IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, AZANGALALA & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 20 of 2012

BETWEEN

COCA COLA EAST & CENTRAL AFRICA LIMITED .....APPELLANT

AND

MARIA KAGAI LIGAGA ……..……..…….....RESPONDENT

(An appeal from the judgment and decree of the Industrial Court of Kenya at Nairobi (Rika J.) dated 31st May, 2011

in

Industrial Cause No. 611 (N) of 2009

****

JUDGMENT OF THE COURT

1. The appellant and the respondent entered into a contract of employment dated 30th July, 2005 whereby the respondent assumed duty as the Human Resource Manager with effect from 1st September, 2005. The station of duty of the respondent was Nairobi, Kenya.

2. The employer/employee relationship between the appellant and respondent was pleasant until December, 2008 when the appellant relocated the respondent and her whole family to Kampala-Uganda. In January, 2009, within one month of being deployed to Kampala, the appellant was verbally advised to relocate to Mozambique. Before the respondent could travel to Mozambique, she was relocated to Nairobi for the period February to April, 2009. During this period, the respondent stated that due to lack of work or duties she was frustrated and demoralised. She was then relocated to Nyeri Town in Kenya with effect from 1st April, 2009; no clear duties were assigned to her. Thereafter, the appellant relocated the respondent to work in Kisii and Kisumu towns with effect from 1st June, 2009; the respondent reported to work at Kisumu but on 3rd June, 2009, she was asked to leave Kisumu without any consultation. Aggrieved, the respondent informed the appellant, as her employer, that she has been left with

no work or duties to perform thus causing her harassment, frustrations, inconvenience, anxiety, mental and emotional distress and embarrassment.

3. From these facts, the respondent contended that the appellant as her employer was in breach of contract and violated its own Work Place Rights Policy as well as local and international labour regulations. The respondent states that upon being recalled to Nairobi from Kisumu and with no clear job assignment, she wrote a letter dated 5th June, 2009 to the appellant expressing her fears that she had no work to do and that the state of affairs was causing her emotional distress.

4. In the letter dated 5th June, 2009, the respondent wrote to the appellant as follows:

"It has been and continues to be a pleasure working for the Coca-Cola Company. Given the Company's Vision 2020 Road map for Winning Together that ECABU has consented to, it is my understanding that the development of women in General Management/Operations is actively pursued. I was ecstatic to have been identified as a female with potential to ascent to senior roles in General Management and hence placed on an accelerated development program. Pursuant to this initiative, I enthusiastically took on a development assignment effective December 1st 2008 for an approximate period of twelve months per the contract dated September 16th, 2008.

Unfortunately, the journey so far has been a harrowing experience as a result of inconsistencies in planning, direction and the general stewarding of my development assignment. I have been offered four assignments within a six month period and none of them has materialized. Below is a summary of the events:

1. *I relocated with my family to Uganda in December 2008 upon receiving a development assignment dated September 16th, 2008, to work with Century Bottling Company Limited.*

2. *On January 23rd 2009, I was informed that I could no longer continue on the development assignment and needed to be assigned to a new role. Subsequently, I was offered an Operational Marketing Manager role for Mozambique on February 5th 2009, which I accepted. The offer was later withdrawn.*

3. *There was a lull after the withdrawal of the Mozambique offer and following several phone calls and discussions, I met you in person in Kampala and you issued me with a development assignment letter for Kenya effective April 1st 2009. The letter required that I take on projects as well as a development assignment in Nyeri. A contract was later issued to me on April 1st 2009 dated March 16th 2009, which I endorsed.*

4. *Whilst I reported to work to honor the Nyeri/Projects assignment, the contract was not enforceable as the Company was not able to clarify my tasks leading to a period where I was not adding value to the Company. As a result of this and my insistence for direction and various discussions, a letter dated April 30th 2009 was issued to me to take on the role of Operational Marketing Manager, Kisii/Kisumu, effective May 1st 2009.*

5. *Handing over with the current OMM for Kisii/Kisumu (Rickham Muga) commenced immediately including introductions to both bottling plants. I formally relocated to Kisumu on June 1st 2009 to fully take up the role, only to be informed by Peter Njonjo that it is not possible as Rickham will continue to serve in this role.*

In light of the above events, I conclude as follows:

- *Owing to the ambivalent approach to my development assignment, it is unlikely that the desired results shall be achieved.*
- *I have been inequitably treated.*
- *I am emotionally torn apart by these events and my family by extension has suffered the same."*

5. Following the letter of 5th June, 2009, the appellant held discussions with the respondent which discussions did not bear fruit. Consequently, the respondent issued a notice of termination of employment by letter dated 16th June, 2009. Excerpts from the letter relevant to this appeal are as hereunder:

"NOTICE TO TERMINATE EMPLOYMENT

The events over the last six months have left me in a position where I neither contribute to the company productively nor advance my career, thus negating the development assignment. My treatment over the same period has been inequitable and unjust and has resulted in emotional distress to me and my family. Considering the recent events and my current situation, I am hereby forced to submit my notice to terminate employment from the Company and tender one month notice as provided for by the Company policy. I would have preferred to continue working for this great company given my performance, potential and the recognition that you have provided over the years that I have served. It would have been my pleasure to continue working for the company in the long term but circumstances have changed and I am forced to make this decision. During this notice period, I shall endeavour to clear with the company per the exit policy. I would like the Company to process my separation dues as follows:

(a) Breach of contract payments per employment legislation.

(b) ……

(c) ……

(d) …….

(e) Compensation for unfair treatment and discrimination.

(f) Compensation for traumatic experience and emotional distress.

(g)

(h) ……"

6. The appellant did not effectively process the respondent's separation dues as requested in the letter dated 16th June, 2009. As a result, the respondent lodged a claim against the appellant at the Industrial Court seeking *inter alia* (a) general damages for breach of contract of service; (b) payment in compensation for loss of earnings for the remainder of her 28 years of service till retirement at the age of 65 years (c) maximum compensation of 12 months provided in law for severance of contract.

7. The appellant filed its defence denying liability to the appellant stating that at no time was the respondent frustrated, harassed or mistreated; that the respondent voluntarily resigned from employment and there was no breach of contract; that the respondent was not entitled to one year notice or salary in lieu of notice; that the respondent has not indicated the basis upon which she alleges she would have retired at the age of 65 years; that at all material times, the appellant was intent and desirous to develop the respondent's career and the appellant went out of its way to find suitable management positions for the respondent; that failure to find suitable position was due to factors beyond the appellant's control and such factors included the respondent's dissatisfaction with positions that opened up and making unreasonable demands for the available positions; that there were unforeseen intervening circumstances in the positions that opened up for the respondent.

8. Upon hearing the evidence by both parties, the trial judge entered judgment for the respondent against the appellant holding as follows:

"a. *The respondent was constructively dismissed from employment by the appellant;*

b. *The constructive dismissal amounted to unfair termination of employment;*

c. *The appellant to pay the respondent nine (9) months gross salary in compensation calculated at Ksh. 6,416,406/= (six million, four hundred and sixteen thousand four hundred and six only).*

d. *The entire sum to be paid within 30 days of the delivery of this award.*

e. *Parties to bear their own costs."*

9. Aggrieved by the award, the appellant lodged the instant appeal citing the following grounds:

"(a) That the learned judge erred in law and fact in holding that the respondent was entitled to damages for wrongful termination of employment notwithstanding that she had voluntarily resigned from employment and all her dues paid.

(b) That the learned judge erred in fact and law in his assessment of the submissions and evidence before the court and the applicable law and thus arrived at an erroneous award.

(c) That the learned judge erred in law and fact in applying a concept referred to as "constructive dismissal" which was not raised by either party and proceeded to hold that the respondent was constructively dismissed notwithstanding her formal resignation.

(d) That the learned judge erred in law and fact in applying the United Nations Declaration on Human Rights (UNDHR), International Convention on Civil and Political Rights (ICCPR) and other international conventions which were not urged or relied upon by either party and in the result made out a case eschewed in a manner favourable to the respondent.

(e) That the learned judge erred in law in purporting to change the law to include the concept of constructive dismissal in the Employment Act, 2007 and in the result erred in failing to interpret and apply the law.

(f) The learned judge erred in law in importing a doctrine not otherwise pleaded by the parties and not codified in our law to base an award in the respondent's favour where an employee has tendered a resignation on her own volition.

(g) That in any event, the award of Ksh. Ksh. 6,416,406/= being nine months gross salary was excessive and not justified.

(h) That the learned judge erred in law and fact in predisposing his mind to a position favourable to the respondent against the appellant and thereby arrived at a wrong decision."

10. At the hearing of this appeal, learned counsel Mr. Martin Munyu appeared for the appellant while learned counsel Mr. Francis Kadima appeared for the respondent. This is a first appeal and we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see also **(Abdul Hameed Saif vs. Ali Mohamed Sholan [1955] 22 E. A. C. A. 270)**.

11. Counsel for the appellant abandoned grounds (c) (d) (e) and (f). Counsel urged the appeal and made his submissions focusing on grounds (a) (b) (g) and (h). He submitted that the abandoned grounds had been overtaken by ***Article 2 (5)*** of the Constitution which provides that the general rules of international law shall form part of the law of Kenya.

12. It was emphasized that the appellant's appeal is premised on various grounds: first, the learned judge erred in law and fact in finding that the respondent did not voluntarily resign from her employment; second, the judge erred in holding that there was constructive dismissal when the facts do not support such a finding, third, the judge erred in law in extending and stretching the concept of constructive dismissal to enable employees manipulate the concept; fourth, the judge erred in failing to appreciate the legal criteria applicable in the concept of constructive dismissal and failed to appreciate that the burden to prove constructive dismissal was on the respondent and the burden was not discharged; and finally the judge erred to the extent that the quantum awarded as damages was excessive taking into account previous judicial decisions.

13. The appellant urged this Court to find that the trial judge did not give due weight and consideration to the respondent's letter dated 16th June, 2009 where she voluntarily terminated from her employment; that the respondent was not forced or coerced to write the letter of termination which she did of her own free will and time. That the various postings or relocation of the respondent to various stations of work by the appellant did not amount to harassment, inequitable treatment or discrimination; that the appellant placed the respondent on a managerial career development assignment and the respondent was impatient and never gave the appellant time to implement the management career development path; that the appellant was keen in promoting women in management development and the postings of the respondent were aimed at enhancing the role of women in managerial positions.

14. The appellant submitted that the respondent strategized, calculated and timed the writing of the termination letter in order to manipulate the concept of constructive dismissal and seek compensation; that the strategizing and manipulation is evident from the fact that the respondent wrote the letter of termination on 16th June, 2009 giving 30 days notice and on 17th July, 2009 when the notice expired, the respondent landed another job as the Human Resource Manager at Mumias Sugar Company; that getting the new job was not a coincidence but evidence of strategic manipulation of the concept of constructive dismissal; that the 30 day notice of termination was a guise to exploit the concept of constructive dismissal when the respondent had already looked for another job and made up her mind to leave employment of the appellant; that the notice to terminate and the timing of the new job are evidence that the respondent was all along intending to terminate employment with the appellant and the issue of constructive dismissal should not arise. It was submitted that having formed the intention to quit employment, the respondent manipulated the employment laws and voluntarily wrote the letter of termination and is now turning around asserting constructive dismissal.

15. The appellant submitted that an employee who is constructively dismissed has no time or opportunity to write a letter of resignation or give notice of termination; that such an employee is a frustrated person who simply quits and vanishes from his place of work; that in the instant case, the respondent was not frustrated and did not immediately quit and disappear from her place of work; she gave a one month notice and arranged handover all which prove that she was neither frustrated nor distressed at her place of work; that when you have planned and timed your exit from employment, this should not be constructed to be constructive dismissal.

16. It was submitted that the trial court erred in failing to correctly evaluate and construe the facts giving rise to "changed circumstances" stated in the respondent's letter of termination dated 16th June, 2009; the judge failed to appreciate that the changed circumstance was that the respondent had gotten a new job at Mumias Sugar Company; it was an error for the court to find that the changed circumstances were the numerous postings and relocations. It was submitted that judicial authorities show that subsequent action and conduct of an employee can negate constructive dismissal; that in the instant case, by giving one month notice and staying over, the respondent's conduct negated any constructive dismissal and what remained was a voluntary termination of employment.

17. Submitting on the applicable legal principles, counsel for the appellant stated that the trial court erred in law in failing to correctly apply the legal criteria for determining if constructive dismissal has taken place; the court erred in stretching the concept of constructive dismissal to the point that employees can manipulate it; the court erred in not appreciating that subsequent conduct of an employee can negate the inference of constructive dismissal; the court did not consider the legal criteria and ingredients of constructive dismissal and correctly apply them to the facts of this case; that in constructive dismissal, the employee must come with clean hands without manipulation of the concept; that in this case, the respondent was impatient, started looking for another job and upon securing the same timed her notice and exit to coincide with commencement of her new employment; that the evidence shows the respondent conveniently manipulated and timed her voluntary letter of termination which she now terms was involuntary.

18. On the quantum of award, the appellant faulted the trial court for ordering it to pay the respondent nine (9) months gross salary in compensation calculated at Ksh. 6,416,406/= (six million, four hundred and sixteen thousand four hundred and six only). It was submitted that the award was excessive and out of line with decided judicial authorities. Counsel cited the case of **Kenneth Kimani Mburu & Another - v- Kibe Muigai Holdings Limited (2014) eKLR** where five months salary in damages for unfair constructive dismissal was awarded; **Telkom (K) Limited -v- Erricsson Edeyangwa Band, Nairobi Civil Appeal No. 152 of 2011** in which a sum of six months' salary was awarded; the persuasive authorities of South Africa in **Schindler Lift (SA) -v- The Metal & Engineering Industries and Others Case No. JR. 1551 of 2011** where six months' salary was awarded and **National Health Laboratory Services -v- Mandisa Yona & 2 others, Case No. PA 12 of 2013** where three (3) months' salary was awarded for constructive dismissal.

19. In concluding his submissions, the appellant urged this Court to find that the facts disclosed in this case do not support the application of the concept of constructive dismissal and in the alternative, this Court was urged to interfere with the award of nine (9) months' salary compensation and reduce the same to three (3) months in line with the persuasive authorities from South Africa. Counsel cited the Kenya High Court decision in **Alfred Nephat Mwaniki -v- Barclays Bank (K) Limited [2005] eKLR** and urged this Court to find that the respondent's termination of her employment was voluntary.

20. The respondent opposed the appeal and urged us to uphold the judgment and conclusions of the trial court. Counsel submitted that the appellant by abandoning some grounds of appeal had conceded that concept of constructive dismissal was now part and parcel of Kenya's employment law. It was emphasized that the fundamental issue is whether the facts prove that the appellant constructively dismissed the respondent. To the respondent, the undisputed facts prove constructive dismissal because within a period of six months, the respondent had been relocated from Nairobi to Kampala; to Mozambique; to Nyeri, to Kisii and Kisumu and then back to Nairobi; that the respondent as a committed employee dutifully relocated without hesitation; that a glaring fact is that in all these stations, there was no work for the respondent to do; that in Kampala, the respondent was recalled because the position offered did not exist in the company to which she was posted; in Mozambique she was redeployed even before she travelled because the appellant as the employer could not facilitate her relocation and mode of salary payment; in Nyeri she was recalled as her duties had not been specified; from Kisii-Kisumu she was recalled because the person from whom she was to take over hand declined to leave the station and

while back in Nairobi no duties or work were assigned to her.

21. It was submitted that the respondent was subjected to six (6) months of postings and relocations with no work to do, no adequate facilitation and despite airing the grievance, no effective solution was forthcoming; that all these led to harassment, inequitable treatment, embarrassment and emotional distress not only to the respondent but her family and that these facts proved constructive dismissal.

22. On the issue that the letter of termination dated 16th June, 2009 was voluntary, it was submitted that it has never been denied that the respondent wrote the letter; that indeed she was not coerced to write the letter however, the letter is explicit that the respondent had been frustrated at her place of work and forced to write the letter. Counsel submitted that the critical parts of the letter are where the respondent states that “the events over the last six months have left me in a position where I neither contribute to the company productively nor advance my career, thus negating the development assignment. My treatment over the same period has been inequitable and unjust and has resulted in emotional distress to me and my family.” It was submitted that the testimony by the respondent was corroborated by the appellant’s own witness the Human Resources Manager ***Mr. Ssegawa****,* who confirmed that there were several postings and relocations that took place in a span of six (6) months and that in his career he had never witnessed such frequent postings in such a short span.

23. The respondent urged this Court to find that the treatment meted on the respondent by the appellant amounted to constructive dismissal. The attention of this Court was drawn to the appellant’s “Work Place Rights Policy” wherein the appellant violated its own policy instrument during the six month period.

24. On the issue that the respondent secured another job at Mumias Sugar Company, it was submitted that there is nothing wrong for a frustrated and constructively dismissed employee to look for employment elsewhere. Regarding the one month notice of termination, it was submitted that at all material times, the respondent dealt with the appellant with dignity and as a dignified person, she could not just disappear from her place of work; that it is not wrong for an employee who has constructively been dismissed to treat the employer with dignity and make handover arrangement. This Court was urged to find that the trial court properly considered the concept of constructive dismissal and correctly applied the legal principles and criteria of the concept to the facts of the case.

25. On the quantum awarded as compensation as nine (9) months gross salary, the respondent urged this Court not to interfere with the award. It was submitted that the quantum of award for compensation is at the discretion of the trial court and the appellant had not demonstrated how the trial judge erred in exercise of his discretion in arriving at the nine months gross salary award. Counsel distinguished the case of **Alfred Nephat Mwaniki -v- Barclays Bank (K)**

Limited [2005] eKLR stating that the issue in that case involved coercion and undue influence which are not issues in the instant case.

26. We have considered the judgment of the trial court, record of appeal and submissions by counsel. Two issues arise for our consideration and determination. First is to identify the criteria for constructive dismissal and to examine if the trial court properly applied the criteria to the facts of the case; the second issue is whether this Court should interfere with the nine months' gross salary awarded as compensation for constructive dismissal.

27. In entering judgment for the respondent against the appellant, the trial court in considering the criteria for constructive dismissal, held as follows at pages 12 and 13 of the judgment:

"3.1 There are several issues that could be framed for the purpose of settling this dispute. The core issue is whether Maria terminated her contract of employment of her own free will or whether she was let into doing so. Both parties did not put their finger on the basic principle at play in this dispute. They skirted around the implicated legal concept without giving it a name. The matter revolves around the concept known in employment law as "constructive dismissal." It is defined in most employment statutes in other jurisdictions but unfortunately, has not been defined in our employment and labour statutes. It is adequately defined in common law. Some of the statutes that have defined the concept include the English Employment Rights Act of 1996 and the South African Labour Relations Act Number 66 of 1995. 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."

28. In this appeal, we have considered the local and persuasive foreign authorities cited by counsel. The authoritative meaning of constructive dismissal was articulated by Lord Denning MR in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761**, as follows:

"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 that 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 (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1)."

29. What is the key element and test to determine if constructive dismissal has taken place" The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which 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 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] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual 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. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See **Pedersen -v- Camden London Borough Council [1981] ICR 674**). The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory (See **Office -v- Roberts (1980) IRLR 347**). The employee must be able to show that he left in response to the employer's conduct (i.e. causal link must be shown, i.e. the test is causation). In the case of **Jones -v- F. Sirl & son (Furnishers) Ltd. [1997] IRLR 493,** it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go to. The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause. (See **Walker -v- Josiah Wedgwood & Sons. Ltd. [1978] IRLR 105).** The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations. (See **Wooder -v- Wimpey [1980] 1 WLR 277;** see also **Malik and Mahmud -v- Bank of Credit and Commerce**

International [1998] AC 20). If the employee makes it clear that he or she is working under protest, he/she is not to be taken to have waived the right to terminate the contract under constructive dismissal**.** We adopt the dicta in the above cited persuasive judicial decisions as establishing relevant principles in constructive dismissal.

30. The legal principles relevant to determining constructive dismissal include the following:

a. *What are the fundamental or essential terms of the contract of employment"*

b. *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer"*

c. *The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*

d. *An objective test is to be applied in evaluating the employer's conduct.*

e. *There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.*

f. *An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*

g. *The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*

h. *The burden to prove repudiatory breach or constructive dismissal is on the employee."*

i. *Facts giving rise to repudiatory breach or constructive dismissal are varied.*

31. In the instant case, the trial court concluded that the facts and evidence on record proved constructive dismissal. The court in evaluating the evidence made the following analysis and conclusions:

"We do not find any issue that could be blamed on the claimant as to why the assignment failed. She was asked to move to Century Bottling in Uganda. The respondent must have known there was an actual role for the claimant to perform in Uganda… Within one month, the claimant was told there was no role in Uganda. Why would the respondent send her to Uganda knowing there was no role for her there"....The respondent then offered to send the claimant to Mozambique….There is nothing on record however to show that she expressed unwillingness to move and work in Mozambique…the offer to Nyeri does not seem to have been backed up with sufficient support from the respondent. One gets the impression that the respondent was still

struggling to find a well defined and verifiable role for the claimant in the company. What was meant by the respondent in allocating the claimant Operations Alignment Project in East Africa" The offer to Nyeri and East Africa.…was not specific. Mr. Ssegawa described it as an opportunity designed against a project and a territory but from the wording of the offer and the evidence of the parties, Maria was simply getting into that role of "A Minister without Portfolio" or "Ambassador at Large". Such a role did not fit in with the purpose of development assignment. The pattern of mismanaging her mobility continued to Kisumu. As observed with regard to Uganda, it was the respondent to have appropriate plans in rolling out the Kisii-Kisumu assignment. It was irresponsible to send the claimant into the unknown.…Employees do not just act without the direction of the employer on movement from one location to another. The failure of the venture into Kisumu only buttressed the conclusion that the respondent had completely mismanaged the development assignment. Maria's career-path was totally mishandled by the respondent. Her career with Coca-Cola was derailed. She set off on a career development path, was moved from one vehicle to the other, persistently given new destinations and ended up in the middle of nowhere.

In this dispute, the claimant did not say that she was coerced or threatened into resigning. That she wrote the letter of 5th June 2009 freely was never in issue. The issue was whether she had good reasons to resign, whether she was justified in resigning and whether the events leading to that resignation were of the respondent's making. The actions of the respondent need not be coercive, threatening or in the nature of duress. The respondent in this dispute appears to us, to have been an employer who created an intolerable work environment, fundamentally breached the contract of employment, through sheer professional incompetence, rather than through any deliberate acts of coercion, threats or duress....This is what constitutes constructive dismissal. Indeed, the concept demands that the employee initiates the termination and does so within a reasonable time after the trigger."

32. We have re-evaluated the facts on record and applied the criteria and legal principles for constructive dismissal. We have agonized whether the several postings and relocations of the respondent amount to a repudiatory breach of the contract of employment; we have considered whether the conduct of the appellant created intolerable working conditions making it difficult for the respondent to continue working; whether the appellant committed a significant breach of the contract of employment and if the respondent reasonably believed that the appellant would not abandon the pattern of posting and relocating her without any job or work to do thereby continuing to create what the respondent called embarrassing and emotionally distressing work environment.

33. In considering the issues, we have examined the appellant's Workplace Rights Policy document. In the policy, the appellant undertakes, *inter alia,* to provide a safe and healthy workplace; an environment that is free from disruptive conditions due to internal and external threats; to operate in compliance with applicable laws and to offer employees opportunity to develop their skills and capabilities and provide advancement opportunities where possible. The trial court in evaluating the evidence made factual conclusions that the appellant was an employer who created an intolerable work environment, fundamentally breached the contract of employment through sheer professional incompetence; that the appellant was irresponsible to

send the respondent into the unknown and persistently posted her to new destinations ending up in the middle of nowhere. We are satisfied that the trial court, without saying so, adopted the contractual approach in determining if the facts of the case revealed constructive dismissal.

34. In **Sanitam Services (EA) Ltd. -v- Rentokil [2006] 2 KLR 70**, this Court stated that it would not lightly differ with the trial court's finding of fact unless the conclusion is based on no evidence or misapprehension or on application of the wrong principles.

35. The appellant submitted that the trial court erred and misapprehended the evidence because the court should have considered that the respondent voluntarily terminated the contract of employment; that the court ignored that the respondent strategized and timed her exit from employment; that the respondent was impatient and never gave the appellant an opportunity to develop her career path. It was further submitted that the trial judge did not properly interpret the facts to find that the changed circumstances were that the respondent had secured new employment with Mumias Sugar Company.

36. In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue. Conduct by an immediate superior or supervisor may be enough to justify constructive dismissal. (See **Hilton Industrial Hotels (UK) Ltd. -v- Protopapa [1990] ILR 316)**. An employer is required not to behave in a way that amounts to a repudiatory breach of contract. In this appeal, the appellant did not make any submissions regarding its conduct as an employer. All that is stated is that the appellant was keen to promote and advance the role of women in managerial positions and that intervening circumstances arose. As we have observed above, in dealing with constructive dismissal, it is the conduct of the employer that is in issue and not the conduct of the employee; by ignoring to address the legal consequences of the conduct of the appellant, as an employer, the submissions by the appellant relating to the respondent's conduct were thus directed at an issue that is not pertinent in determining whether the facts disclosed constructive dismissal.

37. The appellant has not satisfied us that the learned judge misapprehended or misapplied the criteria and principles of constructive dismissal. The respondent submitted that the conduct of the appellant constituted harassment, emotional distress and intolerable behavior; that through the frequent postings and relocations with no work or duty assigned, the appellant acted in a manner that destroyed the employer employee relationship and this constituted significant change of circumstances. The appellant has not denied the frequent postings and relocations, neither has the appellant denied that there was neither work nor any duty assigned to the respondent. It is the appellant's case that the correct interpretation of the facts is that the respondent was impatient and also acquiesced to the circumstances because she did not quit immediately but gave a voluntary notice of termination of employment. It is our considered view that the letter dated 5th June, 2009 by the respondent is clear testimony that there was no acquiescence to the state of affairs that she found herself in; further, in the letter of termination dated 16th June, 2009, the respondent explicitly states that she is forced by circumstances to terminate the employment relationship. It is not by implication but it is expressly stated that she is forced to terminate the contract. The context and background to the letter of termination dated 16th June, 2009 lead us to give weight and consideration to the word "forced" in the said letter. The word "forced" imports the meaning that the letter was not written voluntarily. Involuntariness need not be through conduct that is physical, coercive, duress or undue influence. Involuntariness can be deduced

from the context and circumstances surrounding the case.

38. The trial court did give due consideration to the letter of termination and weighted the same against the oral testimony of the appellant's witness where Mr. Ssegawa, the appellants Human Resource Manager, testified that he had never experienced the withdrawal of four job offers within a period of six months. No material was availed by the respondent to show why the job offers were withdrawn; at no time did the respondent resist any new posting or relocation. Failure to facilitate and to ensure that work was available in each of the stations where the respondent was posted is evidence that the appellant had no job for the respondent. It is a fundamental term of contract of employment that an employee is engaged to work; to be employed means there is work to do; an employee is engaged to work not to idle around and be tossed from station to station with no work to do. By tossing the respondent from place to place with no work to do, the appellant's conduct was a fundamental repudiatory breach of the contract of employment.

39. Based on our independent re-evaluation of the evidence and the context in which the letter dated 16th June, 2009 was written, we are satisfied that the letter of termination by the respondent was not voluntary. In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the contract with notice; notice or no notice the departure must be within a reasonable time and the employer's conduct must be the effective cause of leaving or termination. Notice of termination is not necessarily a bar to a claim based on constructive dismissal. Further, a quitting employee need not be unemployed for some period of time to succeed in a claim of constructive dismissal. The cause of action is founded on facts giving rise to constructive dismissal. Cause of action is neither founded on nor dependent on unemployment or the period within which a new job is secured. In any contractual relationship, there is a duty to mitigate losses and it is our considered view that the respondent in this case mitigated her loss by securing another job at Mumias Sugar Company.

40. As regards the nine (9) months compensation award, both counsel submitted that quantum of damages as compensation is at the discretion of the trial court. In **Edward Sargent -v- Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63**, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also Spry VP in **Haman Singh & Others -v- Mistri [1971] EA 122, 125)**. The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of **Mbogo & Another -v- Shah [1968] EA 93,** where it was held at page 96 that:

"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion…."

41. The Employment Act permits the trial court to award compensation up to a maximum of twelve (12) months' salary. The trial court exercised its discretion and awarded nine (9) months' gross salary. The appellant submitted that the trial court did not take into account persuasive judicial authorities and other local authorities whereby three to five months' salary was awarded as compensation. Each case should be decided on its own facts and we are not satisfied that the trial court non-judiciously or capriciously exercised its discretion in awarding the nine (9) months' salary as compensatory damages. The appellant has not demonstrated to us how the trial court abused its discretion or if the court misdirected itself in any way. We decline to interfere with the order that the appellant is to pay the respondent nine (9) months' salary. The awarded sum of Kshs.6,416,406 (six million, four hundred and sixteen thousand four hundred and six only) is however subject to all relevant statutory deductions being made.

42. Subject to statutory deductions as clarified above, this appeal has no merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 25th day of September, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR