



REPUBLIC OF KENYA



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**Mutai v Kisa & another (Cause E002 of 2020)  
[2022] KEELRC 1543 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1543 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE E002 OF 2020  
ON MAKAU, J  
MAY 25, 2022**

**BETWEEN**

**EDGAR KIPLANGAT MUTAI ..... CLAIMANT**

**AND**

**JAMES KIPKECH TOROITICH KISA ..... 1<sup>ST</sup> RESPONDENT**

**MOLO SOUTH BUDS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 10<sup>th</sup> November, 2020 and filed on the 17<sup>th</sup> November, 2020, the Claimant alleges that the Respondent fundamentally breached his contract of employment and thereby forced him to resign. He avers that he was constructively dismissed and his terminal dues withheld. Accordingly, the suit seeks the following Orders:
  - a) A declaration that the claimant was constructively, wrongfully, unfairly and unlawfully terminated from employment and thus for an order of payment of all terminal dues and benefits owed and full compensation for wrongful dismissal from employment as particularized hereunder;
    - i. Kshs 2,820,000 being an equivalent of the annual claimant's salary as compensation for his wrongful, unfair and unlawful termination.
    - ii. Kshs. 470,000 being unpaid salaries for the month of September and October.
    - iii. Kshs 49,159 being unpaid claims and reimbursements on claims.



- iv. Kshs. 195,755 being 25 days' pro-rate accrued leave days earned but not paid.
    - b) Certificate of service
    - c) Costs of this suit.
2. The facts leading to this case are that the 1<sup>st</sup> Respondent being the director of the 2<sup>nd</sup> Respondent enlisted the service of the Claimant to offer consultancy services on the 26<sup>th</sup> July, 2018 to prepare a project set up proposal (Rose Farm), which brief the Claimant duly discharged to the satisfaction of the 1<sup>st</sup> Respondent and he was paid all his consultancy fees.
3. It was averred that sometimes in November-December, 2018 the Claimant's engagement with the 1<sup>st</sup> Respondent was reviewed and he now took up full employment as the Chief Executive Officer (CEO) for the 2<sup>nd</sup> Respondent even before it was incorporated. His salary was Kshs 200,000 plus house allowance of Kshs. 35,000 per month. Subsequently employment contract was drawn by the Claimant for the consideration and approval of the 1<sup>st</sup> Respondent but it was never returned to the Claimant duly signed.
4. However, it was averred that the Claimant received his monthly salary for January to August 2019 from the 1<sup>st</sup> Respondent's accounts because the 2<sup>nd</sup> Respondent's had not opened a bank account. In addition, a motor vehicle KCT xxxx was acquired for the Claimant's use in the management of the 2<sup>nd</sup> Respondent but in the month of August, 2019, the Respondent failed to settle the monthly instalment for the said vehicle was repossessed by Rift Motor Limited.
5. As a result of the repossession of the motor vehicle, the Claimant was forced to incur more costs in accessing the farm that was 12 kilometers away. Furthermore, the Respondents cut communication with the claimant and failed to pay his salaries and allowances. Again the claimant was not paid his salary for the month of September and October 2019 plus arrears of Kshs 49,159. Based on this, the Claimant resigned from his employment on the 7<sup>th</sup> November, 2019.
6. It was also averred that the Claimant had earned 25 leave days but he was not compensated after the termination.
7. The Respondent entered appearance on the 30<sup>th</sup> June, 2021 and filed a response to the claim 26<sup>th</sup> October, 2021 denying all the averment by the Claimant and demanded strict proof thereof. The Respondents then stated that there is no employment relationship between them and the Claimant and if any relationship existed it was that of consultancy. It was contended that the Respondents contracted the claimant herein on need basis and was duly paid for the consultancy services rendered.
8. The suit went to full hearing and both parties gave evidence. Thereafter they filed written submissions.

## **Evidence**

9. The Claimant testified as CW-1 and adopted his written statement dated 24<sup>th</sup> November, 2021 as his evidence in chief. He further produced 5 documents as Exhibits 1-5 respectively. In brief, he told the Court that he is a management professional who was employed by the Respondent as the CEO of the 2<sup>nd</sup> Respondent from January, 2019 to 7<sup>th</sup> November, 2019. He reiterated that his salary from September, 2019 was not paid and a vehicle he had been given for official use was withdrawn. He followed up the issue with the Respondents however his calls went unanswered and email were not responded to. He therefore presumed that his services were no longer required and he resigned on the 7<sup>th</sup> November, 2019.



10. He testified that he prepared a draft contract of employment and forwarded a copy to the Respondent, who failed to return the same duly signed it and alleged that it was lost. Another copy was forwarded to the 1<sup>st</sup> Respondent but again he still did not return the same duly signed. The Claimant reiterated that before being employed as the 2<sup>nd</sup> Respondent's CEO he rendered consultancy services to the 1<sup>st</sup> Respondent towards establishment of the Respondent's Rose farm. He fully completed the said task in October, 2018 and his fees was fully paid.
11. He further testified that in November, he was employed as the Chief Executive Officer on full-time basis for a monthly basic salary of Kshs 200,000 plus House allowance of Kshs 35,000. He was paid the said salary plus the allowances up to August, 2019. However, he until 7<sup>th</sup> November, 2019 when he resigned due to the frustrations by the Respondents, by refusing to sign his employment contract, cut communication with him over the phone or email and refused to pay his salary.
12. Upon cross examination by Mayende Advocate, the Claimant contended that he was an employee of the 2<sup>nd</sup> Respondent and maintain that he signed the employment contract but the 1<sup>st</sup> Respondent did not execute its part on behalf of the 2<sup>nd</sup> respondent. He reiterated that he did consultancy for the Respondent from July, 2018 till October, 2018 and then he was appointed as the CEO of the 2<sup>nd</sup> Respondent in November, 2018 but the starting date was of the appointment was January, 2019.
13. He stated that as a consultant he raised his fees through invoices but as the CEO he earned salary every month. One of the duties given to him was to pursue registration of the 2<sup>nd</sup> Respondent as a company.
14. On further cross examination, the witness testified that initially he was the only employee of the Respondents but later on, the Respondents recruited about 20 employees including Production Manager one George Omollo who was his assistant. On the prayers sought the claimant stated that the claim under 17(c) in the claim was for travel and medical expenses which were given to the 1<sup>st</sup> Respondent, while the 470,000 claimed thereafter is for September and October salary.
15. On re-examination the claimant testified that he was first engaged to do consultancy and even made project proposal for the 1<sup>st</sup> Respondent which was acceptable to him. Upon presentation the 1<sup>st</sup> Respondent requested him to roll out the project still under consultancy however, due to the sensitivity of the Rose Farm, he refused and made it clear that he could only agree to the appointment if the said employment was full time. The 1<sup>st</sup> Respondent then agreed to the said terms and he was made the 2<sup>nd</sup> Respondent's CEO even before it was registered.
16. The 1<sup>st</sup> Respondent testified as RW-1 and adopted the witness statement dated 15<sup>th</sup> November, 2021 and produced 5 documents as exhibits D1-D5 respectively. He stated that he engaged the Claimant as a consultant to set up a flower farm in Molo, which became the 2<sup>nd</sup> Respondent herein. During the intervening period, it was agreed that the Claimant was to be paid Kshs 235,000 per months.
17. He stated that the Claimant recommended other consultant in the establishment of the farm who were also paid. He maintained that the Claimant was a consultant throughout the period from July, 2018 to 5<sup>th</sup> June, 2019. He admitted that he received an email on 21<sup>st</sup> November, 2018 from the Claimant attaching a contract of employment between the Claimant and the 2<sup>nd</sup> Respondent when the 2<sup>nd</sup> Respondent had not yet been incorporated. However, declined the contract and restated to the claimant that he was a consultant and not an employee.
18. He also stated that during the establishment of the farm, he engaged other professionals such as; engineer, surveyor and hydrogeologist for specific tasks and they were paid their respective fees. He further stated that he also hired casuals from time to time to perform specific tasks and therefore



contended that none of its employees was on permanent terms. He maintained that the services of the Claimant as consultant ended in June, 2019 after appointment of a Production Manager.

19. Upon cross examination by Koech Advocate, RW-1 testified that he indeed received the email forwarding the contract of employment by the Claimant and declined to sign the same because the Claimant was a consultant and not an employee. Further he reiterated that the company had not yet been set up for anyone to be appointed in such a position.
20. He also contended that the Claimant's services were no longer required upon the company hiring a Production Manager. He admitted that he informed the Claimant that his services were no longer required on the 8<sup>th</sup> November, 2019 while replying to the resignation email. He also averred that the claimant stopped presenting his weekly and monthly report as from August, 2019 affirming that his services had indeed come to an end.
21. The Witness also admitted that the Claimant was using the Respondent properties, such as a laptop and documents including his email domains. He added that he used to pay to the Claimant gross salary without any deduction and left the Claimant with burden of paying his taxes.
22. On re-examination, the witness testified that the email of 13<sup>th</sup> September, 2019 was done when the claimant's services were no longer required. He also stated that he never permitted the Claimant to use his company's email domain.

### Submissions

23. The Claimant submitted from the onset that he became the 2<sup>nd</sup> Respondent's employee from January, 2019 till his termination. He avers that his employment relationship changed from that of consultancy to that of full time employee after completing his consultancy work in October, 2018. He contended that he was appointed Chief Executive Officer of the 2<sup>nd</sup> Respondent commencing January, 2019 for a salary of Kshs 235,000 which the Respondents paid promptly up until August, 2019. He produced a bundle of his bank statements as Exhibits EKM-3 to prove the said payments.
24. It was then submitted that based on those circumstances the Claimant had become an employee of the Respondents and not remain a consultant as alleged. In support of his case the Claimant relied on the case of *Kenneth Kimani Mburu & Another V Kibe Muigai Holding Limited* [2014] eKLR where the Court held that the Claimant was an employee and not a consultant.
25. Like in the cited case, that the Claimant herein was given tools of trade such as the laptop, worked in the Respondent's premises and even used the Respondent's official email domain in carrying out his duties. He always sought for permission of the 1<sup>st</sup> Respondent to be away, ascertaining that he was under control of the Respondent and an employee.
26. The Claimant then submitted that he resigned from the Respondents' employment due to frustrations occasioned by the Respondent who had cut communication from him, failed to pay his salary and refused to sign the contract of employment. He therefore argued that the termination was not voluntary but caused by the actions of the Respondent. To support his case, the Claimant relied on the case of *Coca Cola East and Central Africa Limited V Maria Kagai Ligaga* [2015] eKLR where the Court held that: -

“Under a majority of statutory laws, constructive dismissal occurs where, “an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct.” These Acts of foreign parliaments do not of course bind this



Court, but an overall understanding of the concept is gained from a comparative look, particularly in view of the omission in our own statutory law. Common law, which has been embraced in our law through section 12 of the *Labour Institutions Act* Number 12 of 2007, treats constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behavior in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination..... The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the *Employment Act* 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.”

27. The Claimant also relied on the case of *Kenneth Kimani Mburu and another V Kibe Muigai Holdings Limited* (*Supra*) where the Court held that: -

“The Claimants resigned as a result of the breach. They did not wait too long to resign, but resigned within three months after the Respondent first failed to remit their salaries. Retention by an employer of an employee's 4 months' salary is a serious, fundamental breach that is properly to be viewed as a repudiation by the employer, of the contract of employment. The salary or wages of an employee are protected under Part 4 of the *Employment Act* 2007. An employer who willfully fails to pay an employee's salary or wages not only acts in repudiation of the contract of employment, but commits a wage offence under Section 17 and is liable to criminal prosecution. The non- payment of the Claimants' salaries amounted to repudiation of the contracts, and an offence under the *Employment Act* 2007. The Claimants were entitled to consider themselves as dismissed from employment. They were constructively dismissed, and are entitled to damages under Section 15 of the repealed Part 3 of the *Labour Institutions Act* Number 12 of 2007 and Section 49 of the *Employment Act* 2007, which are the relevant substantive laws in force at the time of the constructive dismissal.”

28. Accordingly, the Claimant urged this Court to allow the claim as prayed.



29. The respondent filed their submissions on 22<sup>nd</sup> May, 2022 raising two issues, that is, whether the parties herein had any contractual relationship; and whether the claimant is entitled to the reliefs sought.
30. On the first issue, the respondents submitted that there was no employment relationship between them and the Claimant because there was no written agreement between them and the Claimant as required under Section 9 of the *Employment Act*.
31. They further submitted that the relationship between them and the Claimant was that of contractor-client and not employer-employee. They contended that the indicators of employer-employee relationship set out by the Claimant in paragraph 26 of his written submissions do not establish that there was any agreement creating employment relationship between them and the Claimant.
32. The Respondent maintained that the Claimant was engaged for consultancy services as an independent contractor and he was free to work for other clients. He was not entitled to leave and overtime, his had agreed fees was not subjected to statutory deductions, and he was not under the control of any one while performing his work. As an independent contractor, he did his work without instructions. For emphasis, they relied on the case of *Gilbert Sule Otieno v Seventh Adventist Church (East Africa) Limited (sued on behalf of S.D.A. Church, Kiamunyi East)* [2014] eKLR, where the Court held that: -
 

“The contract provided for the obligations, duties and responsibilities of each party. None of the obligations, duties and responsibilities accruing to the claimant are of the genre which constitute the fundamental rights or basic conditions and terms of employment of an employee such as entitlement to a wage/salary, which is an essential of a contract of service, hours of work, entitlement to annual leave, public holidays, accommodation or in lieu housing allowance, pension and protection against unfair or wrongful dismissal.”
33. The Respondent further relied on the case of *George Kamau Ndiritu & another v Intercontinental Hotel* [2015] eKLR, where the Court dismissed the suit after finding that there was no employer-employee relationship but client-independent contractor relationship.

### **Analysis and Determination.**

34. I have considered the pleadings, evidence and the submissions by the parties. The issues that commend themselves for determination are as follows;
  - a) Whether from January, 2019 to November, 2019 the claimant was an employee of the Respondent or an external consultant.
  - b) Depending on the finding in (a) above, whether the claimant was constructively dismissed.
  - c) Whether the claimant is entitled to the reliefs sought.
  - d) Who should bear costs of this claim?

### **An employee or an external consultant?**

35. The Claimant averred that he was a consultant of the Respondent from July, 2018 to October, 2018 but thereafter he became an employee of the Respondents on full time basis. He argued that after verbal agreement on his appointment, he immediately drafted an employment contract and forwarded to the 1<sup>st</sup> Respondent for signing but it was never returned to him duly signed. However, the Claimant maintained that he was a full time employee in the respondent’s farm where he was provided with



working tools, transport, staff to supervise, official email and a monthly salary plus house allowance. He was also under the control of the Respondent and would always seek permission before leaving the Respondents' farm as evidenced by the email dated 13<sup>th</sup> September, 2019 whereby he sought for a day off to see a doctor. He also wrote another the email seeking leave to be away from the farm from 18<sup>th</sup> to 21<sup>st</sup> October, 2019.

36. The Respondent, on the other hand, maintains that the Claimant was contracted as a consultant until his resignation on 7<sup>th</sup> November, 2019. Therefore, they maintained that the Claimant was an independent contractor and not an employee.
37. However, during cross examination, RW1 admitted that the Claimant was not deducted withholding tax from the monthly his payments. He further admitted that it was not normal for an external consult to use the client's domain in his email address.
38. The definition of an employee is provided for under Section 2 of the [Employment Act](#), which defines an employee and a contract of service as: -

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“contract of service” means an agreement, whether oral or writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured leadership but does not include a foreign contract of service to which Part XI of this Act applies.”

39. The Court in the case Kenneth Kimani Mburu cited by the Claimant above agreed with the decision in [Everret Aviation Limited v Kenya Revenue Authority \(Through The Commissioner of Domestic Taxes\)](#) [2013] eKLR which gave the pointers to look at when determining whether a person is an employer and held that:

“There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business. The greater the direct control of the employee by the employer, the stronger the ground for holding it to be a contract of service. See *Simmons V Heath Laundry Company* [1910] 1 KB 543, *O' Kelly V Trusthouse Forte* [1983] 3 ALL ER 456. That test is however not conclusive. The passage cited by the appellant in Halsbury's Laws of England Vol I 26, 4<sup>th</sup> edition paragraph 3 is instructive

“There is no single test for determining whether a person is an employee, the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but is likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. The factors relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer, stipulations as to hours; overtime, holidays etc.; arrangements for payment of income tax and national insurance contribution; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment;



and who, ultimately, bears the risk of loss and the chance of profit. In some cases, the nature of the work itself may be an important consideration.”

40. The foregoing authority is on all fours with the in the instant case. From the facts of this case, the Claimant’s services were central in the operationalization of the Rose farm project which the Claimant described as too sensitive to be managed on temporary consultancy basis. His services were therefore integrated into the project as the person on the ground managing all the affairs of the 2<sup>nd</sup> Respondent and always coordinating with the 1<sup>st</sup> Respondent on the day to day running of the 2<sup>nd</sup> Respondent.
41. The Claimant was also under the control of the 1<sup>st</sup> Respondent on his performance of his duties. The RW-1 confirmed that he used to receive weekly and monthly reports from the Claimant on the progress of the farm. He could also not absent himself from work without first seeking permission from the 1<sup>st</sup> Respondent. There is no evidence that the Claimant could delegate his responsibilities to anyone else.
42. Further, the Claimant’s place of work was ascertained to be at the Respondent’s Rose farm, and he was also provided with tool of trade. RW-1 further confirmed during hearing, that the Claimant had been given a laptop to assist him in his work. It has also not been denied that he was provided with a motor vehicle for transport and at least 20 other employees under his supervision.
43. The Claimant was further paid a standard amount of Kshs 235,000 per month from January 2019 to August 2019 after which the payment was stopped without notice. RW-1 confirmed that the said payment was not subjected to withholding tax which is deducted from independent contractors.
44. The email by the Claimant dated 21<sup>st</sup> November, 2018 by which he forwarded a draft contract soon after the discussion with the 1<sup>st</sup> Respondent corroborates the allegation by the Claimant that a deal had been made between the two to have the Claimant become a full time employee in the Rose farm from January, 2019 even before the 2<sup>nd</sup> Respondent was registered. The Respondent did not deny receiving any of the emails produced by the Claimant as exhibits nor did he object to any. It was also not denied that the Rose farm was operational even before the company was registered. Further it was not denied that the Claimant was supervising workers and production before July 2019 when Production manager was appointed.
45. In view of the foregoing matters and the aforesaid precedents, I find that the Claimant has proved on a balance of probability that he ceased being external consultant for the 1<sup>st</sup> Respondent in October, 2018 and became a full time employee of the Respondents in their Rose farm in Molo from January to November 2019 when he resigned. Until then the Respondents had not written to the Claimant that his services were no longer required.

### **Constructive Dismissal**

46. The Claimant avers that he resigned from employment on the 7<sup>th</sup> November, 2019 due to frustration by the Respondents. He argued that the 1<sup>st</sup> Respondent had cut off communication with him and failed to pay his September and October 2019 salary, forcing him to resign. The Respondents on the other hand maintain that their consultancy relationship with the Claimant ended in July 2019 when they employed a Production Manager.
47. I have already made a finding of fact that the Claimant ceased being a consultant for the 1<sup>st</sup> Respondent in October, 2018 and became a full time employee with effect from January 2019. Therefore, the question that begs for answer is whether his resignation on 7<sup>th</sup> November, 2019 amounted to constructive dismissal.



48. The law on constructive dismissal is fairly well settled. *Black's Law Dictionary* (Tenth Edition) defines constructive dismissal or discharge as: -

“An employer’s creation of working conditions that leave a particular employee or group of employees with little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

49. Court of Appeal, in its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR stated the following: -

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The 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.”

50. The Court of Appeal went further to set out the following as guiding principles in determining the issue of constructive dismissal: -

- “(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 conduct himself to be estopped from asserting 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.”

51. In this case, the Claimant alleged that he was forced to resign from employment by the action of the Respondent and even sent an email on 7<sup>th</sup> November, 2019 informing the Respondent of the same. The said email attached a resignation letter but the same was not produced as evidence in this Court.



- Nevertheless, the Court notes that the email indicated the reason for resigning as being emergence of new development.
52. The said new developments were not elaborated but the Claimant has set out the same in his pleadings and evidence, that is, the Respondent frustrated his employment by cutting off communication with him, failing to pay salary and by allowing the vehicle which was aiding his movement to the farm to be repossessed by Rift Motors.
  53. A perusal of the record shows that the Claimant was paid up to August, 2019. The Claimant worked for the Respondent till 7<sup>th</sup> November, 2019 when he resigned. He continued to render services and could not even go to see his doctor without informing the 1<sup>st</sup> Respondent. The Respondent did not tender any evidence to rebut the said evidence. Therefore, it is apparent that the Claimant was denied his salary for the month of September and October 2019 without any lawful cause.
  54. Withholding of an employee's salary without any excuse is a fundamental breach of integral part of employment contract and therefore on that ground alone the Claimant was justified to resign and sue. An employee, in such circumstances is entitled to deem that the employer has chosen to repudiate the contract. Consequently, based on judicial precedents and the facts set out above I find and hold that the Claimant has proved on a balance of probability that his resignation was not voluntary and it amounted to a constructively dismissal by the Respondents.
  55. Based on the facts of this case, the above finding of fact that the Claimant was an employee of the Respondents and that he was constructively dismissed, I make further finding that he is entitled to some of the reliefs sought. For avoidance of doubt I am satisfied that the constructive dismissal, amounted to unfair dismissal within the meaning of Section 45 of the *Employment Act*.
  56. To begin with I award him the unpaid salary for September and October 2019 salary as prayed since evidence was tendered before this Court that showed the Claimant worked up until 7<sup>th</sup> November, 2019 when he resigned. His monthly salary was Kshs 235,000, hence  $Kshs235000 \times 2 = 470,000$ .
  57. The Claimant is further awarded one-month salary being Kshs. 235,000 as compensation for the unfair termination under Section 49 (1) read with section 50 of the *Employment Act*. In awarding the said compensation I have considered that he worked for less than one year before the dismissal and that no valid reason was cited.
  58. The claim for unpaid reimbursements of Kshs. 49, 159 is declined because the Claimant did not tender any evidence in form of receipts to confirm that he had incurred such expenses.
  59. The Claimant also prays for 25 leave days on pro rata basis. He did not have a written contract giving him more than the statutory minimum of 21 leave day per year. He worked for 10 months from January to October, 2019 on full time basis before the forced resignation and therefore on pro rata basis, he earned 17.5 leave days. On that basis I award him  $Kshs. 200,000 \times 17.5/30 = 116,666.66$ .
  60. The prayer for Certificate of Service is also granted because from January 2019 to November, 2019 is over ten months of service as full time employee. Under Section 51 of the *Employment Act* an employee who serves for more than 4 weeks consecutively is entitled to a certificate of service.
  61. In conclusion and for the reasons set out above, I enter judgment for the Claimant for the sum of Kshs. 821,666. The award is subject to statutory deductions but the Claimant is also awarded costs of this suit plus interest at court rate from the date hereof. He will also be issued with certificate of service.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 25<sup>TH</sup> DAY OF MAY, 2022.**

**ONESMUS N MAKAU**



## **JUDGE**

### **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 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

