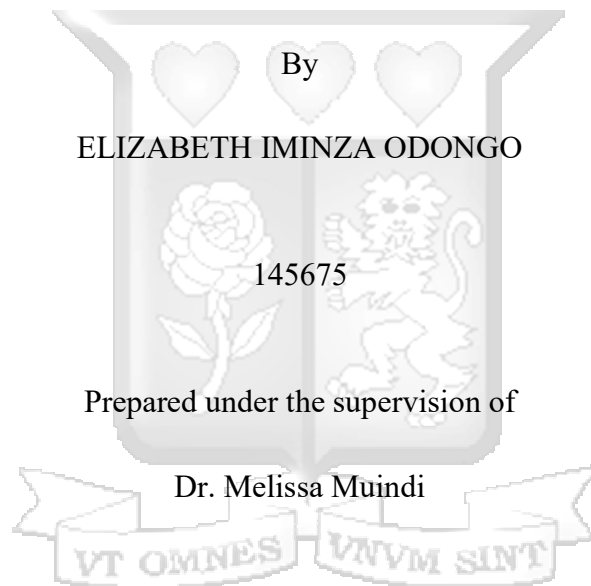


AN ASSESSMENT OF THE ADEQUACY OF EMPLOYMENT LAWS GOVERNING  
CONSTRUCTIVE DISMISSAL IN KENYA

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School




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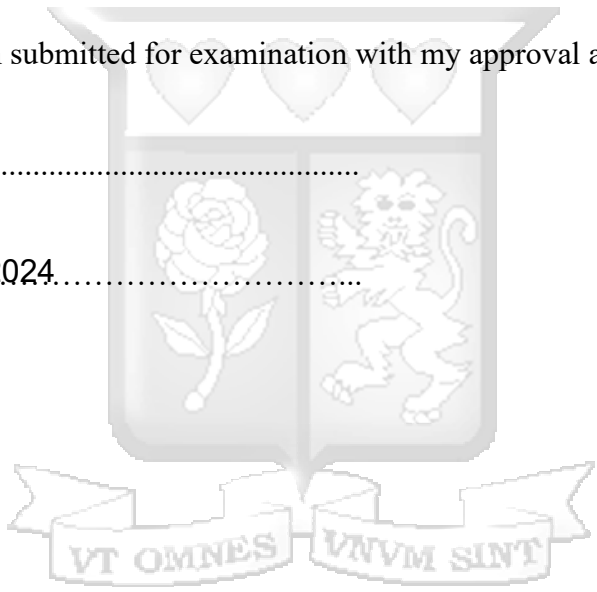
DECLARATION

I, ELIZABETH IMINZA ODONGO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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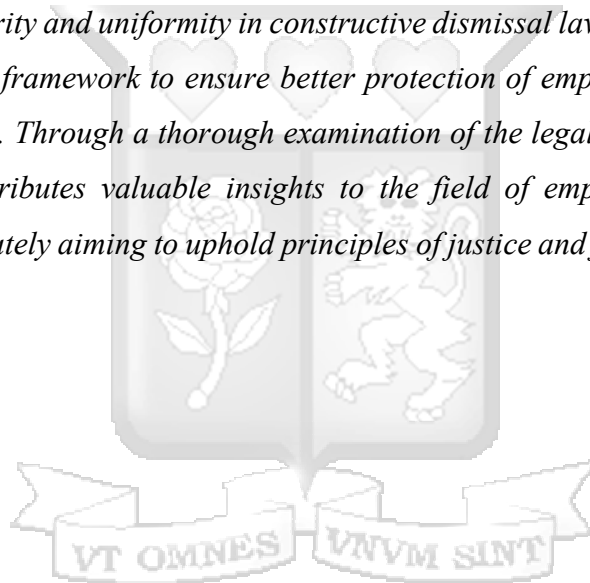
## Acknowledgment

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## **Abstract**

*The phenomenon of constructive dismissal, where employees feel compelled to quit due to unbearable workplace conditions, presents both a workplace challenge and a legal dilemma. This research delves into the complexities of constructive dismissal using John Rawls' theory of justice as a framework, emphasizing fairness and equality. Through an analysis of constructive dismissal cases in Kenya and the existing legal framework, this study aims to uncover inconsistencies and propose solutions. Despite the absence of specific provisions for constructive dismissal in Kenya labour laws, courts have established tests for determining constructive dismissal. However, inconsistencies in applying these tests have led to uncertainty and unfair outcomes for employees seeking redress. By examining court decisions and legal interpretations, this research seeks to highlight the need for clarity and uniformity in constructive dismissal laws. It also aims to propose amendments to the legal framework to ensure better protection of employee rights and promote fairness in the workplace. Through a thorough examination of the legal landscape and empirical findings, this study contributes valuable insights to the field of employment law and labour relations in Kenya, ultimately aiming to uphold principles of justice and fairness in the workplace.*



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## LIST OF LEGAL INSTRUMENTS

### **Kenyan Legislation**

The Employment Act No 11 of 2007

The Constitution of Kenya 2010

### **International and regional Legislation**

Constitution of the International Labour Organization (1919), Treaty Series No. 1

Convention No. 158 (1982), International Labour Organization.

Declaration of Philadelphia (1944), annexed to the Constitution of the International Labour Organization, Treaty Series No. 1

Labour relations Act 66 of 1995

Recommendation No. 166 (Termination of Employment Recommendation, 1982

## LIST OF CASES

### **International Cases**

*Aldendorf v Outspan International Ltd (1997), CCMA, South Africa.*

*Fedife Ltd v Wolfaard (2002), Supreme Court of Appeal, South Africa.*

*HC Heat Exchangers (Pty) Ltd v De Araujo N.O. and Others (2019), Labour Court, South Africa.*

*Jooste v Transnet Ltd t/a SA Airways (1995), Labour Appeal Court, South Africa*

*LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others (2007), the Labour Court of South Africa*

*Mafomane v Rustenburg Platinum Mines Ltd (2003), Labour Court, South Africa.*

*Pretoria Society for the Care of the Retarded v Loots (1997), Labour Appeal Court, South Africa*

*Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others (1998), Labour Court, South Africa*

*Solid Doors (Pty) Ltd v Commissioner Theron & others (2004), Labour Appeal Court, South Africa.*

*Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others (2016), Labour Court, South Africa*

*Van Wyk v Albany Bakeries Limited (2003), the Labour Court of South Africa.*

*Western Excavating (ECC) Ltd v Sharp (1978), Court of Appeal, England*

**National Cases**

*Coca Cola East and Central Africa Limited v Maria Kagai Ligaga (2015) eKLR*

*D.K. Njagi Marete v Teachers Service Commission (2013) eKLR*

*Emmanuel Mutisya Solomon v Agility Logistics (2011) eKLR*

*Godfrey Allan Tolo v Tobias O. Otieno & Another (2022) eKLR*

*Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR*

*Kenya Union of Sugarcane Plantation and Allied Workers v Othira (2023) eKLR*

*Nathan Ogada Atiagaga v David Engineering Limited (2015) eKLR*



**List of Abbreviations**

ILO – International labour organization

LRA - Labour relations Act

PTY - Proprietary

SOC - State-owned company

## Chapter 1

### 1.0 Introduction and Background

Imagine being trapped in a workplace where the conditions become so unbearable that walking away seems like the only escape route. This nightmare scenario, known as constructive dismissal, is more than just a workplace challenge.<sup>1</sup> It is indeed a legal dilemma that can leave employees feeling helpless and desperate for relief.

Constructive dismissal cases often hinge on the subjective experience of the employee as a result of which, the court has to involve a subjective assessment of the case.<sup>2</sup> This technicality within the realm of constructive dismissal, calls for adequate attention to the legal framework governing constructive dismissal. The responsibility of ascertaining whether the conduct of an employer can be deemed as intolerable normally falls upon the court which evaluates the merits of each case. This research is therefore important because it is assessing whether the laws governing constructive dismissal protect the employees even before the courts.

Constructive dismissal is a type of dismissal where an employer makes the working conditions of the employee are intolerable employee must quit.<sup>3</sup> The court in the case of *Nathan Ogada Atiagaga v David Engineering Limited* defined it to mean an instance where an employee resigns because the behaviour of the employer has become so intolerable and made life so difficult that the employee has no choice but to resign.<sup>4</sup> The Employment Act of 2007, the key legislation overseeing labour relations in the country, does not include provisions for this kind of dismissal. Nonetheless, Section 45 of the Act allows an employee to end their employment if the employer violates terms of the employment contract.<sup>5</sup> This provision forms the foundation of constructive dismissal.

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<sup>1</sup> Arori N, Constructive dismissal under Kenya employment law, The Nairobi Law Monthly, 24th July 2024. <https://nairobi.lawmonthly.com/the-doctrine-of-constructive-dismissal-under-kenyan-employment-law/>

<sup>2</sup> *Herbert Wafula Waswa v Kenya Wildlife Services* (2020) eKLR.

<sup>3</sup> Black's Law Dictionary, 3rd ed.

<sup>4</sup> *Nathan Ogada Atiagaga v David Engineering Limited* (2015) eKLR.

<sup>5</sup> Section 45, *Employment Act* (No 11 of 2007).

The Court of Appeal in the case of *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* established the principles to determine whether an employee has been constructively dismissed.<sup>6</sup> The concept of entitlement for the employee to leave encompasses two interpretations, leading us to the application of a specific test. The initial interpretation suggests that an employee can leave when the employer's conduct becomes unreasonably intolerable, making it unrealistic to expect the employee to remain. This is known as the unreasonable test.<sup>7</sup> The second interpretation explains that the employer's behaviour is so severe that it amounts to a fundamental breach of the employment contract. This is the contractual test.<sup>8</sup>

In prior scholarly works, legal experts have endeavoured to address the matter of constructive dismissal, often drawing comparisons between the legal frameworks governing it in Kenya, the United Kingdom, and South Africa.<sup>9</sup> Some scholars have gone so far as to propose the inclusion of a provision for constructive dismissal within the Kenyan legal system.<sup>10</sup> However, to date, this recommendation has not been implemented. These scholars however have missed out on identifying the inconsistencies in court decisions with regards to constructive dismissal. They have mostly focused on proposing that there is a need for legislative action to establish a clear statutory framework that defines constructive dismissal.<sup>11</sup>

This research is therefore important as it seeks to show that the inadequacy of this legal framework governing constructive dismissal has led to inconsistent court decisions within the Kenyan courts. This research is seeking to identify the issues that come about as a result of the absence of the legal framework regarding this dismissal and also look at the challenges facing the possible legislation of this kind of dismissal.

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<sup>6</sup> *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR.

<sup>7</sup> *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR.

<sup>8</sup> *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR.

<sup>9</sup>Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University, Nairobi 2014, 21.

<sup>10</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University Nairobi, 2014, 21.

<sup>11</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University, Nairobi, 2014, 21.

This research seeks to underscore the potential adverse implications of such disparate judicial decisions on the administration of justice as well as scrutinize the test to be employed in the determination of constructive dismissal. Its objective is to clarify the criteria that would ideally constitute the proper test. Lastly, the research seeks to propose amendments to the laws of Kenya to incorporate provisions related to constructive dismissal.

### **1.1 Problem Statement**

The absence of explicit reference to constructive dismissal in primary employment legislation, coupled with the Court of Appeal's establishment of the "unreasonable" and "contractual" tests in *Coca-Cola Case* creates a framework for determining constructive dismissal in Kenya. However, the lack of a precise definition of intolerable conduct and inconsistent application of these tests, as seen in the case of *Herbert Wafula Waswa v Kenya Wildlife Service* as has been discussed above illustrate a significant problem.

In the case of *Herbert Wafula Waswa v Kenya Wildlife*, the court departed from the established criteria outlined in the *Coca-Cola* case. Instead of focusing on whether the employer's conduct led to the employee's resignation, as per the "unreasonable" and "contractual" tests, the court emphasized the employee's reaction to the conduct of the employer. This is not only case that demonstrates the depart from the already established test in the *Coca-Cola* case by the Court of Appeal. These inconsistencies then call for prompt attention for legislators to consider how the laws are drafted with regards to constructive dismissal in Kenya.

The absence of a clear legal framework for constructive dismissal creates significant challenges in Kenya's labour law. The inconsistency in court rulings, such as the departure from the *Coca-Cola* case in *Herbert Wafula Waswa v Kenya Wildlife Service*, highlights the lack of a standard approach. Without a precise definition of what constitutes intolerable conduct, courts rely on subjective interpretations, leading to unpredictable outcomes that undermine legal certainty. This inconsistency places an unfair burden on employees, as it shifts focus from the employer's conduct to the employee's reaction, leaving workers vulnerable and without clear legal recourse when forced to resign under difficult conditions. Therefore, addressing these gaps in the law is crucial to ensuring fairness and consistency in employment disputes.

## **1.2 Research objectives**

The primary aim of this study is to critically assess the legal framework and judicial interpretation of constructive dismissal in Kenya, focusing on inconsistencies in court rulings. By conducting an analysis on the International Labour Organization Standard on constructive dismissal and a comparative analysis with South Africa, this study seeks to propose legal reforms that enhance clarity, fairness, and the protection of employee rights.

The objectives are:

- I. To examine the inconsistencies in constructive dismissal cases in Kenya and assess the impact of the judicial inconsistencies on justice administration.
- II. To analyse the International Labour Organization Standard on constructive dismissal
- III. To conduct a comparative study of best practices in handling constructive dismissal as demonstrated in South Africa

## **1.3 Research Questions**

- I. What are the specific inconsistencies in the adjudication of constructive dismissal cases in Kenyan courts and how do they affect the administration of justice for both employees and employers in Kenya?
- II. How do the standards set by the International Labour Organization on constructive dismissal influence court decisions on constructive dismissal cases?
- III. What are the best practices in handling constructive dismissal in South Africa and how can these practices inform improvements in Kenya?

## **1.4 Justification of the study**

This work on constructive dismissal holds significant importance as it contributes to the existing body of knowledge by uncovering inconsistencies in the application of constructive dismissal laws, a topic that has received limited attention in the academic literature. By addressing this research

gap, the study offers valuable insights into the complexities of constructive dismissal jurisprudence in Kenya, shedding light on areas where legal clarity is lacking and where employee protections may be inadequate. Moreover, by identifying discrepancies in judicial interpretations and proposing potential solutions, this study has the potential to influence policy and practice in labour relations, guiding policymakers in developing more robust legal frameworks to safeguard employee rights. Ultimately, the findings of this research can lead to improvements labour law fostering fairer and more equitable workplaces and contributing to socioeconomic development by upholding principles of justice and fairness.

### **1.5 Hypothesis**

This study tests the hypothesis that the absence of a proper legal framework regarding constructive dismissal will lead to inconsistent outcomes and a lack of clarity in defining the threshold for constructive dismissal, resulting in challenges for employees seeking redress for workplace grievances.

### **1.6 Theoretical framework**

This research delves into the intricacies of constructive dismissal, a phenomenon riddled with inconsistencies within labour law, through the prism of John Rawls' theory of justice.<sup>12</sup> Rawlsian justice theory, with its emphasis on fairness and equality, provides a robust framework for examining these inconsistencies.<sup>13</sup> Central to Rawls' theory are the principles of equal basic liberties and the difference principle.<sup>14</sup> The former asserts that individuals possess fundamental rights that must be safeguarded, including the right to a place of work free from coercion and exploitation.<sup>15</sup> The latter principle addresses inequalities, stipulating that they are permissible only if it is beneficial to the less advantaged in society.<sup>16</sup> By applying Rawlsian principles to the issue of constructive dismissal, this research seeks to scrutinize the disparities in legal interpretations and applications, questioning their alignment with principles of justice. Ultimately, the aim is to

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<sup>12</sup> Mandle J, Rawls's A Theory of Justice: An Introduction Cambridge University Press, England, 2009, 10.

<sup>13</sup> Rawls J, A Theory of Justice. Belknap Press, Cambridge, 1971, 52.

<sup>14</sup> Mandle J, Rawls's A Theory of Justice: An Introduction Cambridge University Press, England, 2009, 15.

<sup>15</sup> Mandle J, Rawls's A Theory of Justice: An Introduction Cambridge University Press, England, 2009, 69.

<sup>16</sup> Mandle J, Rawls's A Theory of Justice: An Introduction Cambridge University Press, England, 2009, 49.

propose reforms that promote fairness, equity, and dignity in the workplace, thereby contributing to the realization of Rawls' vision of a just society.

This principle of justice emphasizes the importance of fairness and equality in society. The Greatest Equal Liberty Principle asserts that everyone should have the same basic freedoms, such as the right to speak, practice religion, and participate in politics, ensuring no one is treated unfairly.<sup>17</sup> When courts make inconsistent decisions about constructive dismissal, it undermines this basic right. Employees are not sure if leaving a toxic work environment will be legally supported, which puts them in a vulnerable position. This uncertainty does not reflect fairness because their rights are not being consistently protected. The Difference Principle allows for some social and economic inequalities, but only if it is beneficial to the less advantaged in society, meaning that any disparities should help improve the situation of those who are worse off.<sup>18</sup> In this case, inconsistent rulings usually hurt employees more than employers, especially those who do not have the same power or resources to fight back. When courts handle similar cases differently, it can leave the weaker party often the employee without proper protection, which goes against the idea of fairness that Rawls emphasizes. The Equal Opportunity Principle ensures that all individuals have the same chances to succeed, regardless of their background, by removing unfair advantages or disadvantages.<sup>19</sup> But because there's no specific law on constructive dismissal, some workers might win their case while others lose, even if their situations are very similar. This unequal treatment shows why there's a need for clearer rules, so everyone has an equal shot at justice. While these principles are crucial for a just society, they can sometimes conflict with one another. In such cases, Rawls argues that the principle of equal liberty should take precedence, as basic freedoms are fundamental to achieving true justice.

Building on John Rawls' theory, particularly the concepts of the veil of ignorance and justice as fairness, this research advocates for a legal framework that ensures consistency and fairness in cases of constructive dismissal.<sup>20</sup> The veil of ignorance, which suggests that decision-makers

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<sup>17</sup> M.Y.S., 'A Review on Rawls Theory of Justice' INJURLENS, 1, (1), April 2021, 4.

<sup>18</sup> M.Y.S., 'A Review on Rawls Theory of Justice' INJURLENS, 1, (1), April 2021, 3.

<sup>19</sup> M.Y.S., 'A Review on Rawls Theory of Justice' INJURLENS, 1 (1), April 2021, 3.

<sup>20</sup> Rawls, J, A Theory of Justice, The Belknap Press of Harvard University Press Cambridge, Massachusetts, 1971, 11.

should create laws without knowing their own social position or advantages, highlights that rules should be impartial, neither favouring employers nor employees.<sup>21</sup> In the current legal landscape, the lack of a specific law governing constructive dismissal has led to inconsistent court rulings, where decisions often vary based on interpretation, leaving employees vulnerable to unfair outcomes. This unpredictability undermines Rawls' principles of justice, which emphasize equality and fairness for all individuals, regardless of their position in society. Clear, consistent laws governing constructive dismissal would promote a fairer balance of power in the workplace, ensuring that workers' rights are protected, while also providing employers with a more predictable legal framework. By aligning the legal treatment of constructive dismissal with Rawlsian principles, this research seeks to promote a more just society, where workers' dignity and equality are safeguarded, and legal interpretations are uniform and transparent.

In conclusion, this research demonstrates how inconsistencies in constructive dismissal rulings conflict with the principles of fairness outlined in John Rawls' theory of justice. The lack of a specific law governing constructive dismissal results in unpredictable outcomes, disproportionately affecting employees and undermining their basic rights. By applying Rawls' principles, particularly the difference principle and the veil of ignorance, this research advocates for clear, consistent legal reforms. These reforms would protect workers' rights and ensure fair treatment, aligning legal interpretations with Rawls' vision of justice as fairness in the workplace.

## **1.7 Literature review**

This section that follows is analysing the existing literature related to constructive dismissal and this will offer insights into the current state of knowledge but also identifies gaps and potential avenues for future exploration in the complex terrain of employment law and labour relations.

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<sup>21</sup> Rawls, J, A Theory of Justice, The Belknap Press of Harvard University Press Cambridge, Massachusetts, 1971,11.

Okechi Dennis Chiruba's research paper, delves into the critical area of employment law that addresses the circumstances under which an employee may resign due to intolerable conditions created by the employer.<sup>22</sup> Chiruba explores the legal framework surrounding constructive dismissal in Kenya, positing that while the doctrine is recognized in practice, its lack of statutory backing leads to significant challenges for employees seeking redress.<sup>23</sup> Key topics discussed in this review include the burden of proof in constructive dismissal claims, the reliance on common law precedents, and the comparative analysis with other jurisdictions.

Chiruba's work provides a thorough overview of constructive dismissal in Kenya, emphasizing the absence of explicit statutory recognition.<sup>24</sup> The burden of proof rests on the employee, who must demonstrate that the employer's actions made the employment intolerable, a requirement that poses significant challenges due to the need for substantial evidence.<sup>25</sup> The reliance on common law precedents leads to inconsistencies in judicial interpretations, resulting in varying outcomes in similar cases.<sup>26</sup> Chiruba compares the Kenyan legal framework with that of South Africa and the United Kingdom, and underscores the need for a clear statutory framework to protect employees' rights effectively. Although Chiruba's work primarily focuses on the legal principles and challenges associated with constructive dismissal in Kenya, this research aims to demonstrate how the existing tests are being applied differently across various courts.

Wanjiku Daphne's research paper focuses on constructive dismissal within the Kenyan employment law. The thesis posits that the lack of explicit statutory provisions in the Employment Act creates challenges for employees seeking redress. The literature reveals a consensus on its definition, as articulated in Black's Law Dictionary, and highlights the pivotal case of *Emmanuel*

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<sup>22</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University, 2014, 11,

<sup>23</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University, 2014, 5

<sup>24</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University, 2014, 11

<sup>25</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University 2014, 11

<sup>26</sup> Okechi D ' Constructive dismissal: A critical analysis of its legal perspective in Kenya', published, Kenyatta University, 2014, 24

*Mutisya Solomon v. Agility Logistics*, which establishes a precedent for subsequent claims.<sup>27</sup> However, the absence of specific statutory provisions leaves employees vulnerable, as courts may not consistently apply established principles, leading to variability in outcomes.<sup>28</sup> Additionally, a comparative study on public-private sector wage differentials illustrates broader systemic inequalities that may contribute to conditions leading to constructive dismissal.<sup>29</sup>

In her work, Wanjiku Daphne discusses the challenge of not statutorily providing for constructive dismissal, highlighting that this absence creates significant hurdles for employees seeking justice.<sup>30</sup> The author notes that without explicit provisions in the Employment Act, claims of constructive dismissal often face difficulties due to the reliance on case law. This reliance can lead to inconsistencies in judicial outcomes, as courts may interpret precedents in a manner that neglects the specific circumstances of individual cases. The lack of a clear statutory framework means that employees must merely allege grounds for constructive dismissal.

Overall, the review highlights critical insights into the definition and challenges of constructive dismissal, emphasizing the need for legislative reform to ensure equitable protection for employees. The findings call for a re-evaluation of employment laws to address these inequalities effectively. Though her research work considers the challenges and implications of constructive dismissal within Kenyan employment law, this research delves into the actual test that is applied in such cases and determines whether the law we have is suitable for effectively addressing the needs of both employees and employers.

Stella Vettori's article provides an in-depth analysis of the legal concepts surrounding constructive dismissal within South African and English law.<sup>31</sup> The thesis emphasizes that constructive

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<sup>27</sup> Wanjiku D, A study of the inequalities emerging from the 2007 Employment Laws, Unpublished LLB Dissertation, Strathmore University law School, Nairobi, 2018, 19,

<sup>28</sup> Wanjiku D, A study of the inequalities emerging from the 2007 Employment Laws, Unpublished LLB Dissertation, Strathmore University law School, Nairobi, 2018, 18.

<sup>29</sup> Wanjiku D, A study of the inequalities emerging from the 2007 Employment Laws, Unpublished LLB Dissertation, Strathmore University law School, Nairobi, 2018, 45.

<sup>30</sup> Wanjiku D, A study of the inequalities emerging from the 2007 Employment Laws, Unpublished LLB Dissertation, Strathmore University law School, Nairobi, 2018, 19.

<sup>31</sup> Vettori I, 'Constructive Dismissal and repudiation of contract: what must be proved?' 22(1)Stellenbosch Law Review, 2011.

dismissal is a hybrid legal concept that intertwines common law and statutory provisions, necessitating a nuanced understanding of the distinctions between unlawfulness and unfairness in employment relationships.<sup>32</sup> Vettori highlights the historical context of labour law as a blend of status and contract, illustrating how these elements shape the interpretation and application of constructive dismissal. The article discusses the differing burdens of proof required under common law and statutory claims, which can complicate the legal landscape for both employees and employers.<sup>33</sup>

In critically evaluating Vettori's arguments, the statement highlights two key aspects of her article. First, it acknowledges that Vettori successfully synthesizes complex legal principles related to constructive dismissal, making them accessible and understandable. This means that she has taken intricate legal concepts, such as the distinctions between unlawfulness and unfairness, and woven them together into a coherent framework that helps readers grasp the nuances of constructive dismissal within the context of both common law and statutory provisions. Unlawfulness refers to breaches of legal obligations that can lead to legal consequences, while unfairness pertains to the equitable treatment of parties within the employment relationship.<sup>34</sup> This clarity is essential for legal practitioners, scholars, and students who need to navigate these concepts in their work or studies.

A critique to this article by Vettori is, that while the theoretical framework is strong, the article would be enhanced by including more practical scenarios or case studies. For instance, under common law, once a repudiatory breach is established, the focus is on whether the employer's conduct resulted to a breach of contract, without the possibility of escaping liability by proving reasonableness.<sup>35</sup> In contrast, statutory frameworks allow employers to argue that their actions were fair, even after a breach has been established.<sup>36</sup>

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<sup>32</sup> Vettori I, 'Constructive Dismissal and repudiation of contract: what must be proved?' 22(1) Stellenbosch Law Review, 2011, 175.

<sup>33</sup> Vettori I, 'Constructive Dismissal and repudiation of contract: what must be proved?' 22(1) Stellenbosch Law Review, 2011, 174.

<sup>34</sup> Vettori I, 'Constructive Dismissal and repudiation of contract: what must be proved?' 22(1) Stellenbosch Law Review, 2011, 174.

<sup>35</sup> Vettori I, 'Constructive Dismissal and repudiation of contract: what must be proved?' 22(1) Stellenbosch Law Review, 2011 182.

<sup>36</sup> Vettori I, 'Constructive Dismissal and repudiation of contract: what must be proved?' 22(1) Stellenbosch Law Review, 2011, 175.

Finally, Daniel Ongondi Onsare's thesis posits that while the Employment Act provides a legal basis for addressing constructive dismissal, there are significant gaps in its application and enforcement that can leave employees vulnerable. In his work, he attempts to define what constructive dismissal entails, which is a termination of employment resulting from the employer's behaviour which can include actions such as harassment or significant changes to job responsibilities. The Act also imposes a high burden of proof on employees, requiring them to demonstrate that their resignation was a direct consequence of the employer's actions.<sup>37</sup> This aspect of the law can be seen as both a strength and a weakness. On one hand, it protects employers from unjust claims; on the other, it may discourage legitimate claims from employees who feel they cannot meet the stringent requirements.<sup>38</sup>

In analysing the procedural requirements, Daniel Ongondi emphasizes the importance of due process in the dismissal process. Employees must be given an opportunity to address grievances before resigning, which is a critical component of the legal framework surrounding constructive dismissal.<sup>39</sup> This requirement not only protects the rights of employees but also serves as a safeguard for employers against potential legal challenges. The literature suggests that failure to adhere to these procedural norms can lead to significant legal repercussions for employers, including compensation claims and damage to their reputation.<sup>40</sup>

Furthermore, Daniel Ongondi in his work critiques the existing legal framework, arguing that it lacks clarity and comprehensiveness in addressing the nuances of constructive dismissal. The ongoing work is described as deficient in articulating the processes that should be followed before, during, and after an employee's dismissal, indicating a need for reform to better protect both employee and employer interests.<sup>41</sup> This critique highlights the necessity for a more robust legal

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<sup>37</sup> Section 47, *Employment Act* (No 11 of 2007).

<sup>38</sup> Onsare Ongondi Daniel, *The Employment Code of Conduct and its import on the Dismissal Process In Kenya*, 2016, 33.

<sup>39</sup> Onsare Ongondi Daniel, *The Employment Code of Conduct and its import on the Dismissal Process In Kenya*, 2016, 77.

<sup>40</sup> Onsare Ongondi Daniel, *The Employment Code of Conduct and its import on the Dismissal Process In Kenya*, 2016, 75.

<sup>41</sup> Onsare Ongondi Daniel, *The Employment Code of Conduct and its import on the Dismissal Process In Kenya*, 2016, 17.

framework that not only defines constructive dismissal but also provides clear guidelines for its adjudication. The dissertation critiques the existing legal framework for its clarity and comprehensiveness, suggesting a need for reforms to better protect employee rights.

In contrast, this research seeks to demonstrate that the standards currently in place to determine what constitutes constructive dismissal have led to inconsistencies in how these cases are adjudicated in Kenyan courts.

### **1.8 Research Methodology**

This study relies on doctrinal legal research methodology. This research utilizes both primary and secondary sources of data. The primary sources include an analysis of the legal and regulatory framework governing constructive dismissal in Kenya and case law. The primary sources to be used are the Constitution of Kenya and the Employment Act. The cases identify the different court decisions regarding constructive dismissal and demonstrate the challenges facing constructive dismissal. The secondary sources being utilised include working papers, reports, existing literature, journal articles and online sources that are relevant to the study. They are to be used to supplement the information that has been drawn from the primary sources of law. This research additionally adopts a comparative analysis to draw best practices from South Africa regarding the legislation of constructive dismissal.



### **1.9 Limitation to the study**

The study encountered several limitations that may have influenced the depth and scope of its findings. Additionally, the absence of explicit provisions for constructive dismissal in Kenya labour laws hindered access to reliable statutory frameworks, impacting the depth of legal examination. Limited access to comprehensive data on constructive dismissal cases, coupled with the reliance on secondary sources, further constrained the study's ability to draw concrete conclusions. Moreover, the study's focus on the Kenyan context may limit the generalizability of its findings to other jurisdictions. Despite these limitations, the study aimed to provide valuable insights into the complexities of constructive dismissal in Kenya and contribute to the existing body of knowledge on labour law and employee rights.

## **1.10 Chapter breakdown**

The study is divided into five chapters.

### **Chapter One: Introduction**

This chapter serves as an introductory overview, providing the background context of the research and identifying the central issue to be addressed. It outlines the specific objectives, questions, and aims of the study, as well as presenting the hypothesis and rationale behind conducting the research.

### **Chapter Two: Legal framework analysis**

This chapter delves into an analysis of the legal framework governing employment relationships in Kenya. It examines key statutes such as the Employment Act of 2007 to assess the extent to which they address constructive dismissal issues and identifies areas where legislative improvements may be necessary.

### **Chapter Three: International Labour Organization Standards on constructive dismissal**

This chapter explains the International Labour Organization (ILO) standards on constructive dismissal. It looks at the rules and guidelines the ILO has created to protect workers from being forced to leave their jobs due to poor treatment or unfair conditions. The chapter also discusses how these standards influence the laws in different countries and what lessons can be learned to improve the handling of constructive dismissal cases.

### **Chapter four: Comparative Study**

This chapter provides a detailed comparative analysis of constructive dismissal practices in South Africa. It outlines the legal frameworks, judicial approaches, and best practices in this country with regards to constructive dismissal. The chapter aims to identify key lessons that can be applied to improve the handling of constructive dismissal cases in Kenya.

## **Chapter five: Conclusion and recommendations**

The concluding chapter offers a comprehensive summary of the research findings and their implications. It provides recommendations for policy reforms, legal amendments, and practical interventions to address the challenges identified in constructive dismissal cases in Kenya. Additionally, it reflects on the significance of the study and suggests areas for future research in the field of employment law and labour relation.



## Chapter 2

### 2.0 Legal framework analysis

#### **Introduction**

This chapter explores the legal framework governing constructive dismissal in Kenya, focusing on how existing laws and judicial interpretations address this area of employment law. This chapter examines the relevant provisions of the Constitution of Kenya and the Employment Act to understand the protections afforded to employees in such situations. Additionally, it analyses case law to unpack how courts have interpreted the concept of constructive dismissal in the absence of statutory definitions.

The chapter will also assess the adequacy of the current legal framework in addressing constructive dismissal. By reviewing constitutional protections, statutory provisions, and judicial precedents, the analysis seeks to identify gaps in the law that contribute to inconsistencies in court decisions and challenges for employees seeking redress. This evaluation aims to provide understanding of the strengths and limitations of the existing framework in safeguarding employees' rights against unfair treatment that leads to constructive dismissal.

Constructive dismissal, as explained in Black's Law Dictionary, happens when an employer makes the working environment so difficult or changes the job terms so drastically that an employee feels they have no choice but to quit.<sup>42</sup> The employer's course of action, being detrimental to the employee, leaves employee almost no option but to quit.<sup>43</sup> In Kenya, there isn't a specific law that directly addresses constructive dismissal which is described as an instance when an employee feels forced to resign because of unfair or intolerable treatment by their employer. However, courts have tried to fill this gap by defining constructive dismissal through case law, identifying situations where it might apply, and suggesting remedies for affected employees.<sup>44</sup>

Essentially, courts look at whether an employer's actions, like creating a hostile work environment or breaching terms of employment, made it impossible for the employee to stay. In the absence of

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<sup>42</sup> Black's Law Dictionary, 10<sup>th</sup> ed.

<sup>43</sup> Black's Law Dictionary, 10<sup>th</sup> ed.

<sup>44</sup> *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR.

a specific statute on constructive dismissal, employees are still protected by broader laws like the Constitution, the Employment Act, and the Labour Relations Act.

## 2.1 Substantive law

The Constitution of Kenya

Article 41 of the Kenyan Constitution highlights the right to fair labor practices, guaranteeing that all employees receive respect and equity at work.<sup>45</sup> It is the foundation of employee protection in Kenya, guaranteeing fair pay and good working conditions.

While Article 41 of the Constitution of Kenya does not explicitly mention constructive dismissal, this provision sets the groundwork for addressing situations where an employer's actions or omissions create intolerable working conditions that force an employee to resign.<sup>46</sup>

### The Employment Act 2007

The nature of resignation in constructive dismissal is normally not voluntary hence it is in effect a termination.<sup>47</sup> This type of dismissal is seen as unfair termination under Section 45 of the Employment Act. It's a helpful rule that lets an employee resign and still get compensation for unfair treatment, even if the employer didn't officially fire them. Section 45 also says employers must not end someone's job unfairly.<sup>48</sup> If an employee is unfairly dismissed, it's their responsibility to prove that the termination was unfair.<sup>49</sup>

The Employment Act, 2007 does not explicitly address the standard for constructive dismissal. While it provides a framework for addressing unfair termination under Section 45, it does not define what constitutes constructive dismissal or specify the conditions under which it occurs. This lack of clarity means that the standard for constructive dismissal in Kenya is largely shaped by judicial decisions rather than statutory provisions. However, the absence of a clear statutory

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<sup>45</sup> Article 41, *Constitution of Kenya*, (2010)

<sup>46</sup> Article 41, *Constitution of Kenya*, (2010)

<sup>47</sup> *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga (2015)* eKLR.

<sup>48</sup> Sec 45, *Employment Act*, (Act no.11 of 2007).

<sup>49</sup> Sec 47, *Employment Act* (Act No 11 of 2007).

definition or criteria in the Employment Act makes it challenging for employees to navigate such cases, often leading to inconsistencies in judgments.

## **2.2 Definition of constructive dismissal according to case law**

### **2.2.1 Coca Cola East & Central Africa Limited v Maria Kagai Ligaga**

The case was an appeal to the Court of Appeal by the respondents from the High Court decision. Constructive dismissal occurs when an employer's conduct creates intolerable working conditions that make it difficult or unreasonable for an employee to continue working. It involves a significant breach of the employment contract, such as persistent actions that undermine the employee's role or dignity, like arbitrary postings or relocations without assigning meaningful work. Additionally, the employee must reasonably believe that the employer's behaviour will continue, resulting in an embarrassing or emotionally distressing work environment that effectively forces the employee to resign. The court emphasized that the burden of proof lies with the employee to demonstrate a causal link between the employer's conduct and their decision to resign.

### **2.2.2 Nathan Ogada Atiagaga v David Engineering Limited**

In the case, Constructive dismissal, according to the judge, is when an employee quits because their employer's actions have become so unbearable or made their life so miserable that they are left with no other option.<sup>50</sup> Since the resignation was not voluntary, it is a termination in effect.

### **2.2.3 Kenya Union of Sugarcane Plantation and Allied Workers v Othira**

The trial court found that Jacob Ochich Othira had been constructively dismissed. The court based its conclusion on the fact that the Respondent had been sent on indefinite unpaid leave by the Kenya Union of Sugar Plantation Workers (the Appellant). The trial court held that this action, without consultation or clarity on the status of employment, created intolerable conditions for the Respondent, thereby forcing him out of the employment. As a result, the trial court awarded the Respondent compensation for wrongful dismissal, along with other benefits, including underpayment and salary in lieu of notice.<sup>51</sup>

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<sup>50</sup> *Nathan Ogada Atiagaga v David Engineering Limited (2015) eKLR.*

<sup>51</sup> *Kenya Union of Sugarcane Plantation and Allied Workers v Othira (2023) Eklr.*

The appellate court disagreed with the trial court's conclusion of constructive dismissal. It clarified that for constructive dismissal to be established, the employee must have resigned due to the intolerable working conditions created by the employer. In this case, the Respondent did not resign but was placed on indefinite compulsory leave, which did not meet the threshold for constructive dismissal under the common law principles. The appellate court held that since the Respondent had not resigned, his situation could not be considered constructive dismissal.

In these two courts, there are conflicting definitions of constructive dismissal or rather what amounts to intolerable conduct. The trial court held that the Respondent was constructively dismissed due to being placed on indefinite unpaid leave without clear communication regarding his employment status, emphasizing that the employer's actions created intolerable conditions that compelled the employee to terminate his relationship with the employer. In contrast, the appellate court adopted a narrower definition, asserting that constructive dismissal requires the employee to resign as a direct response to the employer's intolerable conduct.

#### ***2.2.4 Godfrey Allan Tolo v Tobias O. Otieno & Another [2022] eKLR***

In this case, the court highlighted that constructive dismissal is unique as it allows an employee who voluntarily resigns to sue for wrongful termination. The court emphasized that for constructive dismissal to be inferred, the employee must have resigned within a reasonable time from his employment, with or without notice, because of the employer's hostile treatment or hostile working conditions at his workplace. The employer must also not have expressed the desire to terminate the employee.<sup>52</sup>

The case added a new aspect to the definition of constructive dismissal by stating that the employer must not have shown any intent to terminate the employee. This means that constructive dismissal happens only when the employee resigns because of the employer's hostile actions or poor working conditions, without the employer expressing a desire to end the contract. While this adds clarity in some cases, it could create challenges. For instance, it might exclude situations where the employer's behaviour is intolerable, but there's also an expressed intent to terminate. This

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<sup>52</sup> *Godfrey Allan Tolo v Tobias O. Otieno & Another (2022) eKLR.*

could lead to inconsistent rulings, as different cases may focus on different parts of the definition. It also shows the difficulty of dealing with constructive dismissal in Kenya due to the lack of a clear, unified legal framework, leaving room for varied interpretations by court

### **2.3 The test to determine whether constructive dismissal has occurred and how they have been applied in Kenyan cases.**

#### **2.3.1 Coca Cola East & Central Africa Limited v Maria Kagai Ligaga**

The test used to determine whether constructive dismissal has occurred was established in the Coca Cola case. The court established two key tests to determine whether constructive dismissal had occurred. The first is the unreasonable test, which evaluates whether the employer's behaviour was so unreasonable that the employee could not be expected to continue in their role, thereby justifying the resignation.<sup>53</sup> The second is the Contractual Test, which focuses on whether the employer's conduct constituted a repudiatory breach of the employment contract, indicating that the employer no longer intended to be bound by its essential terms.<sup>54</sup>

#### **2.3.2 Herbert Wafula Waswa v Kenya Wildlife Service**

The case of *Herbert Wafula Waswa v Kenya Wildlife Service* is a good example of the ambiguity that this test for constructive dismissal provides. In the case, Herbert Wafula Waswa worked for Kenya Wildlife Services as a Customer Care Assistant from March 6, 2009, until his resignation on March 6, 2017. He claimed that he was forced to resign due to frustrations from the Respondent, amounting to constructive dismissal. The Appellant filed a claim in the Magistrate's Court in Voi seeking compensation for constructive dismissal and terminal dues. The trial court dismissed the claim for constructive dismissal but awarded the Appellant terminal dues, including salary for days worked in March 2017, unutilized leave days, and withdrawal benefits under the KWS Staff Superannuation Scheme Rules.

The trial court used the contractual test in arriving at this decision. It emphasized that the employee must prove that the employer is guilty of conduct that constitutes a significant breach going to the

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<sup>53</sup> *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga (2015) eKLR.*

<sup>54</sup> *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga (2015) eKLR.*

root of the contract of employment.<sup>55</sup> This breach must be fundamental enough to be considered a repudiatory breach.<sup>56</sup> The employee must have resigned in direct response to the employer's conduct that constituted the breach.<sup>57</sup> The employee must not delay in resigning after the breach has taken place. If the employee delays, the court may find that the employee has waived the breach, effectively accepting the employer's conduct.<sup>58</sup> The trial court in this case moved away from the reasonability test which is in fact a crucial part of determining whether or not constructive dismissal occurred. The appellate court in this case in its decision referred to both of the tests being the reasonability test and the contractual test and arrived at the conclusion that the employee did not prove that the actions of the employer towards him was so unreasonable and additionally the conduct of the employer did not include a fundamental breach of his contractual terms.

### **The challenge behind the test**

The unreasonable test for constructive dismissal can be flawed due to its inherent subjectivity, as what one judge may consider intolerable behaviour, another might view as acceptable workplace dynamics, leading to inconsistent rulings across similar cases. This subjectivity can lead to significant discrepancies in court rulings, as different judges may have varying thresholds for what they consider unacceptable conduct. For instance, one judge might view a pattern of frequent relocations without assigned duties as a serious breach of the employment contract, while another might see it as a normal aspect of workplace flexibility

This variability can create uncertainty for both employees and employers regarding the standards of acceptable conduct in the workplace. Additionally, the burden of proof placed on the employee to establish a causal link between the employer's conduct and their resignation can be challenging, particularly when the employee's decision to leave may be influenced by multiple factors, making it difficult to isolate the employer's actions as the primary cause. This complexity can result in differing interpretations of evidence and outcomes in court.

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<sup>55</sup> *Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR.*

<sup>56</sup> *Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR.*

<sup>57</sup> *Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR.*

<sup>58</sup> *Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR.*

## 2.4 Common Reasons for Constructive Dismissal

Constructive dismissal occurs when an employer's actions or omissions create an intolerable working environment, effectively forcing an employee to resign.<sup>59</sup> Common reasons include unilaterally varying the terms of an employment contract, such as reducing salary or changing work conditions without consent and failing to pay or delaying the payment of salaries.<sup>60</sup> Employers may also indefinitely suspend employees without pay, fail to assign duties, or subject employees to excessive workloads beyond what was agreed upon.<sup>61</sup> Negative discrimination based on factors such as gender, race, or religion, as well as mistreatment like verbal abuse, bullying, or harassment, can also contribute.<sup>62</sup>

## 2.5 Procedure for when a constructive dismissal suit is filed against the employer.

When an employee files a constructive dismissal claim, the courts or the Labour Office assess whether the employer's actions effectively forced the resignation.<sup>63</sup> If constructive dismissal is established, remedies are awarded to compensate the employee for the harm suffered. These remedies often include damages for the wrongful termination and payment of wages the employee would have earned had the employer given adequate notice of termination, as required under the Employment Act 2007 or the terms of the employment contract.

For instance, in the case of *D.K. Njagi Marete v Teachers Service Commission (2013) eKLR*, the court highlighted that the purpose of such remedies is to ensure they are reasonable and in line with the financial loss the employee has experienced.<sup>64</sup>

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<sup>59</sup> Brodie D, Constructive Dismissal: The Contractual Maze 33(2), King Law Journal, 2022,152.

<sup>60</sup> Tshoose C, 'Constructive Dismissal Arising from Work-Related Stress: National Health Laboratory Service v Yona & Others' Journal for Juridical Science, 42,(1), May 2017, 124.

<sup>61</sup> Tshoose C, 'Constructive Dismissal Arising from Work-Related Stress: National Health Laboratory Service v Yona & Others' Journal for Juridical Science, 42,(1), May 2017, 124.

<sup>62</sup> Tshoose C, 'Constructive Dismissal Arising from Work-Related Stress: National Health Laboratory Service v Yona & Others' Journal for Juridical Science,42, (1), May 2017, 124.

<sup>63</sup> *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR.

<sup>64</sup> *D.K. Njagi Marete v Teachers Service Commission (2013) eKLR*.

## 2.6 Remedies granted by the court.

Courts typically grant one or more of three main remedies in cases of constructive dismissal: reinstatement, re-employment, and compensation. Section 49 of the Employment Act 2007 outlines the specific remedies available to employees who are constructively dismissed, wrongfully dismissed, or unfairly terminated.<sup>65</sup>

## 2.7 Principles the Court Follows to determine whether constructive dismissal has occurred.

When determining constructive dismissal, courts consider several principles to assess whether the employer's actions amounted to a fundamental breach of the employment contract.<sup>66</sup> First, they identify the essential terms of the contract and evaluate if the employer's actions constituted a repudiatory breach which is one that fundamentally undermines the contract. The breach must be significant, demonstrating that the employer no longer intends to be bound by critical terms, and causation must be established, showing the breach directly caused the employee's resignation. The court applies an objective test to assess the employer's conduct and considers whether the employee acted promptly without waiving or accepting the breach.<sup>67</sup> Employees may resign with or without notice, provided the employer's actions were the effective reason for termination. The burden of proof rests with the employee to demonstrate the breach, and each case is assessed on its unique facts. These principles were articulated in the case of *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga (2015) eKLR*.

Based on the outlined principles, the Court of Appeal ruled in Maria's favor, concluding that Coca-Cola, as the employer, had created an unbearable working environment. The court noted that while the breach of the employment contract was not due to deliberate acts of coercion, threats, or duress, it stemmed from professional incompetence, which still constituted constructive dismissal. Furthermore, the court found no evidence that the trial court had abused its discretion or

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<sup>65</sup> Section 49 *Employment Act* (Act No.11 of 2007).

<sup>66</sup> *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga (2015) eKLR*.

<sup>67</sup> *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga (2015) eKLR*.

misdirected itself and upheld the award of nine months' salary to Maria. However, the total sum of Kshs. 6,416,406 was subject to applicable statutory deductions.<sup>68</sup>

## 2.8 Conclusion

The analysis in this chapter reveals that Kenya's legal framework on constructive dismissal is incomplete and leaves employees vulnerable. While the Constitution of Kenya and the Employment Act offer some protections, there is no specific law defining or addressing constructive dismissal. This has forced courts to step in and create their own interpretations, but these vary from case to case, leading to inconsistency and confusion. Employees are often left unsure of their rights, and employers lack clear guidelines on what constitutes intolerable behaviour. This gap in the law makes it harder for employees to get justice and highlights the urgent need for clear legislation to provide better protections and fairness in such cases.



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<sup>68</sup> *Coca-Cola East and Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR.

### 3.0 International Labour Organization Standards on Constructive Dismissal

#### 3.1 Introduction

While the Concept of constructive dismissal is widely recognized in labor jurisprudence, the manner in which it is regulated varies across jurisdictions due to the absence of a uniform international standard. In different jurisdictions, the requirement to prove constructive dismissal in some instances is to show that there was a breach of the contract<sup>69</sup> and in other jurisdictions the focus is more on the aspect of intolerable conditions created by the employer.<sup>70</sup> The ILO plays an important role in shaping labor practices through its conventions and recommendations, which emphasize fairness, justice, and worker protection.<sup>71</sup>

This chapter explores how the ILO's standards influence court decisions on constructive dismissal cases. Although the ILO does not explicitly define or address constructive dismissal in its instruments, its principles, such as the duty of fair treatment, mutual respect, and access to justice, provide a foundation for courts to assess employer behaviour. By analysing how ILO conventions like Convention No. 158 and Recommendation No. 166 inform judicial reasoning, this chapter highlights the indirect but significant impact of ILO standards on shaping labor law and jurisprudence related to constructive dismissal.

The chapter also considers the challenges arising from the lack of explicit ILO guidance on forced resignations and examines how national courts interpret and apply broader ILO principles to bridge these gaps. This analysis sheds light on the role of international labor standards in promoting equitable outcomes in constructive dismissal cases.

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<sup>69</sup> *Western Excavating (ECC) Ltd v Sharp* (1978), Court of Appeal, England.

<sup>70</sup> *Jooste v Transnet Ltd t/a SA Airways* (1995), Labour Appeal Court, South Africa.

<sup>71</sup> Article 4, Convention No. 158 (1982), International Labour Organization.

### 3.2 The role of International Labour Standards in Domestic Legal systems

These standards provide a comprehensive framework addressing critical aspects of employment, such as working conditions, wages, discrimination, and occupational safety.<sup>72</sup> By integrating these standards into domestic laws, countries ensure alignment with internationally recognized principles of human rights and social justice, fostering more equitable labor practices.<sup>73</sup>

In cases where domestic legislation may be ambiguous or insufficient, these standards help judges uphold the rights of workers and ensure fair treatment in the workplace.<sup>74</sup> Additionally, the influence of international labour standards extends to legislative development, encouraging governments to adopt or amend laws that reflect global norms. This process leads to more robust legal protections for workers and ensures that national laws remain responsive to the evolving needs of the workforce.

International labour standards also promote social dialogue among governments, employers, and workers, facilitating the development of equitable policies that address the interests of all stakeholders.<sup>75</sup> This collaborative approach contributes to a more inclusive and participatory legal framework, reinforcing trust and cooperation in labor relations.

By embedding international labour standards into their legal systems, countries contribute to the establishment of a global baseline for workers' rights, promoting fair competition and social justice on an international scale.<sup>76</sup> Courts that creatively apply these standards often develop new legal principles and interpretations, driving innovation in labor law and advancing the protection of

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<sup>72</sup> Thomas C, Oelz M, and Beaudonnet X, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence and Practical Implications' in *Normes Internationales Du Travail: Un Patrimoine Pour L'avenir: Mélanges En L'honneur de Nicolas Valticos*, ILO, Geneva 2004, 281.

<sup>73</sup> Thomas C, Oelz M, and Beaudonnet X, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence and Practical Implications' in *Normes Internationales Du Travail: Un Patrimoine Pour L'avenir: Mélanges En L'honneur de Nicolas Valticos*, ILO, Geneva, 2004, 284.

<sup>74</sup> Thomas C, Oelz M, and Beaudonnet X, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence and Practical Implications' in *Normes Internationales Du Travail: Un Patrimoine Pour L'avenir: Mélanges En L'honneur de Nicolas Valticos*, ILO, Geneva, 2004, 281.

<sup>75</sup> Thomas C, Oelz M, and Beaudonnet X, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence and Practical Implications' in *Normes Internationales Du Travail: Un Patrimoine Pour L'avenir: Mélanges En L'honneur de Nicolas Valticos*, ILO, Geneva 2004, 277.

<sup>76</sup> Thomas C, Oelz M, and Beaudonnet X, 'The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence and Practical Implications' in *Normes Internationales Du Travail: Un Patrimoine Pour L'avenir: Mélanges En L'honneur de Nicolas Valticos*, ILO, Geneva 2004, 249.

workers at the national level.<sup>77</sup> This interplay between international standards and domestic application underscores the transformative potential of international labour standards in fostering just and progressive labor systems worldwide.

### **3.3 ILO Constitution**

The Preamble and Article 1 emphasize the ILO's commitment to improving working conditions and promoting social justice, offering a foundation for evaluating whether an employer's actions have breached the principles of fairness and equity.<sup>78</sup> The Declaration of Philadelphia, annexed to the Constitution, further reinforces the right to work in conditions of dignity and security (Paragraph II(a)) and highlights the importance of protecting workers' rights (Paragraph II(d)).<sup>79</sup> Additionally, Article 19 underscores the adoption of international labor conventions, such as the Termination of Employment Convention, 1982 (No. 158), which provides guidance on unfair dismissal, including cases where an employer's conduct forces an employee to resign.<sup>80</sup> Lastly, Article 35 advocates for integrating international labor standards into domestic legal systems, enabling courts to interpret constructive dismissal claims in a manner that upholds justice and aligns with global best practices.<sup>81</sup> These provisions collectively offer a robust framework for courts to assess employer conduct and address gaps in national legislation.

### **3.4 ILO Standards on dismissal**

The International Labour Organization (ILO) addresses issues related to dismissal through both conventions and recommendations, with key instruments including Convention No. 158 (Termination of Employment Convention, 1982) and Recommendation No. 166 (Termination of Employment Recommendation, 1982). These standards provide dismissals and guidelines aimed at ensuring fair and just procedures for termination of employment, promoting protection for workers against unjust dismissals, and fostering secure working conditions globally.

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<sup>77</sup> Thomas, Constance, Martin Oelz, and Xavier Beaudonnet. 2004. "The Use of International Labour Law in Domestic Courts : Theory, Recent Jurisprudence and Practical Implications." Normes Internationales Du Travail : Un Patrimoine Pour L'avenir : Mélanges En L'honneur de Nicolas Valticos, ILO, Geneva 2004, 277.

<sup>78</sup> Article 1, *Constitution of the International Labour Organization* (1919), Treaty Series No. 1.

<sup>79</sup> Paragraph II(a) and II(d), Declaration of Philadelphia (1944), annexed to the Constitution of the International Labour Organization, Treaty Series No. 1.

<sup>80</sup> Article 19, *Constitution of the International Labour Organization* (1919), Treaty Series No. 1.

<sup>81</sup> Article 35, *Constitution of the International Labour Organization* (1919), Treaty Series No. 1.

### 3.4.1 Convention No. 158 (Termination of Employment Convention, 1982)

Article 4 outlines that an employer can only terminate an employee for a valid reason related to the employee's conduct, capacity, or the operational needs of the enterprise.<sup>82</sup> In cases of constructive dismissal, an employee may be forced to resign due to actions by the employer that make continued employment untenable, such as harassment, unsafe working conditions, or a breach of contract, all of which would not meet the criteria for valid reasons as outlined in this article.

Article 5 prohibits termination for discriminatory reasons, such as race, sex, religion, political opinion, or social origin, and protects employees from retaliation for exercising their rights, such as filing complaints.<sup>83</sup> If an employer's actions leading to constructive dismissal are rooted in discrimination or retaliation, they would violate this provision, supporting a claim of unjust treatment. Article 7 ensures that workers are given a fair chance to defend themselves before termination, and while constructive dismissal typically involves resignation rather than formal termination, the principle of procedural fairness is still relevant.<sup>84</sup> If an employer creates conditions that deny the employee the opportunity to express grievances or defend themselves, this can strengthen the claim of constructive dismissal.

Article 12 provides for compensation in cases of unjust termination, offering remedies such as reinstatement or financial compensation.<sup>85</sup> This principle can be applied to constructive dismissal cases where an employee resigns due to the employer's unjust conduct, and compensation or other forms of relief may be warranted. Article 13 emphasizes the need for employers to avoid redundancy and to minimize the impact on workers, which is particularly relevant in situations where an employer's actions, such as unilateral changes to the terms of employment, force an employee to resign.<sup>86</sup> Lastly, Article 14 encourages consultation with workers before making significant organizational changes.<sup>87</sup> Failure to engage in meaningful dialogue about changes to

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<sup>82</sup> Article 4, Convention No. 158(1982) Termination of Employment Convention.

<sup>83</sup> Article 5, Convention No. 158(1982) Termination of Employment Convention.

<sup>84</sup> Article 7, Convention No. 158(1982) Termination of Employment Convention.

<sup>85</sup> Article 12, Convention No. 158(1982) Termination of Employment Convention.

<sup>86</sup> Article 13, Convention No. 158(1982) Termination of Employment Convention.

<sup>87</sup> Article 14, Convention No. 158(1982) Termination of Employment Convention.

terms of employment can be a factor in constructive dismissal claims, as such actions may be seen as unfair or arbitrary.

Together, these provisions of ILO Convention No. 158 create a framework for assessing whether employer conduct justifies an employee's resignation and ensure that such cases are handled with fairness, procedural integrity, and in accordance with international labor standards.

### **3.4.2 Recommendation No. 166 (Termination of Employment Recommendation, 1982)**

ILO Recommendation No. 166: Termination of Employment Recommendation, 1982 provides further guidance on how to apply the principles set out in Convention No. 158. While Convention No. 158 sets the legal standards, Recommendation No. 166 offers more practical advice to governments and employers to ensure fair and just practices when it comes to employee termination, including constructive dismissal.

The recommendation emphasizes that dismissals, including constructive dismissal, should only happen for valid reasons, such as poor performance, misconduct, or operational needs. It stresses that dismissals should never be used as a punishment for workers who have exercised their rights, such as filing complaints or joining unions.

It also advises that governments should create policies to prevent unfair dismissals and protect workers from being forced to resign because of poor working conditions or mistreatment by employers. Employers are encouraged to provide clear, written reasons for termination and to give employees a chance to challenge these decisions in a fair process. Workers should also have access to remedies, like compensation or reinstatement, if the dismissal is found to be unjust or if they were forced to leave under unfair conditions.

Additionally, the recommendation calls for stronger enforcement of labor laws and suggests that governments set up systems to monitor and support workers who are dealing with dismissal disputes.

In summary, ILO Recommendation No. 166 builds on the foundation of Convention No. 158 by offering more specific advice on how to handle dismissals fairly. It guides employers and governments to make sure that when employees are terminated whether voluntarily or involuntarily it is done in a fair, transparent way that respects workers' rights and provides them with the appropriate remedies.

### **3.5 Gap in ILO Standards for Constructive Dismissal**

ILO Convention No. 158 and Recommendation No. 166 provide important protections for employees regarding termination of employment, yet they do not specifically address constructive dismissal, leaving it to national legal frameworks to fill the gap. Convention No. 158 defines "termination" narrowly, focusing on employer-initiated actions such as dismissal or non-renewal of contracts, excluding cases where an employee is forced to resign due to the employer's actions commonly referred to as constructive dismissal.<sup>88</sup> This exclusion is crucial for this research, as it suggests that courts must interpret and regulate cases of forced resignation according to national laws and their judicial discretion.

#### ***National Legal Frameworks and Judicial Interpretation***

The exclusion of constructive dismissal from the ILO's international standards means that national courts are tasked with determining how to handle such cases. This allows for varying interpretations across jurisdictions, as courts often rely on their local legal frameworks and judicial precedents. While the ILO provides general guidelines regarding fair termination practices, such as prohibiting discrimination (Article 5 of the Convention) and ensuring procedural fairness, these standards are not specifically designed to cover forced resignation situations.<sup>89</sup> As a result, courts must creatively apply ILO principles such as fairness, non-discrimination, and due process to constructive dismissal claims, ensuring workers' rights are respected even in the absence of direct provisions on the matter.

#### ***Judicial Creativity and ILO Principles***

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<sup>88</sup> Napier B, 'Dismissals - The New I.L.O. Standards' University of Cambridge, Industrial Law Journal, Paper No. 12, 1983, 12 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/indlj12&div=10&id=&page>.

<sup>89</sup> Napier B, 'Dismissals - The New I.L.O. Standards' University of Cambridge, Industrial Law Journal, Paper No. 12, 1983, 19, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/indlj12&div=10&id=&page>.

In countries where constructive dismissal is not explicitly regulated by law, courts often look to ILO standards for guidance, especially the broader principles of fairness and justice. For example, ILO provisions regarding non-discrimination and protection from retaliation can be applied to cases of constructive dismissal. If an employee resigns due to intolerable working conditions or employer misconduct, courts may interpret this as an indirect form of termination, invoking ILO principles to assess whether the employer's actions were fair and justified.<sup>90</sup> This judicial creativity ensures that the spirit of ILO standards, such as protecting workers from unjust treatment, can still influence domestic decisions on constructive dismissal, even without a clear, universal definition.

### ***Influence on National Legislation***

The absence of specific ILO guidelines on constructive dismissal has also led some countries to develop their own legal frameworks addressing forced resignation. As national courts apply ILO principles and interpret national laws in light of international standards, there is potential for influence on legislative reforms. If courts consistently uphold principles of fairness, justice, and employee protection, this can encourage lawmakers to adopt or amend national labor laws to align more closely with international norms, ensuring better protection for workers facing forced resignations.<sup>91</sup> The evolving judicial approach, supported by ILO's broader labor rights principles, can gradually shape national legislation to more explicitly recognize and regulate constructive dismissal.

### ***ILO Standards and Procedural Safeguards in Constructive Dismissal***

Even though the ILO does not directly address constructive dismissal, its broader principles concerning fair treatment, due process, and transparency still play a role in shaping how national courts approach such cases. For instance, the ILO emphasizes the importance of clear and justifiable reasons for termination, as well as opportunities for employees to defend themselves before termination. Courts may use these safeguards to evaluate whether an employer's actions in creating intolerable working conditions or altering terms of employment unfairly led to the resignation, and subsequently, whether the employee is entitled to compensation or other remedies.

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<sup>90</sup> Napier B, 'Dismissals - The New I.L.O. Standards' University of Cambridge, Industrial Law Journal, Paper No. 12, 1983, 22, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/indlj12&div=10&id=&page>.

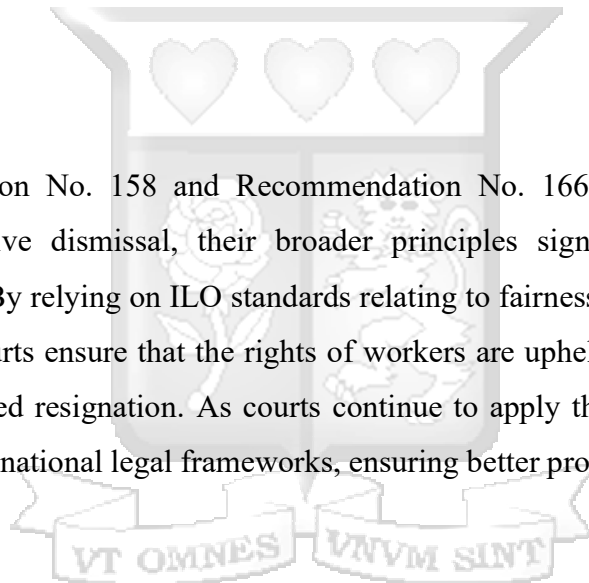
<sup>91</sup> Napier B, 'Dismissals - The New I.L.O. Standards' University of Cambridge, Industrial Law Journal, Paper No. 12, 1983, 21, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/indlj12&div=10&id=&page>.

### ***Global Variations and Inconsistencies***

The exclusion of constructive dismissal from ILO's direct provisions means that countries are left to define and regulate forced resignations within their own legal systems, leading to inconsistencies in how these cases are treated globally. While some jurisdictions have well-established frameworks and legal precedents for constructive dismissal, others may lack specific provisions, leaving employees vulnerable to employer misconduct. This creates a complex legal landscape where workers in some countries enjoy better protection, while those in others may have limited recourse if they are forced to resign under unjust conditions. The role of national courts in interpreting and applying ILO principles is, therefore, critical in bridging this gap.

### **3.6 Conclusion**

Although ILO Convention No. 158 and Recommendation No. 166 do not provide explicit guidelines on constructive dismissal, their broader principles significantly influence court decisions in such cases. By relying on ILO standards relating to fairness, non-discrimination, and due process, national courts ensure that the rights of workers are upheld, even in the absence of direct regulation on forced resignation. As courts continue to apply these principles creatively, they can indirectly shape national legal frameworks, ensuring better protection for workers facing constructive dismissal.



## Chapter 4

### 4.0 Comparative study

#### 4.1 Introduction

In Chapter 1, this research mentioned that South Africa handles cases of constructive dismissal differently compared to the Kenyan approach. The main difference lies in the specific factors that courts consider deciding whether constructive dismissal has occurred. This chapter takes a closer look at these differences and explains the tests and standards South African courts apply to determine if constructive dismissal has occurred.

By looking at South Africa's approach, it shows how having specific rules in the law can make court decisions more consistent and fairer. Clear laws help employees understand their rights and give employers guidelines on how to treat their staff properly, creating a better balance in the workplace.

#### 4.2 The Old Industrial Court

The old Industrial Court was responsible for addressing unfair labour practices, but its framework under the Labour Relations Act of 1956 (as amended) did not specifically include the concept of constructive dismissal. This absence created a significant limitation: if an employee resigned, it was assumed to be a voluntary act, effectively barring them from pursuing claims of unfair treatment under the umbrella of unfair labour practices.<sup>92</sup> However, the court recognized a critical exception. If the resignation was a direct result of the employer's conduct, such as creating intolerable working conditions, the resignation could be treated as a dismissal initiated by the employer. This recognition laid the foundation for the concept of constructive dismissal within South African labour law.

In *Jooste v Transnet Ltd t/a SA Airways*, Myburgh J elaborated on the legal process for claims of constructive dismissal.<sup>93</sup> The court required a thorough factual inquiry to determine whether the resignation was voluntary or coerced. The employee bore the burden of proving that their

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<sup>92</sup> *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998), Labour Court, South Africa.

<sup>93</sup> *Jooste v Transnet Ltd t/a SA Airways* (1995), Labour Appeal Court, South Africa.

resignation was not intended to end the employment relationship but was instead a reaction to the employer's conduct. If the resignation was found to be voluntary or part of an agreement, the case could not proceed unless the employee successfully challenged the validity of the agreement. If the employee overcome these hurdles, the court would then examine whether the employer's actions constituted constructive dismissal. Myburgh J emphasized the distinction between constructive and conventional dismissal: in the latter, the employer directly terminates the contract, whereas in constructive dismissal, the employee is forced to resign due to the employer's behavior.<sup>94</sup>

The approach outlined in *Jooste v Transnet Ltd t/a SA Airways* was affirmed by the newly established Labour Appeal Court in *Pretoria Society for the Care of the Retarded v Loots*. This case reinforced the principle that an employee who resigns due to an intolerable work environment created by the employer could claim constructive dismissal.<sup>95</sup> The concept of constructive dismissal was introduced into South African labour law during the 1980s, heavily influenced by English law.<sup>96</sup> South African courts adapted these principles, emphasizing the employer's role in making the work environment unbearable.

Constructive dismissal is now explicitly addressed in South African labour law under Section 186(1)(e) of the Labour Relations Act of 1995 (LRA). By codifying this concept, the LRA provides clarity and certainty in employment disputes, ensuring employees are protected against abusive practices while also setting clear parameters for what constitutes constructive dismissal.

### **4.3 Definition of Constructive dismissal**

The Labour Relations Act (LRA) of 1995 formally included constructive dismissal as part of the definition of dismissal in South African law. Section 186(e), later renumbered to Section 186(1)(e) in 2002,<sup>97</sup> described dismissal to include situations where an employee resigned with or without

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<sup>94</sup> *Jooste v Transnet Ltd t/a SA Airways* (1995), Labour Appeal Court, South Africa.

<sup>95</sup> *Pretoria Society for the Care of the Retarded v Loots* (1997), Labour Appeal Court, South Africa.

<sup>96</sup> Pakkies K, 'De-constructing constructive dismissal in Lesotho and possible lessons from English and South African law' Keketso Pakkies, *De-constructing constructive dismissal in Lesotho and possible lessons from English and South African law*, published, National University of Lesotho, Roma, 202.2

<sup>97</sup> *Fedife Ltd v Wolfaard* (2002), Supreme Court of Appeal, South Africa.

notice because the employer's behaviour made continued employment unbearable. In 2015, the wording was updated to remove the term "contract,"<sup>98</sup> further clarifying that constructive dismissal refers broadly to the termination of employment caused by intolerable working conditions created by the employer.

As highlighted by Landman J in *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & Others*,<sup>99</sup> the LRA retained the concept of constructive dismissal from earlier case law but refined it significantly. One major shift was moving away from the "contract test" used under common law, which tied constructive dismissal to the wrongful repudiation of an employment contract. Courts like in *Mafomane v Rustenburg Platinum Mines*<sup>100</sup> noted that the LRA now treats constructive dismissal as an independent statutory concept, no longer reliant on common law principles.<sup>101</sup> The Supreme Court of Appeal, in *Murray v Minister of Defence*, confirmed that the LRA eliminates the need to rely on concepts like repudiation, making constructive dismissal a purely statutory issue. Under Section 186(1)(e) of the LRA, constructive dismissal occurs when an employee resigns because the employer's conduct made continued employment intolerable. This shift ensures a clearer and more employee-focused framework for addressing such claims.

#### **4.4 An analysis of the wording of section 186(1)e of the LRA**

Section 186 provides for the definition of the term dismissal. Typically, in any legal proceedings related to a dismissal, the burden of proof initially lies with the employee to demonstrate that a dismissal took place. This means the employee must provide sufficient evidence to establish that their employment was terminated under circumstances that qualify as a dismissal within the framework of the applicable legal provisions.<sup>102</sup> Without meeting this threshold, the case may fail to progress determining whether the dismissal was fair or lawful.

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<sup>98</sup> *Fedife Ltd v Wolfaard* (2002), Supreme Court of Appeal, South Africa.

<sup>99</sup> *Sappi Kraft (Pty) Ltd t/a Tugela Mill v Majake NO & others* (1998), Labour Court, South Africa.

<sup>100</sup> *Mafomane v Rustenburg Platinum Mines Ltd* (2003), Labour Court, South Africa.

<sup>101</sup> *Mafomane v Rustenburg Platinum Mines Ltd* (2003), Labour Court, South Africa.

<sup>102</sup> Section 192, *Labour Relations Act* 66 of 1995.

When addressing claims of constructive dismissal, the employee must demonstrate to the court or arbitrator that their resignation was directly caused by the employer's actions.<sup>103</sup> Importantly, the alleged conduct must be evaluated objectively.<sup>104</sup> Once the employee presents their case, the employer is required to prove that their behavior was fair and reasonable.

Constructive dismissal claims are often more complex than they may initially appear. Courts consider multiple factors and examine the specific circumstances of each case to reach a decision. For instance, in *National Health Laboratory Services v. Yona & Others*,<sup>105</sup> the Labour Appeal Court (LAC) clarified that constructive dismissal occurs when an employee resigns due to the employer's unfair conduct, which makes continued employment unbearable.

The court further emphasized that the test for constructive dismissal is an objective one, requiring the resignation to be a reasonable and justifiable response to the conditions created by the employer.

#### **4.5 The requirements for constructive dismissal**

From the analysis of the wording in section 186(1)(e) of the LRA, there are 3 issues that arise in determining a constructive dismissal case.<sup>106</sup> This was clearly set out in the case of *Solid Doors (pty) ltd v Commissioner Theron and others*.<sup>107</sup> According to the Labour Appeal Court's ruling in this case, three conditions must be fulfilled. First, the employee must have ended the employment contract. Second, the contract must be terminated because the employee no longer finds their ongoing employment to be acceptable. Thirdly, the employer must have been the one who made it unacceptable for the worker to continue working. It was held in this case that these three requirements should be present in order for it to be said that constructive dismissal has taken place meaning that this is a conjunctive test. In the event that one of these elements are absent then

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<sup>103</sup> Cele N, 'Proving Constructive Dismissal: A critical evaluation of section 186(1)(e) of the Labour Relations Act 66 of 1995 and recent judgments', published, University Of KwaZulu-Natal, 2018, 24.

<sup>104</sup> Cele N, 'Proving Constructive Dismissal: A critical evaluation of section 186(1)(e) of the Labour Relations Act 66 of 1995 and recent judgments', published, University Of KwaZulu-Natal, 2018, 9.

<sup>105</sup> Cele N, 'Proving Constructive Dismissal: A critical evaluation of section 186(1)(e) of the Labour Relations Act 66 of 1995 and recent judgments', published, University Of KwaZulu-Natal, 2018, 24

<sup>106</sup> Section 186(1)(e), *Labour Relations Act* 66 of 1995.

<sup>107</sup> *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004), Labour Appeal Court, South Africa.

constructive dismissal can not be established. It would then mean that the claim would fail if one of the three is absent.<sup>108</sup>

#### **4.5.1 The employee terminated the contract.**

Among the three elements of constructive dismissal, proving that the employee terminated the contract of employment is typically the simplest. The employee must show that they, rather than the employer, ended the employment relationship, often referred to as "resignation." This can be done through a formal resignation or clear, unequivocal conduct indicating an intent to unilaterally end the contract. Resignation is a unilateral act that does not require the employer's acceptance or agreement and becomes effective after the notice period stipulated in the contract or by law. Courts have emphasized that resignation must be clear and unambiguous, expressed through words or actions that would lead a reasonable person to conclude the employee intended to terminate the contract. Once submitted, resignation is final and cannot be withdrawn without the employer's consent. These principles ensure that resignation is not only deliberate but also legally binding, subject to compliance with any notice obligations.

#### **4.5.2 The reason for termination of the contract must be that continued employment has become intolerable for the employee.**

When an employee resigns and claims constructive dismissal, the next step is to establish whether the resignation was directly caused by the employer making continued employment intolerable. This requires a clear connection between the employer's conduct and the employee's decision to resign. The case of *Agriculture Research Council v Ramashwana NO* highlights the importance of timing in such claims. If significant time passes between the employer's alleged conduct and the resignation, as in this case where the resignation occurred 15 months after the conduct, it may be difficult to prove the required link. Employees must resign within a reasonable time following the triggering event, whether it is a single severe incident or the culmination of ongoing issues.

The term "intolerable," though not defined in the Labour Relations Act (LRA), sets a high bar. As Grogan explains, the employee must prove that the employer acted in a deliberately oppressive manner, leaving no alternative but resignation.<sup>109</sup> In *Solidarity on behalf of Van Tonder v*

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<sup>108</sup> *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004), Labour Appeal Court, South Africa.

<sup>109</sup> Grogan J, 'Workplace Law' in Grogan J (ed) *Workplace Law*, 13th ed, Juta & Co., Cape Town, 2020, 499.

Armaments Corporation of SA (SOC) Ltd and Others, the court defined "intolerable" as a situation that is insufferable, beyond endurance, and simply too great to bear.<sup>110</sup> Similarly, in *HC Heat Exchangers (Pty) Ltd v Araujo*, the judge clarified that intolerability goes beyond a challenging or unpleasant work environment.<sup>111</sup> The onus is entirely on the employee to prove that the employer's conduct, viewed in its entirety and its cumulative effect, was so unreasonable and unbearable that no rational person could be expected to tolerate it.<sup>112</sup>

Examples of intolerable conduct include unlawful salary deductions, harassment, being asked to perform illegal acts, or severe public humiliation.<sup>113</sup> However, courts have also emphasized that resignation should be a measure of last resort. Employees are expected to exhaust all internal grievance procedures before resigning. For instance, in *Aldendorf v Outspan International Ltd*, the employee failed to utilize available internal mechanisms, which weakened the claim of constructive dismissal.<sup>114</sup> Likewise, in *Albany Bakeries v Van Wyk and Others*, the court ruled that it would be opportunistic for an employee to resign and claim constructive dismissal when reasonable avenues to resolve the issue existed.<sup>115</sup>

On the other hand, in *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others*, the court recognized that there may be instances where pursuing internal processes would be futile.<sup>116</sup> In this case, the employee's failure to lodge a grievance did not undermine her claim because it was evident that such processes would have been ineffective. These cases demonstrate that courts assess claims of constructive dismissal on a case-by-case basis, with particular focus on the reasonableness of the employee's actions and the employer's conduct.

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<sup>110</sup> *Van Tonder v Armaments Corporation of SA (SOC) Ltd and Others* (2016), Labour Court, South Africa.

<sup>111</sup> *HC Heat Exchangers (Pty) Ltd v De Araujo N.O. and Others* (2019), Labour Court, South Africa.

<sup>112</sup> *HC Heat Exchangers (Pty) Ltd v De Araujo N.O. and Others* (2019), Labour Court, South Africa.

<sup>113</sup> Cele N, 'Proving Constructive Dismissal: A critical evaluation of section 186(1)(e) of the Labour Relations Act. 66 of 1995 and recent judgments', published, University Of KwaZulu-Natal, 2018, 9.

<sup>114</sup> *Aldendorf v Outspan International Ltd* (1997), CCMA, South Africa.

<sup>115</sup> *Van Wyk v Albany Bakeries Limited* (2003), the Labour Court of South Africa.

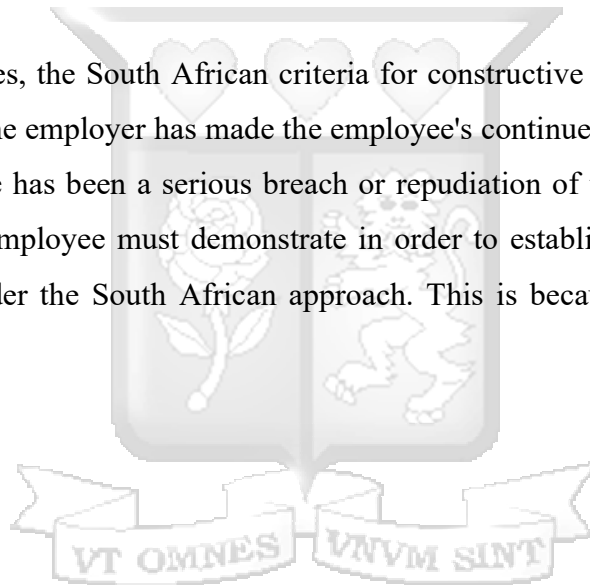
<sup>116</sup> *LM Wulfsohn Motors (Pty) Ltd t/a Lionel Motors v Dispute Resolution Centre and Others* (2007), the Labour Court of South Africa.

#### 4.5.3 The employer must have caused the intolerable conduct.

The "intolerability" requirement in constructive dismissal cases becomes complex when the intolerable conditions are caused not by the employer directly but by a third party, such as a client. Dekker argues that fairness requires holding the employer accountable if they neglect to address or mitigate known intolerable conditions, as they have a duty to provide a safe workplace.<sup>117</sup> This principle was affirmed in *Mafomane v Rustenburg Platinum Mines Ltd*, where the court held that the employer could be deemed to have "caused" the intolerable conditions if the circumstances were within their control.<sup>118</sup>

#### 4.6 Conclusion

Over the past few decades, the South African criteria for constructive dismissal has changed. It now considers whether the employer has made the employee's continued employment unpleasant rather than whether there has been a serious breach or repudiation of the employment contract. The conditions that an employee must demonstrate in order to establish constructive dismissal seem more stringent under the South African approach. This is because "intolerability" is the second criteria.



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<sup>117</sup> Dekker A, 'Did He Jump or Was He Pushed? Revisiting Constructive Dismissal' 24 (3) SA Merc LJ, 2012, 346.

<sup>118</sup> *Mafomane v Rustenburg Platinum Mines Ltd* (2003), the Labour Court of South Africa.

## Chapter 5

### 5.0 Recommendations and Conclusion

This research has examined the challenges surrounding constructive dismissal in Kenya, shedding light on the gaps in employment laws that fail to explicitly address the issue. It has highlighted how these legal shortcomings undermine employee rights, resulting in inconsistent court decisions and obstacles in pursuing justice. Additionally, it has drawn on South Africa's legal framework to propose practical reforms and legislative amendments aimed at strengthening employee protections in Kenya.

Chapter 1 highlighted a major gap in Kenya's legal framework concerning constructive dismissal, leading to inconsistent court rulings. This issue became clear through an analysis of cases where the court established two key tests for determining constructive dismissal: the unreasonable test, which considers if the employer's behaviour was so unreasonable that the employee couldn't continue working, and the contractual test, which examines if the employer's actions amounted to a serious breach of the employment contract.

However, in the *Wafula* case, the court took a different approach, focusing on the employee's reaction to the employer's conduct rather than the employer's actions themselves.<sup>119</sup> This shift highlighted the lack of a clear legal standard and created confusion about which test should be used in constructive dismissal claims.

The central question of this research was: what criteria must be met for a constructive dismissal claim to succeed in Kenya? This question pointed to the need for a clearer and more consistent legal framework. The chapter also set out the study's objectives, which included examining how these inconsistencies affect justice and employee rights, identifying the challenges employees face in pursuing claims, and proposing legal reforms to improve clarity and fairness in employment law. By addressing these issues, the research aimed to foster a more just legal system for employees subjected to unfair treatment at work.

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<sup>119</sup> *Herbert Wafula Waswa v Kenya Wildlife Services* (2020) eKLR.

Chapter 2 focused on the legal framework governing constructive dismissal in Kenya, analysing relevant laws, case law, and judicial interpretations. However, it also pointed out inconsistencies in subsequent cases, such as *Herbert Wafula Waswa v Kenya Wildlife Service*, where different interpretations of these tests led to varying outcomes, undermining legal certainty. Ultimately, Chapter 2 underscored the need for clarity and consistency in the law to effectively protect employee rights and enhance the administration of justice in employment disputes.

Building on the exploration of Kenya's legal framework in Chapter 2, Chapter 3 shifts focus to the standards of the ILO and their impact on how constructive dismissal is understood in labor law. Although the ILO doesn't explicitly define constructive dismissal, its principles like fairness, non-discrimination, and due process play a key role in shaping how courts around the world handle such cases.

The chapter reveals that the lack of direct ILO provisions on constructive dismissal leads to varied approaches across countries. While some nations have clear legal frameworks for addressing these issues, others rely on general labor principles, leaving employees more vulnerable to unfair treatment. This inconsistency highlights the importance of national courts in interpreting and applying ILO guidelines to protect workers effectively.

These insights are crucial for the research as they show how ILO standards indirectly influence labor law and judicial decisions on constructive dismissal. By understanding how international principles can guide legal reforms, the study aims to recommend changes that strengthen employee protections in Kenya. Ultimately, this supports the broader goal of promoting fair and equitable workplaces, in line with the principles of justice and fairness at the heart of labour rights.

Building on the discussions in Chapters 2 and 3, Chapter 4 takes a closer look at how constructive dismissal is handled in Kenya compared to South Africa. The focus is on understanding the differences between the two legal systems and what Kenya can learn from South Africa's approach. South Africa has a much clearer and more developed legal framework for constructive dismissal. Their courts use specific tests to determine if an employee was forced to resign unfairly,

looking closely at things like intolerable working conditions or serious breaches of contract by the employer. This structured approach helps ensure that cases are handled consistently and fairly.

In contrast, Kenya's lack of clear laws on constructive dismissal often leads to mixed interpretations, with similar cases producing different outcomes. This inconsistency creates uncertainty for both employees and employers. The findings from this chapter highlight the benefits of having detailed and specific laws like those in South Africa.

## **5.1 Recommendations**

In light of this discussion, the following recommendations can be made in order to have a clearer framework regarding constructive dismissal in Kenya

### **5.1.1 Adopting Clear Legal Definitions**

One of the biggest issues in Kenya's approach to constructive dismissal is the lack of clear definitions and criteria. This creates confusion and leads to inconsistent court decisions, which can be unfair to both employees and employers. To fix this, the Employment Act should be updated to include clear explanations of what constitutes constructive dismissal. For example, situations like intolerable working conditions, major changes to job terms without an employee's consent, or harassment should be clearly outlined. Additionally, courts should be given guidelines to ensure they apply the law in a consistent and fair way. These changes should also align with International Labour Organization (ILO) standards to reflect global best practices.

### **5.1.2 Learning from Best Practices**

South Africa provides a good example of how to handle constructive dismissal cases, with clear rules and standards that guide courts in making fair decisions. Kenya could learn a lot from their approach. For instance, South African courts use the "reasonable person" test to assess whether an employee's decision to resign was justified based on the employer's behaviour. By borrowing these proven practices, Kenya could improve its legal system, ensuring fair treatment for employees while helping employers understand their responsibilities.

### 5.1.3 Providing Clear Guidelines for Judges

Right now, Kenyan judges don't have clear rules to follow when deciding constructive dismissal cases, which leads to inconsistent results. To address this, detailed guidelines should be created to help judges evaluate cases more consistently. These guidelines could outline key factors to consider, like the employer's behaviour, how the employee responded, and the overall circumstances. The guidelines should also reflect ILO standards to ensure Kenya's laws are in line with international principles.



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