REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 207 OF 2020

(Before Hon. Justice Ocharo Kebira)

STEPHEN MICHUKI.....CLAIMANT

VERSUS

EAST AFRICAN SAFARI AIR

EXPRESS LIMITED.....1ST RESPONDENT

FIVE FORTY AVIATION LIMITED.....2ND RESPONDENT

JUDGMENT

Pleadings and procedural History

1. The claim herein was instituted vide the Claimant's statement of claim dated 15th April 2020, against ***East African Safari Air Express Limited [the 1st Respondent],*** seeking for a couple of orders and reliefs against it. The statement of Claim was amended on the 30th June 2020, whereby one ***Don Smith*** was brought on board as the 2nd Respondent. By leave of the Court, the amended statement of claim was further amended on the 5th October 2020. ***Don Smith*** was removed as a party from this matter, in the place thereof ***Five Forty Aviation Limited*** [hereinafter referred to as the 2nd Respondent] was enjoined.

2. Through the further amended statement of claim, the Claimant sought for the following reliefs, against the Respondents jointly and severally;

a) A declaration that the Respondents breached the employment contract entered into by and between the parties on 1st November 2019.

b) Unpaid salary as from November 2019 up to March 2020 at ***Kshs. 975,000.***

c) Gross salary for 12 [twelve] months of the unexpired term of the fixed term employment contract pursuant to section 49 of the Employment Act 2007 amounting to ***Kshs. 2, 340,000.***

d) Notice Pay at ***Kshs. 195,000***

e) 1 ¾ days of leave with full pay in respect of each completed month of service for six months at ***Kshs. 68,249.58*** pursuant to section 28[1][b] of the Employment Act.

f) 7 days of sick leave with full pay for the first two[2] completed moths of service and 7 days with half pay for the subsequent four[4] completed months of service cumulatively being at ***Kshs. 181,999.70*** *pursuant to section 30[1] of the Employment Act, 2007.*

g) General damages for constructive dismissal.

h) Interest on [b], [c].[d],[e] and [f] above at Court rates from the date of default until full payment.

i) Interest on[g] above at the Court's rate from the date of judgement until payment in full.

j) The Respondents to issue the Claimant with a certificate of service in terms of section51 of the Employment Act within 14 days of delivery of the judgememt.

k) The 2nd Respondent to refund the Claimant all amounts deducted from his salary, for the period January,2019 to October,2019, and then pay the National Social Security Fund and the Kenya Revenue Authority the deductions in question from its own funds pursuant to Section 19[6] of the Employment Act.

l) The Costs of the suit.

m) Any other relief that the Court may deem just and fit to grant.

3. Prior to the filing of the further amended defence, the Respondents had on the 1st July 2020, filed a statement of defence and counter claim. In the statement of defence, the Respondents denied in toto the Claimant's claim, whilst in the counterclaim they sought for a refund of **USD 30,000** and **General damages.** After the last amended statement of claim, the Respondents didn't amend their statement of defence, and counterclaim, they decided to maintain them the way they were.

4. The Claimant in accordance to the Rules, did file a response to the statement of defence and counter claim, dated 22nd June,2021.

5. **T**he plaintiff's case was heard on the 11th November 2021, while the Respondents' was, on the 6th December 2021. At the close of the parties' respective cases, the court gave directions for the filing of written submissions, the parties have complied.

The Claimant's Case.

6. It was the Claimant's case that he entered into a contract of employment as a pilot with the 2nd Respondent, on the 21st December, 2018. Under the Contract of employment, he was entitled to a consolidated net salary of **Kshs.195,000** per a month exclusive of taxation for a period of 90 days. Thereafter, his salary was to go up to the then scale for a First Officer on DHC8, **Kshs. 325,000,** per a month. The contract was to take effect on the 7th January 2019, and indeed it did. He was to remain in the employment of the 2nd Respondent for a period of 24 months, or repay ***USD 30,000***, if he were to quit early.

7. According to the agreement, the Claimant was under an obligation to undergo particular trainings including one in South Africa at a cost of ***USD 30,000*** before entering the payroll of the 2nd Respondent.He asserted that he paid this amount.

8. The Claimant testified that he worked with the 2nd Respondent for 8 [eight months], and when he was fit to earn, **Kshs.325,000** as per the contract, the 2nd Respondent came up with new terms. He was transferred to the 2nd Respondent's sister company, the 1st Respondent. The transfer was through a letter dated 13th September,2019. However, he remained in the employment of the 2nd Respondent until he executed a contract with the 1st Respondent.

9. The Claimant asserted that at the time of the transfer he was owed salary arrears, he only signed the contract with the 1st Respondent after being given post dated cheques for the same.

10. The Claimant stated that he sued the 2nd Respondent because notwithstanding that they were making salary deductions on his salary, they did not faithfully remit the same to the Kenya Revenue Authority.

11. On the 1st November,2019 the Claimant was employed by the 1st Respondent as First Officer on the DASH8 fleet for a period of 1 year. Under this contract, his remuneration was a consolidated net salary of **Kshs. 195,000.** He stated that he signed this contract because he had no option. He didn't have any where to go to immediately.

12. The Claimant stated that he undertook his duties under the contract dutifully and this is evidenced by the logs that were duly approved by the 1st Respondent's Chief Pilot who duly checked and stamped them. Notwithstanding this, the 1st Respondent did not pay him salary for the months of; November 2019, December 2019, January 2020, February,2020, March 2020 and April 2020.

13. On the 25th March,2020, he got constrained to tender his resignation from the employment of the 1st Respondent. In the resignation correspondence, he also gave the contractually required one-month termination notice, which he dutifully served until 30th April, 2020.

14. He made frantic efforts through the Chief pilot, to have the arrears paid, however, this did not realise any fruits. This forced him to approach the Chief Executive Officer of the 1st Respondent, for intervention. Despite numerous promises by him, the payment was never made.

15. In the circumstance, he kept on requesting for the payment through Phone messaging, the last message being that of the 25th March 2020. In response to the message, the Chief Executive Officer, got rude, answering him with a threat of termination of employment. He placed before the Court the messages exchange extract.

16. The fact that he was not paid for all those months made him thrive under a very adverse situation.

17. He stated that he sought the intervention of the Labour Officer who wrote a letter to the Chief Executive Officer. The letter was neither

responded to nor action taken as a result thereof.

18. He asserted that all through he was ready and willing to carry out her obligations under the contract but the 1st Respondent fundamentally breached the contract.

19. The Claimant tendered as evidence all those documents that he had filed under the original list of documents, and the supplementary one. There was no objection from the Respondents.

20. Under cross examination by Counsel for the Respondents on the ***USD 30,000,*** the Claimant reiterated that he paid the sum otherwise the training in South Africa would not have been possible.

21. Put to him by counsel that he was perpetually late and drunk, the Claimant responded by stating that that could not be true, for if a pilot were to be as such, immediate disciplinary action would be taken against him. None was taken against him.

22. He stated that he wrote a number of emails pushing for the payment of his salary arrears, using his official email. That when he resigned he was logged off, not to access them anymore.

23. Under his evidence in re-examination the Claimant clarified that his claim was for constructive dismissal, not wrongful dismissal.

The Respondent's Case

24. The Respondents presented one witness, Mr. George Kivindyo to testify on their defence to the Claimant's Claim and, counter claim. The witness presented himself as an Accountable Manager working with the 1st Respondent. He stated that he is not fully involved in the management affairs of the 2nd Respondent. He only sits in its Board.

25. He asserted that his role includes dealing with the 1st Respondent's personnel and matters related thereto. On normal arrangement, the Claimant would not report to him directly. He would report to the Chief Pilot. The Chief Pilot could then Report to the Head of Operations.

26. The witness confirmed that the Claimant joined the 1st Respondent's employment in November 2019 having worked for the 2nd Respondent before.

27. He signed as a pilot on the 11th November 2019 and was supposed to work for the 1st Respondent for a period of not less than two years and the contract stated that in the event he resigned earlier than the two years then he was bound to pay the Respondent a sum of USD 30,000. The sum should be paid because route and aerodrome checks training were carried out internally by the Respondent's senior pilot, the Chief Pilot.

28. The witness asserted that the Claimant was not a keen pilot. He on a number of occasions failed to keep time and would have all manner of flimsy reasons for such behaviour. The behaviour meant that at all times the 1st Respondent had to have a pilot on standby in case he failed to turn up.

29. The Respondent referred to the Claimant's email dated February, 2020, stated that he received the email. The subject of the email was an alleged incident of being hijacked. The Claimant alleged therein that while on his way to work he had been car jacked. He was therefore unable to report to work. The Respondent had to engage a standby pilot to step in, the flight delayed for one hour. That interestingly, when they followed up the matter, they discovered that the incident was never reported to the police.

30. The 1st Respondent could never understand why such a grave incident was never reported to the police, if it ever happened.

31. Still on the Claimant's conduct, the witness referred to a handwritten letter *[one of the documents in the Respondents bundle of documents],* by the Claimant to the Chief Pilot. The letter was in regard to a reason for delay of a flight on 1st December 2019 and an apology thereof. The reason given in the letter, was that the pilot [Claimant] got late as a result of a delay that he encountered at Java Restaurant, when his food was not served in time.

32. In his view, this letter is testimony of how undisciplined the Claimant was.

33. The witness asserted that the 1st Respondent had a right to summarily dismiss the Claimant, but looking at the future of his career, and age, it opted to try and mould him, giving him a chance to improve and salvage his career.

34. The witness asserted that the Claimant was verbally warned severally by the Chief Pilot but he did not change his in ways.

35. The witness testified that in accordance with the contract of employment, the 1st and 2nd Respondents trained the Claimant. The first training was the ground school, where he was taken through the operation of the type of the aircraft that he was going to fly. The training took a period of 3-4 weeks. The second training was simulator training which was done out of the country. The real training sets in thereafter, flying the aircraft without passengers. It is here that the Respondents expended between 60,000 – 70,000 USD, considering the fuel, and the wear and tear. Other courses involved the Respondents hiring experts to take the Claimant through.

36. On the counter claim, the witness stated that the contract of employment required that the Claimant remains in the employment of the

Respondent for a specific period, in the defaulting, he was to be under an obligation to pay the Respondents **USD 30,000.** Since he never remained on for the contractual period, he is supposed to pay.

37. He alleged that he resigned voluntarily. He never raised any grievance at all, prior.

38. Cross examined by Counsel for the Claimant, Mr. Michuki, the witness confirmed that he did not know the Claimant personally. He only knew him as an employee of the 1st Respondent.

39. The witness further confirmed that through a transfer letter dated 13th September 2019, [Claimant's document No. 2], the Claimant got transferred by the 2nd Respondent to the 1st Respondent. However, he could not become active immediately as he had to go through an induction first.

40. The Witness was referred to a bundle of pilot logs, and more specifically that of 14th September 2019. He confirmed that on that day, a day after the transfer, the Claimant was flying a Dash 80 plane, as a pilot 1. The flight was from Wilson to Wajir and back. On 15th he made flights to and from different points. He was P1 and P2.

41. When he was in the employment of the 1st Respondent, he never went for any training outside the country. He only went for an outside country [South Africa] training, when he was with the 2nd Respondent. Therefore, under the contract he was referring to, the 1st Respondent never facilitated any training for him.

42. Before he joined the 1st Respondent, he had worked for the 2nd Respondent for a period of twelve months. He had been trained.

43. According to the witness, the Claimant was supposed to remain with the 2nd Respondent for the period stated in the contract.

44. He confirmed that there is a sign -in system, for every operator. There is a supervisor who ensures that there is no cheating. The 1st Respondent has no document to show that the Claimant was a perpetual late comer.

45. On the car jacking incident, the witness asserted that, according to the Claimant's correspondence, he got injured as a result of the incident.

46. The Witness stated that there is no denial that the 1st Respondent owes the Claimant his salary for the months on November 2019 to March 2020. That the Chief pilot mentioned to him that there is a pilot who had not been paid.

47. The witness asserted that the situation is one that every employee went through. However, pressed for proof, he stated that he did not have any document to demonstrate it. He further stated that there was no written communication to the Claimant on why he was not being paid.

48. He acknowledged that the letter dated 26th March 2020, addressed to the Managing Director was a demand for payment of the unpaid salary.

49. He stated that the Respondents made payment for the ground and simulation training. The Claimant paid Kshs. USD 30,000.

50. In his evidence in re-examination, the witness did state that the Respondents are sister companies, the Claimant was supposed to stay in employment of the Respondents for 24 months. He stated that clause 8 of the contract between him and the 1st Respondent provided that the 1st Respondent was to meet the training expenses. Before being allowed to work in a new company [read the 1st Respondent] a pilot had to undergo training.

51. During the material period, all employees were not paid their salaries. This was occasioned by a nose dive in the 1st Respondent's earnings, following an accident that involved one of their small planes, which accident costed lives of all those who were on board. The company suffered reputational and business loss.

The Claimant's Submissions.

52. The Claimant's Counsel submitted that the 1st Respondent breached the employment contract and through its actions constructively dismissed the Claimant.

53. It is submitted that constructive dismissal does not have a statutory underpin within the Employment Act. However, through case law the tests to be used by courts in determining whether a claimant has established his or her claim for constructive dismissal are well settled. As regards the conditions, Counsel relies on the holding in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR** where the Court of Appeal held;

> ***'' 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 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 constitutes a repudiatory breach of the contract of employment-this is the contractual test. The contractual test is narrower than the reasonable test.

…… the contractual approach test…… ..is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal…… This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment.

Whether a particular breach of contract is repudiatory is one of mixed fact and law…….The criterion for evaluating the employers conduct is objective; the employers conduct does not have to be intentional or in bad faith before it can be repudiatory. The employee must be able to show that he left in response of the employers conduct… the employers conduct must be such as when viewed objectively, it amounts to repudiatory and fundamental breach of contractual obligations…."

54. The Claimant also relied on the holding of the court of Appeal in **Leena Apparels (EPZ) Limited v Nyevu Juma Ndokalani (2018)**

"…. 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 employers conduct does not have to be intentional or in bad faith before it can be repudiatory….. However it is worth remembering that in constructive dismissal the issue is primarily the conduct of the employer and not the conduct of the employee…"

55. It was further submitted that the Claimant entered into a contract with the 1st Respondent on the 1st November 2019 for a pay of Kshs.195,000/- net per month. While the Claimant dutifully worked until 30th April 2020, the 1st Respondent failed to meet his part of the bargain by failing to pay any remuneration to the Claimant.

56. The Claimant submits that the 1st Respondent's actions of failing to pay the Claimant amounted to an express repudiation of the contract of employment and therefore the employer/employee relationship between the parties stood annulled.

57. In determining whether the failure by the 1st Respondent to pay the Claimant his salary for the entire of that period amounted to a breach, repudiatory in nature, Counsel urged the Court to consider that remuneration is a core term in employment contracts and that is why it is statutorily protected.

58. Counsel urged the Court further to consider the message sent on the 25th Merch, 2020 by the 1st Respondent's director and conclude that it has an implicit indication that the employer did not wish to continue to be bound by the contract. To buttress this submission, he cited the holding in **Brake v PJ-M2R Restaurant Inc. 2017 ONCA 402 thus;**

…… Constructive dismissal consists of conduct when viewed in light of all circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract"

59. The Claimant's Counsel urged the court to find that the Claimant has established that he was constructively dismissed by the 1st Respondent. Constructive dismissal should be deemed to be a wrongful or unfair dismissal attracting the application of the provisions of Section 49 of Employment Act,2007. He urged the Court to consider granting the Claimant 12 months gross salary for the unexpired period of his c contract. He further urged the Court to grant general damages for constructive dismissal.

60. In determining the award, Counsel argued that the Court should consider that it is clear that the 1st Respondent took advantage of its superior position as an employer over the Claimant and failed to pay him for half of the duration of his contract. This was unconscious. This conduct comes out clearly in the message of 25th March,2020 stating that the 1st Respondent would give the Claimant 30 days' notice for him to seek another employment. That such a conduct should attract the relief sought, as held by Dillon L.J in **Alec Lobb Ltd v. Total Oil ltd [1984] EWCA Civ 2; [1985] 1 WLR 173,** thus;

"The whole emphasis is extortion, or undue advantage taken of weakness, an unconscientious us of the power which the Court might in certain circumstances be entitled to infer from a particular -and in these days-notorious-relationship…….. Nothing leads me to suppose that the course of the development of the law over the last 100 years has been that the emphasis on unconscionable conduct and unconscientious use of power has gone and relief will now be granted in equity in a case such as the present if there has been unequal bargaining power, even if the stringer has not used his strength unconscionably."

61. Further that the Court should note that the Claimant was able to demonstrate that as a result of the 1st Respondent's conduct, he and his family were subjected to untold financial turmoil.

62. As regards the reliefs claimed against the 2nd Respondent, Counsel submitted that the Claimant was employed by the 2nd Respondent in January 2019 to October 2019 during which time the 2nd Respondent made statutory deductions on his salary but never remitted the same to the relevant authorities. The Claimant's evidence that the 1st Respondent only remitted deducted sums once, for the month of October ,2019, Kshs, 28,807.70 was uncontroverted. As such the Court should be guided by the provisions of Section 19(6) of the Employment Act and order the 2nd Respondent to refund the Claimant the amount deducted and not remitted amounting to Kshs. 259,269.30. Further that the 2nd Respondent be ordered to pay the Kenya Revenue Authority the sum of Kshs. 259, 269 as income tax for the period January,2019 to September, 2019.

63. On the Counter claim, Counsel submitted, that from the pleadings it is not clear as to who among the two Respondents has brought the same. However, from the language used one can garner an impression that the Counter claim belongs to the 1st Respondent. It is the contract between the 2nd Respondent and the Claimant that provided for the refund of USD 30,000. As regards the contract, there cannot be seen any privity of contract between the 1st Respondent and the Claimant. The 1st Respondent cannot purport to enforce any right thereunder. This submission was buttressed by reliance on the holding in **Saving & Loan [K] Limited v. Kanyenje Karangaita Gikombe & Anor. [2015] eKLR,** thus;

> ***'' In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced by or against a third party."***

64. The entry into contract of employment between the Claimant and the 1st Respondent had an effect of repudiating any contract of employment between the Claimant and the 2nd Respondent. The 2nd Respondent forfeited its rights under the contract that were between it and the Claimant when it transferred him to the 1st Respondent. The contract came into termination. The 2nd Claimant cannot purport to enforce any right thereunder therefore. The counter claim should fail.

The Respondent's Submissions.

65. Counsel for the Respondents identifies four issues as the issues for determination in this matter, thus;

a) Whether the Claimant's termination was unlawful, unfair and whether he was wrongfully and summarily dismissed.

b) Whether the Respondents are justified in asking for the reimbursement of the training expenses.

c) Whether the Claimant is entitled to all the reliefs sought.

d) Who is to pay the costs of this application.

66. It was submitted that through his email dated March,25th 2020 at 4: 09 PM the Claimant voluntarily resigned. Citing the decision in **Edwin Beiti Kipchumba v National Bank of Kenya Limited (2018) eKLR,** counsel stated that therein it was held that resignation by an employee from employment is basically termination of employment at the instance of the employee. The Claimant was not fired or dismissed but he voluntarily resigned thereby terminating his own employment.

67. The Respondents submit that the Claimant often reported to work late which is evidenced by his numerous apology notes to the Chief Pilot. Many times, he would delay flights by an hour necessitating the employer to hire another pilot in his place at an additional cost. The Respondents strongly believe that he resigned to circumvent the outcome of an impending disciplinary process. That therefore the Claimant acted in bad faith, she relied on the holding in **Kenya Union of Commercial, food & Allied workers v B.S Mohindra & Company (K)Limited (2015) eKLR** , to fortify this submission.

68. It was further submitted that the law relating to unlawful, unfair and summary dismissal is governed by the Employment Act, 2007, and more specifically sections 43 and 45 thereof. That the provisions looked at in light of the facts at hand, reveal that the Claimant has not proved that which he was supposed to prove thereunder, and therefore he is not entitled to reliefs for unfair and wrongful termination.

69. Counsel submitted that the Claimant worked for the for first 4 months and needed to have stayed in employment for eight months more, for him to be released from stimulator training fees. The Respondent submits that it is justified to ask for the fee as the Claimant breached the employment contract.

70. The Respondents submit that the Claimant did not sufficiently lay out the basis of constructive/unfair termination, and therefore he is not entitled to an award of general damages.

71. The Respondents submit that the claim for notice pay is unjustified since the Claimant was neither made redundant nor dismissed. He voluntarily resigned and gave the 1st Respondent notice of his resignation. Therefore, the circumstance cannot attract the application of the provisions of section 36 of the Employment Act in his favour.

72. The Respondents submits that the Claimant worked for 5 months and has not given any proof that he was not allowed to take leave. Further that, the Claimant owing to the length of period he worked for the 1st Respondent does not qualify to make a claim for untaken leave days. Reliance is placed on the provisions of section 28[1][b] of the Employment Act.

73. It was further submitted that the claimant did not prove entitlement to the sick leave compensation that he has sought. He did not place before court as evidence any documentary evidence in form of a doctor's notes or report or even a prescription from a pharmacy to demonstrate that he was sick at some time. The holding in **Peris Nyambura Kimani vs Albit Petroleum Limited (2014) eKLR** was cited to buttress this, thus;

> **"the basic requirement on the part of an employee is set out under the employment Act in that where one is sick or unwell, this is to be brought to the attention of the employer within a reasonable time. What therefore is reasonably practicable is based on the circumstances of each case"**

74. The Respondent submits that the claimant does not qualify for any of the reliefs sought and prays that the claim be dismissed with costs.

Analysis and Determination.

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

a) ***Whether the Claimant was constructively dismissed.***

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

c) ***Was the Respondents' counter claim proved?***

d) ***If the answer to [c] above is in the affirmative, what relief[s] is available to the Respondents.***

e) ***Who should shoulder the costs of this suit.***

Whether the Claimant was constructively dismissed.

76. From the onset it should be pointed out that the Claimant's claim is one for constructive dismissal. 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.

77. 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 employees. 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 v. N.B Legal Aid [2015] 1 S.C.R.** Looking at the evidence that was presented by the Respondents, and the submissions by their counsel, on the separation that were, with due respect one gets a clear impression that they missed, exactly what the nature of the Claimant's case is, or if they didn't, what evidence was expected of them to assail a claim in the nature of the Claimant's, successfully. One sees immense dwelling on the conduct and behaviour of the Claimant in the course of his employment with the 1st Respondent, both in the evidence and the submissions. Not on the two tests, that the court shall bring out shortly herein after, and how they do not lie in favour of the claim.

78. In determining whether the conduct of an employer evinced an intention no longer to be bound by the contract, there are two branches of test that are evident across jurisdictions. Court must first identify an express or implied term that has been breached, and then determine whether the breach was sufficiently serious to constitute the constructive dismissal. 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 the* ***Porter case [*** *Supra.]*

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. This is the test that the Court of Appeal called the contractual test, **Coca Cola East & Central Africa Limited v. Maria Ligaga [2015]eKLR.**

80. On the other hand, the Court can declare being of a constructive dismissal where the conduct of the employer more generally shows that the employer intended not to be bound by the contract, it need not identify a specific term that was breached, it shall be enough to find that the employer's treatment of the employee made continued employment intolerable. This approach is in character retrospective. It takes stock of the cumulative effect of the past acts by the employer and consider whether those acts evinced an intention to no longer be bound by the contract, in terms of the Court of Appeal decision [supra], this is the unreasonable test.

81. I note what the Court of Appeal stated of the unreasonable test in comparison with the contractual test. I do not get the Court as stating that the unreasonable test is totally inapplicable in our jurisdiction. As to which test is to be applied by a court, depends on the peculiar circumstances of each case. All that is required of the Court when applying the unreasonable test is abundance of caution.

82. The instant claim is anchored on the fact that the 1st 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, evincing its intention to no longer be bound by fundamental terms of the contract.

83. The Claimant contended that the 1st 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. The witness for the Respondents, clearly admitted that the salary was not paid as alleged by the Claimant. The witness and therefore, the 1st Respondent tried to explain what occasioned the non-payment. He cited financial constraints as hereinabove put forth. However, nothing was placed before Court to demonstrate the financial situation, and that it was not the Claimant only who was affected. He admitted that there was no communication to the Claimant before the stop on paying the salary was effected. There was no consultation.

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 1st November 2019, 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 1st Respondent to unilaterally depart from this.

86. The Respondents' Counsel submitted that the whole purpose of the Claimant commencing the Claim herein against the Respondents,was camouflaged. It was not in pursuit for enforcement of his rights but a way of circumventing a disciplinary action that was impending against him. This submission does not find support in the testimony by the witness who testified on behalf of the Respondents. The witness did not state that there was any impending disciplinary action, all that he stated was that though the 1st Respondent had reasons that would justify a summary dismissal against the Claimant, it did not for the sake of the Claimant's career, considering his young age.

87. If indeed the 1st Respondent had any contemplation to discipline the Claimant for any misconduct, it could have done it during the notice period. I hold it didn't because there was no contemplation, there was no impending disciplinary action. In the persuasive decision of **Standard Bank of South Africa Limited v Chiloane [2020] ZALAC 58,** it was observed,

> ***'' ..... Where an employee hands in a letter of resignation which is to come to effect at some future date [after the notice period has expired] the employer is entitled to discipline the employee within that notice period and if the employee is dismissed consequent upon the disciplinary hearing before the expiry of the notice period the [court] has jurisdiction to entertain a dismissal dispute. However, the relief that the [Court] is competent to give is limited to: [i] compensation in the amount that the employee would have received from the date of dismissal to the date when the resignation would have come into effect, because there would be no longer employer employee relationship between the parties once the notice period has come to an end."***

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, recognised by law.

<u>What reliefs are available to the Claimant if any?</u>

90. The Claimant did seek *inter alia* compensation pursuant to the provisions of section 49 [1] [c] of the Employment Act, 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 1st Respondent that this Court has found amounting to a constructive dismissal of the Claimant; the fact that the 1st Respondent didn't really care that its conduct was not only hurting the Claimant but also his family, lack of care that is exhibited by the 1st Respondent's CEO's email, the industry in which the Claimant was working in, that the conduct was counter to a legitimate expectation of any reasonable employee, and conclude that the Claimant is entitled to the relief. The relief shall be to an extent of 6 [six] months' gross salary. This Court could have engaged a lengthier period than the six months because clearly the circumstances of the matter would attract such an engagement, but I considered the, fact that the Claimant got another job after the separation, and, the length of time he was in the employment of the 1st Respondent.

91. The Claimant further sought for payment of his unpaid salary for the Months of November 2019 to March 2020 to wit Kshs. 975,000. This Claim was not contested by the 1st Respondent. In fact, the witness admitted that the salary was not paid. Without any difficulty, I find that the Claimant is entitled to an award of the same, and hereby make the award.

92. On the Claimant's claim for a prorated leave pay, the Respondents' Counsel submitted that under section 28[1] [b of the Act, the Claimant is not entitled to the compensation sought. A keen look at the section and the same considered against the circumstances of this matter, reveals that counsel is in error in her interpretation of the provision. In fact, the circumstances of the matter *[read the length of time the Claimant was in the employment of the 1st Respondent]*, attracts its applicability in favour of the Claimant. Under this head I award the Claimant a prorated sum of Kshs 68,250, using the formula provided for under the section.

93. I have struggled to understand the basis for the Claimant's claim for leave pay, and notice pay, I am unable to discern any from the evidence placed before this court. There was no specific evidence led by the him to establish the claims. They are for declining, and I hereby decline to grant the same.

94. The Claimant has sought for general damages, independent of the damages contemplated under section 49 [1][c] of the Employment Act. I am of the view that to grant this relief shall amount to double compensation and an unfair enrichment of the Claimant. The reasons that Counsel for the Claimant has advanced to justify the claim are reasons that are considerable in determining the extent of an award under section[49][1][c]. I am not prepared to make any award under this head therefore.

95. The Claimant contended that under the contract of employment between it and the 2nd Respondent, the latter was under an obligation to remit statutory deductions to the relevant authorities. That in breach of this obligation the said Respondent only remitted one months' statutory deduction to Kenya Revenue Authority. This for the month of October, 2019. The obligation to remit an employee's salary's deducted sums in respect of tax and other statutory deductions is both a statutory and contractual obligation. An employer is the custodian of all records regarding its personnel, and whenever there is a dispute arising on the documents, or that can be best resolved by the documents being availed for consideration by the trier as is the case here, the law expects the employer to produce the documents. If indeed the 2nd Respondent had done remittances as per law required, it would have tendered documentary evidence before court to disabuse the Claimant's claim. It did not.

96. The Respondents' witness did not at all testify on this claim by the Claimant. The Claim remained unchallenged therefore. I find that the provisions of Section 19[6] of the Employment Act, should apply against the 2nd Respondent. The Claimant upon basis of the sum of **Kshs. 28, 807.70** that the Respondent deducted and remitted to Kenya Revenue Authority as hereinabove stated and, as can be discerned from the extract of the General ledger report that the he placed before Court, claims under this head through submissions, a sum of Kshs. 259,269.30, and that the Respondent be penalised to pay out of its own funds to Kenya Revenue Authority and National Social Security Fund, a sum equivalent of the deducted amounts.

97. Imperative to state that, the provision of in section 19[6] of the Employment Act underscores the expansive protection accorded to employees' salaries and wages, and fortifies the need on the part of employers to adhere to the provision, otherwise non- adherence births a detrimental consequence to the employer. The section provides;

> ***'' Where proceedings are brought under subsection [5] in respect of failure by the employee to remit deductions from an employee's remuneration, the court may,in addition- to fining the employer order the employer to refund to the employee the amount deducted from the employee's wages and pay the intended beneficiary on behalf of the employee with the employer's own funds.''***

98. Owing to the manner in which the Claimant has fashioned the prayer for the relief in his pleadings, I am of the view that fairness dictates that any compensation and payment as stated hereinabove should be preceded by rendering of accounts by the 2nd Respondent. Upon this premise, I direct that the 2nd Respondent does prepare and file the in court a statement of account in respect of all statutory deductions that it made from the Claimant's salary for the months that the latter was in its employment, and more specifically those that it deducted for remittance to Kenya Revenue Authority, and National Social Security Fund.

99. If the 2nd Respondent defaults in rendering the account within the time hereinabove fixed, then the amount, Kshs**. 259,269.30** shall be the amount it shall pay to the Claimant, and also remit to the Kenya Revenue Authority on the latter's account, under this Judgement.

100. As regards the counter claim, it is my view that the same should fail for the reasons that will come out shortly hereinafter. From the onset it is important to state that the pleadings by the Respondents and more specifically the counter claim are not clear as to who the "owner" of the claim is. However, from paragraph 10 of the statement of defence and counter claim, though it is not expressly stated therein, one can pick an impression that it is the 1st Respondent laying the claim.It is imperative to put forth what the paragraph contains verbatim, thus;

> ***"The Respondent avers that when the Claimant joined its employment he undertook to be in the Respondent's employment for a period of not less than 2 years failure to which he undertook to pay the Respondent a sum of USD* 30,000. *The Claimant only worked for the Respondent for a few months after which he resigned*** *[emphasis mine]**and the Respondent is therefore entitled to the said sum which he hereby claims."***

101. The Claimant only resigned from the 1st Respondent's employment, therefore one can safely conclude that the counter claim was at the initiation of the 1st Respondent. Having said this, the question that sets in is, can the 1st Respondent be entitled to the sums claimed against the Claimant? From the counter claim, it is clear that the claim is anchored on a term of a contract. Looking at the contract that were between the 1st Respondent and the Claimant, it did not provide for a refund of USD 30,000 or any money that the 1st Respondent might have expended on the training of the Claimant, if at all. The claim therefore stands on lose ground.

102. Assuming there was such a term for refund, which there wasn't, I am of the view that a claim for a refund would only be sustained where the Claimant was in breach of the contract of employment triggering a separation, not in a situation like is herein where it is the Respondent who occasioned the separation by breaching the contract fundamentally. A party will never be allowed to benefit from his wrongful actions.

103. The contract that had a provision for a refund of the USD 30,000 was that that were between, the 2nd Respondent and the Claimant. The doctrine of privity of contract cannot allow the 1st Respondent to fetch any benefit from a contract to which it was not a party. This was aptly captured in Court of Appeal decision in **Savings & Loan [K] Limited v. Kanyenje Karangaita Gikombe &** [**2015]eKLR,** thus**,**

> ***"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other that the parties to the contract. Accordingly, a contract cannot be enforced by or against a third party……"***

104. Even if one were to assume that it was the 2nd Respondent who was laying the counter claim, still the same would not succeed. The separation between it and the Claimant was not as a result of any breach of the contract of employment by the Claimant. In my view it was contemplated under the contract that an entitlement to the refund would only flow from a breach of the term regarding the Claimant remaining in the employment of the 2nd Respondent for the specific period that was stitpulated. The 2nd Respondent transferred him to the 1ST Respondent. Nothing could therefore justify any claim for reimbursement, in the circumstances of this matter.

105. Consequently, I find the Respondent's counter claim not proved and dismiss the same with costs.

106. 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 the employment of the 1st Respondent.

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. 1,170,000.**

III. Unpaid salary for the months of November 2019 up to March 2020, **Kshs. 975,000.**

IV. Leave pay prorated pursuant to section 28[1] [b] of the Employment Act, **Kshs, 68,250.**

V. Interest on [ii] at court rates from the date of this judgment till full payment.

VI. Interest on [iii]and [iv] from the time the sums fell due till full payment.

VII. As against the 2nd Respondent, an order that it does prepare and file a statement of account in Court within 14 days of this Judgement on all the statutory deductions it made on the Claimant's salary during the period the Claimant was in its employment, and pay the Claimant any of those sums that it deducted and didn't remit to the relevant authorities, and pay the equivalent sum as they shall pay to the Claimant, to the authorities. In the default of preparing and filing the statement of account, **Kshs. 259,269.30,** as computed by the Claimant shall be deemed the sum payable as such by the 2nd Respondent. The payment to the authorities shall be made within 45 days of this judgment.

VIII. Costs of this suit and the counter claim shall be in favour of the Claimant against the Respondents jointly and severally.

READ, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

OCHARO KEBIRA

JUDGE.