



**Muli v African Banking Corporation Ltd (Cause 1609 of 2018)  
[2023] KEELRC 1135 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1135 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1609 OF 2018**

**JK GAKERI, J**

**MAY 11, 2023**

**BETWEEN**

**PETER MUSYOKA MULI ..... CLAIMANT**

**AND**

**AFRICAN BANKING CORPORATION LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a Statement of Claim filed on December 14, 2018 alleging constructive/unlawful termination of employment.
2. The Claimant avers that he was employed by the Respondent on May 3, 2011 as an Accounting Officer and was promoted to Senior Accounting Officer in 2016 owing to his good performance.
3. It is the Claimant's case that he resigned on January 12, 2018 as a result of coercion, sabotage, frustration, pressure and undue influence from the top management of the Respondent which rendered the continuation of employment difficult and untenable.
4. That in 2014, he noted that the Respondent was falsifying documents contrary to the *Banking Act* and the *Central Bank Regulations and Prudential guidelines*.
5. That one Kellen Kariuki and others were falsifying documents relating to job descriptions and purported that it was the Claimant who had authored the falsification and was reported to the Heads of Human Resource and Finance on October 3, 2014 and October 8, 2014 respectively and the issue was not properly addressed.
6. That the Respondent revisited the matter on December 14, 2017.
7. The Claimant avers that due to frustration, he asked for a transfer to one of the Respondent's designated units in June 2017 at the same rank but was transferred to a new Department on November



- 21, 2017 as a Reliever-Customer Service Representative which prejudiced the Claimant's career development and exposed him to risk of underperformance.
8. That as at the date of resignation on January 12, 2018, his monthly salary was Kshs 101,175/=.
  9. The Claimant prays for;
    - a. A declaration that his resignation amounted to constructive dismissal.
    - b. Reinstatement to employment.
    - c. Damages for wrongful or unlawful dismissal comprising;
      - i. 3 month's salary in lieu of notice.
      - ii. 12 month's salary as compensation.
      - iii. Gratuity at 30% for 80 months.  
Total Kshs 3,945,825/=
    - d. Costs of the suit plus interest.

### **Respondent's case**

10. The Respondent filed its Reply to Statement of Claim and Counter-Claim on May 15, 2019 denying that the Claimant was wrongfully and/or unlawfully or constructively dismissed from employment.
11. It admits the employment and promotion of the Claimant from Accounting Officer to Senior Accounting Officer.
12. The Respondent avers that Kellen Kariuki denied having falsified documents.
13. It is the Respondent's case that it by several meetings attempted to resolve issues raised by the Claimant and at his request was transferred to a relatively challenging department.
14. The Respondent denied having violated the Code of Conduct or the Central Bank of Kenya Prudential guidelines.
15. The Respondent further avers that the Claimant was not entitled to 3 month's salary in lieu of notice as he voluntarily resigned from service, before which he was absent from duty from December 28, 2017 to February 11, 2018 without notice or permission from the supervisor.
16. That the claim for gratuity was unsustainable as it was not part of the contract.

### **Counter-Claim**

17. The Respondent prays for
  - a. The sum of Kshs 88,601.58 being one monthly salary in lieu of notice.
  - b. Interest on (a) above at court rates.
  - c. Costs of this Counter-claim.
  - d. Any other/further relief as the court may deem fit to grant.



## **Claimant's evidence**

18. The Claimant's written statement which he adopted as his evidence-in-chief rehashes the contents of the statement of claim.
19. On cross-examination, the Claimant confirmed that he served as Accounting Officer from 2011 – 2015, a Senior Accounting Officer for about 2 years and as Business Strategy Officer for one (1) year.
20. It was his testimony that the falsification of documents by the Respondent related to job descriptions in that the document in question designated him as the Financial Accounting Officer while his position was Accounting Officer and the signature was not his and he was in the Financial Administration Department.
21. The Claimant testified that he rated his performance as very good and in the January to December evaluation he was rated as having exceeded expectations but towards the end of 2016, he became the Business Strategy Officer from October 3, 2016 and handed over the roles by email dated July 21, 2017.
22. He confirmed that the Balance Score Card was completed once a year.
23. That he had been put on a Performance Improvement Plan (P I P) styled as a Performance Improvement Agreement and was reviewed by the Manager Strategy and Corporate Performance on September 6, 2017 but the same had not been signed by any of the parties.
24. That he did not respond to the email dated September 6, 2017 from Mr Maina, the Manager Corporate Performance on the Performance Review, 2016.
25. That by email dated June 2, 2017, the Claimant intimated to Human Resource his wish to be transferred to another unit preferably Audit, Treasury or Risk and Compliance in that order.
26. The Claimant testified that the relocation was intended to expose him to new areas and environment but received no response.
27. The witness confirmed that he was employed to work in the Finance Department and was transferred to Industrial Area Branch as Reliever Customer Service Representative but declined the transfer on November 27, 2017 and consulted a lawyer to contest the transfer by letter dated December 1, 2017.
28. The Claimant admitted that he did not serve the Respondent after he tendered the notice of resignation but attended a meeting held at the Respondent's place of business at ABC House on February 12, 2018 at 2.45 pm, with Heads of Finance Human Resource and the Manager, Human Resource.
29. The agenda of the meeting was to discuss the Claimant's resignation and seek a mutual way forward.
30. The Claimant signed the minutes on the same day and filed the instant suit in December 2018 and prayed for reinstatement.
31. The witness confirmed that the Respondent persuaded him to reconsider the resignation.
32. On re-examination, the Claimant testified that the signatures on page 34 and 35 were not his and there was no Balance Score Card for 2017.
33. That he was unable to serve because he was barred from accessing the work place. He did not disclose when and by whom or how.



## **Respondent's evidence**

34. RWI, Lucy Wariara, the Respondent's Head of Human Resource confirmed on cross-examination that she worked at the Respondent's Human Resource Department between 2016 and 2018 and the Claimant became the first Business Strategy Officer on October 1, 2016 but was not given an appointment letter as it was the same department and terms and conditions did not change and had no job description but was given a Job Description Update Form.
35. The witness was emphatic that the Job Description was indispensable in the assessment of an employee.
36. That the email dated July 21, 2017 related to the handover of roles by the Claimant from the Senior Accounting Officer to the Business Strategy Officer.
37. The witness confirmed that the Claimant had raised the issue of the Job Description in October 2014 and there was a meeting thereafter.
38. It was her testimony that although an appraisal was necessary before an employee was put on a Performance Improvement Plan (P I P), the employee is entitled to know the reasons why it was essential.
39. That the Claimant's performance was not reviewed in 2017 and the email dated March 29, 2017 on daily reporting did not increase the Claimant's duties.
40. That the Claimant had already applied for a transfer by the time he wrote the email dated August 30, 2017 to one Michael Maina, Head of Corporate Performance of the intended P I P and raised the issue of KPI Mapping for 2017 and understood his role as records show.
41. That the Claimant escalated the issue of transfer to the Group Chief Executive Officer (GCEO) by email dated December 8, 2017 and the same was responded to on December 14, 2017.
42. The witness testified that the transfer was not a demotion and was not designated as a Teller.
43. The witness denied that the Respondent wanted the Claimant out of the bank.
44. The witness confirmed that the Claimant's letter of resignation was responded to after one month and the employee was unavailable for a meeting before February 12, 2018.
45. On re-examination, RWI testified that the Claimant signed a Job Description.
46. That although the Balance Score Card was an annual affair, interim reviews were conducted and the Performance Improvement Plan was intended to show areas of improvement.

## **Claimant's submissions**

47. Counsel for the Claimant submitted on the law on constructive dismissal, facts leading to resignation, unfairness following resignation and reliefs.
48. On the first issue, reliance was made on the Court of Appeal decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR to highlight the legal principles applicable in determining whether constructive dismissal had occurred.
49. Counsel urged that the fact that the court used the word "includes" meant that the list of the principles catalogued by the court was inexhaustive.



50. Counsel relied on the terms used by the Claimant in the statement of claim i.e “ coercion, sabotage, frustration, pressure and undue influence” to urge that the work environment was hostile and forced him to resign.
51. That the background of the resignation letter was crucial.
52. As regards the facts preceding resignation, counsel made reference to the complaint in 2014 about one Kellen Kariuki and the Job Description in 2016 and the Key Performance Indicator for the position of Business Strategy Officer were given in an updated Job Description Form and continued performing some roles he had handed over and more tasks were added by email dated March 29, 2017.
53. Counsel submitted that his alleged underperformance was based on an unprocedural review and he had not been consulted on the Performance Improvement Plan and had no Key Performance Indicators.
54. That the transfer to a Branch was inhumane and a demotion and the email to the Group CEO elicited an unsatisfactory response.
55. That after resignation, the bank kept the Claimant in limbo for over one (1) month and tried to appease the Claimant.
56. As regards the reliefs sought, counsel urged that the Claimant was entitled to all of them.
57. That the 3 months claim for notice pay was based on seniority.
58. The decisions in *John Kimingi V Damco Logistics Kenya Ltd* (2021) eKLR and *CNR V Freight in Time Ltd & another* (2022) eKLR were relied upon to urge that the Claimant was entitled to 12 months salary compensation.

### **Respondent’s submissions**

59. The Respondent’s counsel identified several issues, namely; whether the Claimant was constructively dismissed, entitlement to reliefs and the counter-claim.
60. As regards constructive dismissal, counsel relied on the decisions in *Herbert Wafula Waswa V Kenya Wildlife Services* (2020) eKLR and *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (Supra)* to underscore the circumstances in which constructive dismissal is said to have occurred. Counsel urged that the Claimant had challenges in meeting Key Performance Indicators and thus sought a transfer to another unit, rejected the same and instructed his counsel to write to the bank while still in employment and absconded duty until his resignation and rejected other positions offered even after resignation, having served for many years.
61. That the Claimant had confirmed that he intended to retire at the age of 55 and the resignation was timely.
62. Counsel submitted that the Claimant had made up his mind to leave the bank.
63. Counsel urged that the Claimant was not forced to resign as he had requested for a transfer and no breach of contract had occurred.
64. As regards entitlement to reliefs, counsel relied on Section 47(5) of the *Employment Act*, 2007 on the burden of proof in claims for unfair termination.
65. The claim for gratuity is discounted on the ground that the termination of employment was not unfair and the Claimant was a member of the NSSF.



66. The decisions in *Bamburi Cement Industries v William Kilonzi* (2016) eKLR and *Kenya Kazi Services Ltd v Dickson Onjwaya Wasike and 42 others* (2021) were relied upon to reinforce the submission.
67. As regards reinstatement, counsel relied on Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 to urge that the remedy was unavailable owing to the 3 years period and the Claimant had been offered 3 years within which he could return to work place but he did not.
68. On the Counter-claim, counsel urged that since the Claimant issued a notice of resignation with immediate effect contrary to the contract of employment, the Respondent was entitled to one month's salary Kshs 88,601.08.

### Determination

69. After careful consideration of the pleadings, evidence and rival submissions, the issues for determination are;
  - i. Whether the Claimant was constructively dismissed.
  - ii. Whether the Claimant is entitled to the reliefs sought.
70. As to whether the Claimant was constructively dismissed, the starting point is the principle or doctrine of constructive dismissal as enunciated by courts of law as the provisions of the *Employment Act*, 2007 are silent on it.
71. According to Lord Denning MR in the often cited decision in *Western Excavating (ECC) Ltd V Sharp* (1978) 2 WLR 344, constructive dismissal takes place;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.

72. Closer home is *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (*Supra*), cited by both counsels, the Court of Appeal affirmed the contractual test and articulated the principles for determination of constructive dismissal.
73. The court stated as follows;

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct . . . The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd V Sharp*



(1978) 1CR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment . . .”

74. The court expressed similar sentiments in *Nathan Ogada Atiagaga v David Engineering Ltd* (2015) eKLR.
75. Finally, on the timing of resignation in *Godfrey Allan Tolo v Tobias O Otieno & another* (2022) eKLR, the court stated as follows;

“For constructive dismissal to be inferred, the employee must have resigned within a reasonable time from his employment with or without notice as a result of the employer’s treatment or hostile working conditions at his work place. The employer must not have expressed the desire to terminate the employee . . .”
76. Some of the principles applicable in determining constructive dismissal are essential or fundamental terms of the contract, repudiatory breach, employer’s conduct must be a fundamental or significant breach going to the root of the contract, objectivity, causal link between the employer’s conduct and resignation, with or without notice, employee to prove the repudiatory breach and the employee must not have accepted, waived, acquiesced or conducted himself in a manner to be estopped from asserting the repudiatory breach.
77. I will now proceed to apply the foregoing principles to the facts of the instant case.
78. It is common ground that the Claimant was an employee of the Respondent from May 3, 2011 to January 12, 2018, initially at a salary of Kshs.45,000/= per month which had risen to Kshs 95,000/= effective July 2015 and Kshs 101,175/= by January 2018.
79. Similarly, although the Claimant alleged that one Kellen Kariuki and other staff of the Respondent were falsifying documents, and in particular the Job Description, the two page document on record dated January 2012 has no author and the Claimant denied that the signature on page 2 of the document was his.
80. It is unclear to the court as to what was falsified and by whom.
81. Similarly, it is not in contest that the Claimant’s exemplary performance led to his promotion from Accounting Officer to Senior Accounting Officer and was the first Business Strategy Officer of the Respondent.
82. For the latter position, the Claimant was given a Job Description Update Form as opposed to a Job Description which he signed on June 25, 2014.
83. Noteworthy, as early as June 2017, the Claimant had applied for a transfer to another unit and preferred Audit, Treasury or Risk and Compliance in that order. The email was a follow up of a discussion the Claimant had with the Human Resource Manager, RWI. According to the Claimant, the transfer would expose him to new areas and environment for career development and apply his skills and knowledge in other functions.
84. This is an important issue which I will revert to later in the judgement.



85. As regards staff evaluation, RWI confirmed that the Respondent conducted the exercise annually when members of staff would complete their Balance Score Cards and be evaluated by their supervisors and a score would be agreed upon and areas of improvement would be teased out for action within the agreed time frames.
86. RWI testified that although the Job Description Update Form was completed in January 2017, it was only signed by the Head of Finance. The Claimant did not sign the document nor were the Balance Score Card for the year agreed upon and no targets or Key Performance Indicators (KPIs) were agreed upon as evidenced by the Claimant's email dated August 30, 2017.
87. Puzzlingly, the Respondent's email dated August 30, 2017 makes reference to deliverables agreed upon between the Claimant and Mr Samuel Muchiri as regards the Claimant's role as the Business Strategy Officer allegedly on October 3, 2016.
88. The email additionally states that the Claimant's performance was to be monitored and reviewed after 6 months and it had been agreed that the Claimant be put on a Performance Improvement Plan.
89. However, although the Respondent furnished no evidence of the alleged review or its findings, the Claimant admitted that indeed there was a performance review.
90. The Claimant's email to Mr Samuel Muchiri dated August 30, 2017 would appear to suggest that there was no consultations before the Respondent agreed to put the Claimant on a Performance Improvement Plan. The email is clear that the Claimant learnt of it on June 27, 2017 and objected to the proposal as it was not part of the proposals made from the review and was made after he had intimated his desire to move to another unit.
91. Creditably, the Claimant proposed a way forward including agreements on Key Performance Indicators for 2017, additional responsibilities he was discharging to the detriment of his core duties, an issue he had raised earlier but had not been addressed.
92. This complaint is supported by the Claimant's email dated July 21, 2017 to several persons including the Head of Finance, attaching the handover schedule.
93. The email simply states;  
Dear Team  
  
Kindly find attached my handover schedule indicating what and whom am handing over to and the status of completion of activities/functions.  
  
Best regards.
94. The email suggests that although the Claimant was the Business Strategy Officer, effective October 2016, he was still performing other duties outside his core mandate, a fact confirmed by the email dated March 29, 2017 by which Mr Michael Maina designated the Claimant as the officer who would be handling daily reports effective March 30, 2017.
95. Impliedly, the activity was previously not part of the tasks allocated to the Claimant. Clearly, it does not appear to have been part of the deliverables agreed in October 2016 and subsequent emails by the Claimant confirm as much and may have been part of the performance review referred to by the parties in their emails dated late August and September 2017.
96. From the email communication on record, it is evident that no Key Performance Indicators had been agreed upon between the Claimant and the supervisor and the Claimant's role as Business Strategy Officer does not appear to have been clearly demarcated. Even as late as September 5, the Claimant was



- still handling tax even after having handed the same over to one Zipporah. This is further exemplified by the migration of daily management reports from Kellen Kariuki to the Claimant in March 2017.
97. These other roles affected the Claimant's performance as he had less time to concentrate on his core mandate. The Claimant was emphatic that the disablers were not removed to enable him handle his docket.
  98. There is no evidence on record to show that the Claimant's performance would be and was indeed reviewed after 6 months of appointment as the Business Strategy Officer.
  99. Strangely, the Claimant was not made aware that he would be placed on a Performance Improvement Plan until June 27, 2016 during a meeting with Chea and Michael yet no appraisal had taken place and a recommendation for a Performance Improvement Plan agreed upon.
  100. Intriguingly, the Respondent's witness adduced no evidence to suggest that the Claimant's performance was wanting in any respect. In her own words, "I am not saying that your client underperformed."
  101. In a nutshell, the Claimant was being placed on a Performance Improvement Plan without any documented and agreed upon targets and Key Performance Indicators or result areas, no structured or formal performance appraisal had been conducted and the Claimant was still performing duties he had handed over to colleagues to enable him concentrate on his role as Business Strategy Officer more than 10 months after taking up a new role.
  102. It is unclear to the court why the Claimant, whose performance in Finance Department, the Respondent admitted was exemplary was made a Business Strategy Officer, a new office with no clearly defined roles, something analogous to setting him up for failure as he opines.
  103. Finally, as regards the transfer, the Claimant had intimated to the Respondent's Human Resource Manager, RWI, the areas he would be comfortable serving the Respondent and grow his career and did so after he had discussed the issue with the Manager.
  104. The Respondent responded by letter dated November 21, 2017 by which it transferred the Claimant to Industrial Area Branch as Reliever-Customer Service Representative from November 27, 2017, a transfer the Claimant rejected citing bias, lack of fairness and accountability on the part of the "Finance Management."
  105. Although it is unclear as to why the Claimant implicated the Finance Management in the allegation of bias and unfairness, he cannot be faulted for the spontaneous comment in that he had sought to transfer to specifically preferred units but was transferred out of the Head Office to a branch at Industrial Area which was, in the court view a demotion as submitted by his counsel.
  106. The hand written comment by the Claimant leave little doubt that the Respondent's Human Resource Manager did not discuss the transfer with the Claimant before the letter was written.
  107. Having been approached by the Claimant on the issue, before the email communication dated June 2, 2017, it was incumbent upon the Human Resource Manager to explain to the Claimant why he could not be transferred to the units he preferred and his views sought on whether he was comfortable working as Customer Service Representative before the letter was finally written.
  108. Puzzlingly, the letter makes no reference to the Claimant's email nor the units he had indicated and why he could not be transferred there.



109. Such an approach would probably have assuaged the Claimant and obviated the need to do the letter and subsequent meetings and in particular the meeting of February 12, 2018 whose sole purpose was to persuade the Claimant to reconsider his decision to leave the Respondent as it was yet to respond to the letter more than one (1) month later.
110. Although the Claimant's desire to be transferred appear to have been made in good faith for purposes of exposure and career development, the Respondent does not appear to have taken it as such.
111. The Claimant merely expressed a desire to proceed to another unit preferably any of the three, but had not made it a condition or imperative.
112. There was nothing easier and plausible than communicating to the Claimant that his preferred units had no vacancy which would have afforded him the opportunity to determine whether to remain in Finance or explore units outside his preferred areas.
113. Having served the Respondent diligently since May 3, 2011, it behoved the Respondent to treat the Claimant friendlier than it did in this case.
114. It is common ground that the Claimant escalated the issue to the Group Chief Executive Officer via email dated December 8, 2017, who responded via email dated December 14, 2017 from the Human Resource Manager who *inter alia* intimated that the transfer was informed by the need to match skills with various roles available. Similarly, RWI seized the opportunity to inform the Claimant that the preferred units of transfer were adequately staffed.
115. It is curious that the reason was not given in the transfer letter dated November 21, 2017.
116. Similarly, the Respondent's retort that the Claimant initiated the transfer cannot avail the Respondent as the Claimant was specific on what he desired.
117. By then, the Claimant had already engaged counsel to contest the transfer and did so by letter dated December 1, 2017.
118. In his letter to the Group Chief Executive Officer of the Respondent, the Claimant indicated the tribulations he had been subjected to in Finance Management culminating with the transfer to the Industrial Area Branch as Reliever-Customer Service Representative.
119. The Claimant had reached out to the Group Chief Executive Officer as he was persuaded that the issue of transfer would be resolved otherwise but the Group Chief Executive Officer remanded the issue to the Human Resource Manager who had already communicated her decision by letter dated November 21, 2017.
120. The Respondent's Group Chief Executive Officer's failure to address the Claimant's issue portrayed the Respondent as insensitive to its staff, the fact that the Claimant had sought legal advice notwithstanding.
121. RWI's response dated December 14, 2017 was a clear signification that the Claimant had reached the end of the tether and appear to have been the proverbial straw that broke the camel's back. The minutes of the meeting held on February 12, 2018 confirmed as much. Implausibly, the Respondent was offering the Claimant the role he held before the transfer or in a different department of his choice despite the resignation. The gesture can only be construed to mean that the Claimant was a diligent employee and the Respondent appreciated that it had treated him in a shabby manner.
122. The Claimant appeared to have weighed the options available to him and resigned by letter dated January 12, 2018.



123. The Claimant isolated two reasons for the resignation, namely; absence of good will and professionalism in the resolution of issues he had raised in good faith and the transfer to a department he had not expressed interest in and which would break his career.
124. From the foregoing, it is discernible that the Respondent, by default or design engaged in a consistent course of conduct which impacted on the Claimant negatively and which culminated in his resignation from employment. In the court's view, the Respondent's conduct was the proxima causa of the Claimant's resignation.
125. For the above-stated reasons, it is the finding of the court that the Claimant has on a balance of probability demonstrated that he was constructively dismissed by the Respondent.
126. Having found that Claimant was constructively dismissed by the Respondent, I will now proceed to determine the reliefs available to him.
- a. Having found as above, a declaration is hereby issued that the Claimant's resignation on January 12, 2018 amounted to constructive dismissal.
  - b. Reinstatement
127. This is a remedy provided by Section 49(3)(a) of the *Employment Act* read with Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011.
128. There is no gainsaying that the remedy of reinstatement is not automatic. It is discretionary. Similarly, Section 12(3)(vii) of the Employment and Labour Relations Court, 2011 provides that the courts jurisdiction to grant reinstatement of an employee is only exercisable within 3 years of dismissal and subject to such conditions as the court may think fit to impose.
129. In the instant case, the Claimant resigned on January 12, 2018, more than 5 years ago. For that reason alone, the remedy of reinstatement is unavailable.
130. For unexplained reasons, the Respondent did not take advantage of the 3 years grace period he had been given to reconsider the resignation.

The prayer is declined.

### **c. 3 month's salary in lieu of notice**

131. The Claimant tendered no evidence of entitlement to 3 months notice. Although counsel for the Claimant submitted that the contract of employment between the parties was oral, the Claimant did not contest the contract dated April 27, 2011 which he provided as evidence of the employment relationship.
132. Relatedly, documentary evidence on record reveals that the Claimant signed the Service Terms and Benefits Regulations on May 3, 2011, the effective date of employment which was an integral part of the contract of employment as the "Acceptance", executed on even date shows paragraph 8 of the Respondent's Service Rules and Regulations provided that the contract of employment was terminable by one (1) month's notice in writing.

The Claimant is awarded one (1) month's salary in lieu of notice.



#### **d. Gratuity at 30% of 80 months**

133. As explained in *Nelson Kesbei V Narok County Government & another* (2019) eKLR;

“The payment of gratuity by an employer is gratis. Its basis is on the practice of an employer or as agreed under the contract of service.”

134. Further, the court is in agreement with the sentiments of the court in *Bamburi Cement Ltd V William Kilonzi* (*Supra*) relied upon by the Respondent’s counsel and *Bamburi Cement Ltd V Farid Aboud Mohammed* (2016) eKLR, that gratuity is indeed a gratuitous payment for services rendered.

135. Neither the contract of employment dated April 27, 2011 nor the Service Terms and Benefits provide for payment of gratuity to employees by the Respondent.

The prayer is declined.

#### **e. 12 months salary as compensation**

136. Having found that the Claimant was constructively dismissed from employment, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007 subject to taking into consideration the relevant factors in Section 49(4) of the Act.

137. In determining the level of compensation in this case, the court has taken into consideration the fact that;

- i. The Claimant was a diligent employee and served the Respondent dutifully and had no disciplinary cases.
- ii. The Claimant wished to continue in the Respondent’s employment as evidenced by the prayer for reinstatement.
- iii. The Claimant was an employee of the Respondent for a period of about 6 years 8 months which is neither too long nor too short.
- iv. The Claimant did not contribute to the constructive dismissal.
- v. The minutes of the meeting between the Claimant on the one hand and the Respondent’s Head of Finance, Human Resource and the Manager Human Resources are emphatic that the Respondent had decided to make a peace offering by giving the Claimant the option to remain in Finance as the Business Strategy Officer or take up a new role in a different department of his choice and as a sign of good faith was offered a position at Custodial or Security Department.  
  
It requires no belabouring that Respondent was holding out an olive branch to the Claimant who did not reciprocate.  
  
The three years grace period to reconsider his decision was also made in good faith as there is no evidence to show the contrary.  
  
Had the Claimant taken up the Respondent’s offer, the suit herein would probably have been avoided and the ensuing costs saved
- vi. The Claimant absented himself from the work place for many days after resignation and was unavailable to the Respondent having promised to avail himself for the one (1) month notice.

138. In the circumstances, the court is persuaded that the equivalent of two (2) months salary is fair.



### **Counter-Claim**

139. The Respondent is claiming one (1) month's notice pay as the Claimant did not give notice. Having found and held that the Claimant was constructively dismissed, the Respondent's claim for salary in lieu of notice is unsustainable and is dismissed.
140. In the upshot, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Declaration that the Claimant was constructively dismissed.
  - b. One (1) month's salary in lieu of notice Kshs 101,175.00.
  - c. Equivalent of 2 months salary, Kshs 202,350.00.  
Total Kshs 303,525.00
  - d. Costs of this suit.
  - e. Interest at court rates from date of judgement till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF MAY 2023**

**DR. JACOB GAKERI**

**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 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 Civil 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.

**DR JACOB GAKERI**

**JUDGE**

