complaining about the denial of access to his office.

21. The Claimant stated that he was last at the Respondent's offices in the year 2018. Then the CEO was Michael Mureithi. He is still with the Respondent.

22. He further testified that he never received the letter that purported to review his salary. He did not receive his salary after the letter.

23. He acknowledged that he received the salary for the months stated in his evidence in chief, in the various times and amounts.
24. He asserted that he did not find this abnormal because as the General manager he was aware that at that time, the Respondent company was facing financial challenges.
25. In the letter that purported to reduce his salary, there are reasons put forth therein that allegedly occasioned the reduction.
26. Accessing the office was through Bio- metrics. The working system would also be accessed through this mode.
27. He asserted that he raised the issue with the Human Resource Manager, who did not sort out the same, constraining him to start corresponding via emails.
28. The Claimant reiterated that he was terminated by denial of access to his office.
29. That after utilizing the 36 leave days, he had 22 [Twenty-two] leave days outstanding.
30. As regards salary variation, he contended that from the month of January 2017 to August 2017, he was not paid any salary. Payments started coming in, in the month of August. He stated that he never at any time waived his right to claim the unpaid salary.
31. His claim is on constructive dismissal, he clarified.
32. He never proceeded for leave because he was so busy.

**The Respondent's case.**

33. One Dancan Bosire testified on behalf of the Respondent in support of its defence. The witness adopted the contents of his witness statement as part of his evidence in chief, and urged the court to admit the documents that were filed under the list of documents and the supplementary list of documents as the Respondent's exhibits. With no objection from the Claimant, they were so admitted.
34. The witness stated that on or about the 28<sup>th</sup> May, 2015 the Claimant was employed by the Respondent as a chief accountant at a monthly gross salary of Kshs. 250,000. That however, on the 12<sup>th</sup> February 2016, he was sent on compulsory leave on the basis of financial mismanagement issues.
35. He stated further that upon finalization of the investigations, the Respondent appointed the Claimant to the position of General Finance Manager, with a gross monthly salary of Kshs. 400,000 subject to all statutory deductions. When the Claimant was serving in this position, he took his 36 days accumulated leave starting 12<sup>th</sup> July, 2017.
36. That due to various financial challenges that the Respondent was facing at that time, it resolved to review the Claimant's salary downwards to Kshs. 250,000 [Two hundred and fifty thousand], per a month commencing 1<sup>st</sup> August 2017. At this time the Claimant started absconding duty and in the same month deserted work without handing over the company's assets.
37. The witness contends that in its counterclaim, the Respondent seeks for the court's finding that the Claimant breached the employment contract by deserting work.
38. He further contended that there was no termination letter that was issued to the Claimant. The Claimant never communicated to the Human resource manager that he had been denied a log-in. The log-ins are allocated by the Respondent's IT department.
39. Under cross examination by counsel for the Claimant, the witness stated that as at 28<sup>th</sup> May 2017, he was not the Principal Officer of the Respondent company, however he was in its management.
40. That though he has stated in his witness statement that the Claimant was sent on compulsory leave to pave way for investigations, the Respondent did not tender any investigation report before the court to demonstrate the being of the investigations.
41. The witness stated that the Respondent decided to review the Claimant's salary downwards. It communicated this decision through the letter dated 31<sup>st</sup> July 2017. The Claimant did not accept the terms.
42. He admitted that the Respondent did not conduct any disciplinary hearing on the alleged desertion of duty.
43. He stated that the Respondent later issued a termination letter to the Claimant.
44. The witness reiterated that logging-in access is granted by the Respondent's IT department. The witness went on to state that there was no document from that department to show that the Claimant was not denied access and that he did not attempt to log in.
45. He confirmed that the Respondent is still a going concern. That the Respondent has not provided its set of figures to rebut the amount that the Claimant is claiming as being owed to him.

46. In his evidence in re-examination, the witness asserted that he was in the management of the Respondent company during the period 2015 to 2018. By virtue of this, he is conversant with the facts of the instant matter.

47. That when the Claimant was sent on compulsory leave, he was earning Kshs. 250,000, but when he got back, his salary went up to Kshs. 400,000. During the month of July 2017, the salary was reviewed downwards to Kshs. 140,000. The following month of review he was paid Kshs. 240,000, and he did not register any protest.

48. There was no letter terminating his employment. When he absconded, the Respondent did not have any meeting with him to deliberate on the issue. He never requested for the meeting.

### **The Respondent's submissions**

49. Counsel for the Respondent identified three issues as the issues that emerge for determination, thus:

- a) *Whether the termination of the employment of the Claimant was unfair and unlawful, and constituted constructive dismissal.*
- b) *Whether the Claimant violated his employment contract.*
- c) *Who should bear the costs of this suit?*

50. Counsel submitted that under section 47 [5] of the Employment Act, in situations where there is any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests on the employee, while the burden of justifying the grounds for the termination of employment or dismissal rests on the employer.

51. It was argued that though the Claimant alleges in his memorandum of claim that the termination of his employment was unfair and unlawful, inspired by malice on the part of the Respondent, he failed to provide evidence in support of this.

52. In the submissions it was contended that the Respondent granted the Claimant annual leave for 36 days commencing 12<sup>th</sup> July 2017. During the leave period, the Claimant sent an email seeking extension of leave and proceeded for leave without authorization from the General manager or from the Human Resource department in breach of his employment contract.

53. The decision in the case of **Vincent Abuya Obunga -vs- Mast Rental Services Limited [2019] eKLR** was cited to buttress counsel's submission that absenteeism and absconding amounted to gross misconduct, that entitles an employer to dismiss an employee and this was the case in this matter. Further reliance was placed on the case of **Daniel Mueke -vs- Bhogals Auto World [2014] eKLR**.

54. On the Claimant's claim that he was constructively dismissed, counsel for the Respondent submitted that **Black's Law Dictionary** defines constructive dismissal as an employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign as by fundamentally changing the working conditions or terms of employment; and employer's course of action, that, being detrimental to an employee leaves the employee almost no option but to quit.

55. That the court in **Herbert Wafula Wafwa -vs- Kenya Wildlife Services [2020] eKLR** rendered itself on the conditions that must be established in order for a claim for constructive dismissal to succeed:

- a) *That the employer is guilty of conduct which is a significant breach going to the root of the contract of employment;*
- b) *The breach must be fundamental as to be considered a repudiatory breach;*
- c) *The employee must not delay in resigning after the breach has taken place, otherwise court may find the breach waived.*

56. It was argued that the Respondent reviewed the Claimant's salary due to the financial constraints that it was facing. The review of the salary was not therefore a breach of the contract of employment of the Claimant. It did not go to the root of the contract.

57. The Claimant did not demonstrate that the Respondent created a condition that was so unbearable for its employees in particular the Claimant, as was required of him in his claim for constructive dismissal.

58. The Claimant was summarily dismissed pursuant to section 44 [3] of the employment as a result of his conduct that indicated that he had fundamentally breached his obligations arising under the contract of service.

59. As regards the second issue, Counsel submitted that at its page three, the letter of appointment, provided for absence from duty, thus:

*"If you are unable at any time to report for duty as a result of illness or other unexpected cause, you should make it known [in writing if practicable] to the General manager or the Human resource department immediately. In the event of absence through illness, a medical certificate must be produced within 48 hours."*

60. Counsel reiterated the submissions on desertion and absconding duty pointed out here-above, to drive this issue home.

61. Costs ordinarily follow the event. Upon dismissal of the suit the Claimant should be condemned to shoulder the costs of this matter.

**Analysis and Determination.**

62. The following issues commend themselves to this Court as the issues for determination in this matter;

a) How did the separation between the Claimant and the Respondent occur?

b) Did the Respondent prove its counter claim?

c) What relief[s] are available to the Claimant under his claim, if any.

d) What reliefs are available to the Respondent under its counter claim if any?

e) Who should shoulder the costs of this suit and the counter claim.?

**How did the separation between the Claimant and Respondent occur?**

63. The protagonists herein have taken diametrically opposed positions as to how the Claimant's employment came to an end. The Respondent contended that it summarily dismissed the Claimant on account of a gross misconduct, while the Claimant asserted that he was constructively dismissed when the Respondent breached the terms of the employment contract, fundamentally evincing that it no longer desired to be bound by the terms of the contract. That the breach was repudiatory in nature.

64. I start with the Claimant's position. From the onset it is imperative to state that constructive dismissal does not have any statutory anchorage within the Employment Act, 2007 or any of our statutes. It is a creature of Common Law. It is trite law that where an employer's conduct evinces an intention no longer to be bound by the contract of employment, a path gets available to the employee to either accept the conduct or changes made by the employer or treat the conduct or changes as a repudiation of the contract by the employer and sue for wrongful dismissal. In the instant matter, it is clear that the Claimant settled for the latter choice.

65. Having said this, it is further imperative to state that at the centre of a claim for constructive dismissal is ever the conduct of an employer, not the employee's. The term "constructive" indicates that the dismissal is a legal construct. The employer's act is treated as a dismissal because of the way it is characterised by law - **Potter vs. N.B Legal Aid [2015] 1 S.C.R.**

66. Imperative to state that jurisprudence is now firm on the test to be applied by Courts in determining whether constructive dismissal has occurred. In the Court of Appeal decision in the case of **Coca Cola East and Central Africa Ltd vs Maria Kagai Ligaga [2015] eKLR**, the Court rendered itself thus;

*"What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to the 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 would leave when the employer's behaviour towards him was so unbearable 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 constitutes a repudiatory breach of contract of employment-the contractual test. The dicta in **Western Excavating [ECC] Ltd v. Sharp [1978] ICR 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 approach test. 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 contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. .... The Criterion for evaluating the employer's conduct is objective; the employer's conduct does not have to be intentional or in bad faith, before it can be repudiatory. [ see **Office vs Roberts [1980] IRL 347**]. The employee must be able to show that he left in response to the employer's conduct i.e. causal link must be shown i.e. the test is causation. In the case of **Jones v F. Siri & Son [Furnishers] Ltd, [1997] IRLR 493**, it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go to. The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause..... The burden of proof lies with the employee....."*

67. In **Leena Apparels [EPZ] Ltd vs Nyevu Juma Ndokolani [2018] eKLR**, the Court of Appeal stated;

*"..... 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. The employer's conduct does not have to be intentional or in bad faith before it can be repudiatory....."*

68. In order for a claim for constructive dismissal to succeed where the Court applies the contractual 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.

69. Having in mind the taste enunciated in the decisions hereinabove cited, I now turn to consider, the conduct of the Respondent that the Claimant alleged stirred his move to quit the employment of the Respondent. In his evidence and the material placed before this Court, I get the Claimant as contending that the Respondent's, failure to pay him his salary as and when they fell due, decision to review his salary

downwards, and decision to deny him access to the system, prompted his action.

70. The instant claim therefore is anchored on the fact that the 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 acts that were unilateral and substantial. A breach which was repudiatory in nature, evincing the Respondents intention to no longer be bound by fundamental terms of the contract.

71. The Claimant contended that the Respondent unilaterally did review his salary down wards from 400,000 to 250,000. The Respondent did not contend and prove that this reduction was upon consulting the Claimant and or with his concurrence. In fact, the Respondent's witness in his evidence under cross examination did state that, though the Respondent's decision to review the salary was communicated through its letter dated 31<sup>st</sup> July 2017, the Claimant did not accept the terms. It is clear therefore that notwithstanding the absence of consent by the Claimant, the Respondent went ahead to effect the reduction.

72. The Respondent alleged that the reduction of the salary was as a result of financial constraints that it was facing during the material time. It did not however place any material before court to demonstrate that the constraints existed and that they were of a magnitude that would attract the decision to reduce the Claimant's salary. Too, that the decision did not affect him only. However, this does not mean that existence of financial constraints on an employer, can lawfully lead to reduction of an employee's salary without being preceded with consultations, and concurrence of the employee.

73. The Claimant pleaded and testified that on a number of months between the months of April 2017 to September 2018, the Respondent did not pay him his salary when and in the manner, it was supposed. The Claimant in his pleadings and evidence gave a detailed account, with abundant specificity on this. Contrary to what was expected of the Respondent, it did not place any material before court, to controvert the account. Section 10 of the Employment Act required the Respondent to so do. It didn't.

74. The Respondent's own document titled "**salary arrears for Geoffrey Muthee**" that was filed under the supplementary list of documents shows that even at paying the Claimant the reduced salary, salary arrears rose from **Kshs. 284,536.75 as at April 2017, to Kshs. 1,103,220.50, as at 29<sup>th</sup> November 2017.**

75. 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 an employee. 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.

76. I have no doubt in my mind that under the terms and conditions of the contract dated 28<sup>th</sup> May 2015, and the provisions of the Employment Act, the Claimant's salary was one that was payable at end of every month, without any authority on the part of the 1<sup>st</sup> Respondent to unilaterally depart from this.

77. I do not agree with the submission of the Respondent's counsel that the reduction of the salary, [reduction which I have found was unilateral] did not result to a breach of contract, therefore. In his submission counsel further submitted that the reduction did not go below what the contract of employment dated 28<sup>th</sup> May 2015, provided. With due respect this submission makes no sense at all. The stated agreement cannot be read in isolation from the letter dated 13<sup>th</sup> March, 2017 through which the Claimant's position was elevated and salary increased to Kshs. 400,000.

78. The Claimant contended that the Respondent denied him access to the system. In effect he was saying that the Respondent failed and or refused to give him work. I am of the view that it is one of the fundamental terms under a contract of service for an employer to supply work to an employee. Where an employer without any justifiable reason in whichever manner refuses to supply work to an employee, this would amount to a repudiatory breach of the contract.

79. The evidence by the Claimant that he was disabled from logging into the system and therefore unable to work, was not challenged sufficiently. The witness who testified on behalf of the Respondent could not with certainty testify on the log-in matters. Those were matters that were within the realm of the IT department of the Respondent Company.

80. I am convinced that the Claimant was disabled from logging into the system to work. He was therefore not supplied with work. This is an act that clearly evinced that the Respondent was no longer interested to be bound by the contract of employment.

81. In the upshot and applying the contractual test, I come to a 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 reviewing his salary down words without first consulting him and or securing his consent 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.

82. The Claimant was constructively dismissed. This places him on the path to entitlement to one or more of those reliefs normally attracted by a wrongful or unfair termination of an employee, recognised by law.

83. Now I turn to the Respondent's position. Counsel for the Respondent in his submissions contended that the Claimant was summarily dismissed on account of absconding from duty. This submission is not a true reflection of the averments in the Respondent's pleadings. Parties are bound by their pleadings, in an adversarial system as is ours, a departure from pleadings is not allowed. At paragraph 8 of the Reply to the Claimant's Memorandum of Claim & Counter Claim, the Respondent pleaded;

*"From then on, the Claimant started absconding duty. From August,2017, the Claimant deserted work and has not reported back.*

*There was never a dismissal [emphasis mine] and neither did the Claimant tender his resignation as required by the law and the contract terms of employment”*

84. In any event, looking at the evidence tendered by the Respondent’s witness, there is no demonstration that the Claimant’s employment came to an end through a summary dismissal. Consequently, I find that the position taken by Respondent in its submissions does not find any support in its pleadings and evidence that was placed before court on its behalf.

85. The Claimant was not summarily dismissed but constructively dismissed, therefore.

**Did the Respondent prove its counter claim?**

86. Under its counter claim, the Respondent pleaded;

*“19. The Claimant in total breach of the employment contract and in violation of section 36 of the employment Act No. 11 of 2007 absented himself from duty without official leave and in total breach of employment contract, terminated the contract without notice and without paying the Respondent remuneration which would have been earned by the Respondent in respect of the period notice required to be given under the corresponding provisions of the Employment Act.*

*20. It is trite law that employees may resign at any time, provided they give reasonable notice. The employment agreement between the Claimant and the Respondent clearly stipulates notice periods. The Claimant did not give the required notice before leaving work, but the Respondent paid the Claimant’s dues.*

**Reasons Wherefore the Respondent prays that;**

*21. The Claimant’s Claim be dismissed with costs to the Respondent.*

*22. The Claimant’s claim is fatally defective and will at the appropriate time apply for its dismissal;*

*23. The Claimant has imaginary figures; and*

*24. The Claimant is seeking for certain prayers in the wrong forum.”*

87. It is note difficult to note that the Respondent has not made any specific prayer on its Counter Claim. What relief is it seeking from Court? One cannot with certainty state. This Court is unable to grant any relief under the Respondent’s Counter Claim as a Court of Law only grants that which has been sought, and proved.

88. In the Respondent’s pleadings, it is averred that the Claimant breached both the terms of his contract of employment and the provisions of the Employment Act, as he quit the employment without first giving notice. In matters where an employee is alleging that the employer’s conduct evinces that he p[the employer] has committed a repudiatory breach of the contract of employment, he has the option of accepting the repudiation, quit the employment even without giving notice and sue for constructive dismissal. It is not mandatory that a notice precede the quitting.

89. The evidence tendered by the Respondent’s witness did not bring out what reliefs it is seek from this Court. The submissions by Counsel, I believe by reason of the foregoing premises, have not addressed the aspect of the reliefs that the Respondent is seeking.

90. Consequently, I find the Counter Claim not merited, and unproved. The same is hereby dismissed with costs.

**What reliefs are available to the Claimant if any?**

91. The Claimant did seek *inter alia* compensation pursuant to the provisions of section 49 [1] [c] of the Employment, and to the maximum extent contemplated therein. This Court is cognizant of the fact that a grant of the compensatory relief contemplated under the provision is discretionary. The extent of the grant too. The extent is normally attracted by the peculiar circumstances of each case. I have considered the conduct of the Respondent that this Court has found amounting to a constructive dismissal of the Claimant; that the conduct was counter to a legitimate expectation of any reasonable employee, and that it amounted to unfair labour practice, the Respondent’s degree of deviation from what the law expected of it, lastly the length of period the Claimant was in the employment of the Respondent, and conclude that the Claimant is entitled to the relief. The relief shall be to an extent of 6 [six] months’ gross salary, therefore, **Kshs.2,400,00. [Two Million Four Hundred Thousand].**

92. The Claimant further sought for payment of his unpaid salary for the Months of April 2017 to September 2018, **Kshs. 6,547,463.25.** From the Claimant’s pleadings, one notes him contending that the breach of contract by the Respondent through the conduct hereinabove brought forth, started in the month of April 2017 when the latter started failing in his obligations under the contract to dutifully pay his remuneration as and when it fell due. On the 8<sup>th</sup> June 2017, he was instructed to proceed for annual leave of thirty-six [36] days, and upon resumption, he was denied access to his office, another conduct that evinced the Respondent’s intention not to be bound by the terms of the contract. On the 31<sup>st</sup> July, 2017, through its letter dated the even date, his salary was unilaterally reviewed downwards. It is my view that an employee who forms a mind to leave his employment on an account of constructive dismissal, must leave within a reasonable time, reasonable time here depending on the circumstances peculiar to each case. In the circumstances of this matter, including that the Respondent through its document hereinabove mentioned, apparently acknowledges that The Claimant’s entitlement for the remuneration for the period up to November 2017, and that from the document the last pay of Kshs. 30,000 was made on the 29<sup>th</sup> November 2017, a reasonable time for

him to leave would have been end of December 2017. Insistence on “within reasonable time” is informed by the need to deter employees from making a lottery out of the doctrine of constructive dismissal, for unjustified self- enrichment.

93. Consequently, under this head, I will award unpaid salary for the period 30<sup>th</sup> April 2017 to 30<sup>th</sup> December, 2017, a period of seven months, at **Kshs. 400,000** per a month, therefore **Kshs. 2.8 million** less the cumulative amount that he acknowledged to have been paid during the period, **Kshs. 652,536.75**. He is therefore awarded, **Kshs. 2,147,463.25**.

94. On his claim for service pay, it is difficult for one to understand the basis for his claim for **Kshs. 1000000[ One Million]**, meaning that the figure has been arrived at using a formula, one month’s salary for each year completed. This Court, in absence of any contractual term, can only award **Kshs. 500,000**, an amount arrived at by employing the now traditional 15 days’ pay for each year completed.

95. In the upshot judgement is hereby entered in favour of the Claimant in the following terms;

- (i) A declaration that the Claimant was constructively dismissed from his employment.
- (ii) Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, to an extent of 6 months’ gross salary, therefore, **Kshs. 2,400,000**.
- (iii) Unpaid salary up to December, 2017, **Kshs. 2,147,463.25**.
- (iv) Service pay, **Kshs. 500,000**.
- (v) Interest on [ii] and [iv] above at court rates from the date of filling suit till full payment.
- (vi) Interest on [iii]and [iv] from the time the sums fell due till full payment.
- (vii) Costs of the suit and the dismissed counter claim.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>th</sup> DAY OF FEBRUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of:

Mutugi for the Claimant.

No appearance for 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.

**OCHARO KEBIRA**

**JUDGE**