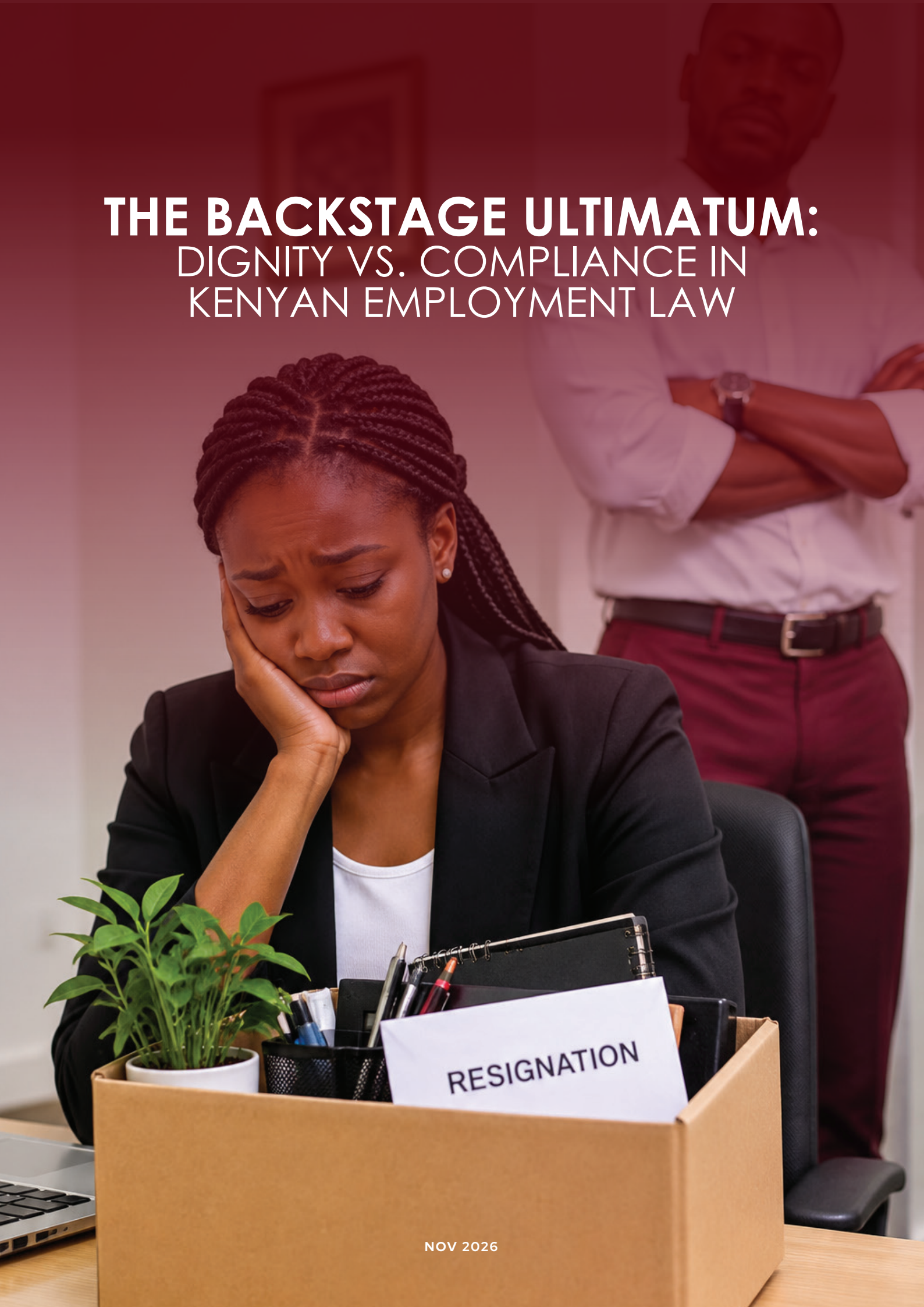
THE BACKSTAGE ULTIMATUM:
DIGNITY VS. COMPLIANCE IN KENYAN EMPLOYMENT LAW



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INTRODUCTION

At an orchestral concert, if the instrumentalists manage to butcher a piece, who do you blame: the players, or the conductor? Suppose the conductor stumbles onto the stage, intoxicated, and the music descends into chaos. A cacophony of noise, if you will. The players know they are not obligated to endure the public humiliation; they could simply put down their instruments and leave. Yet, backstage, they have been issued an ultimatum:

continue playing, or risk being removed from the orchestra. So they continue. I mean, what other option do they have?

THE CASE

This very question puzzled the Employment and Labour Relations court (ELRC) in CWK v Sun Power Products Ltd (Browns Food Company) [2026] KEELRC 2125 (KLR). On or about 4 th of July 2023, female employees of the Respondent, Browns Food Company, were subjected to a physical 'menses inspection' conducted by the Respondent's senior officers, namely the Manager of Quality Assurance, under the oversight of the Human Resource Manager. The purpose of the inspection was to identify the employee who had disposed of a sanitary pad in a trash bin.

It requires little demonstration that the inspection in question constituted a gross and highly indecent violation of the liberties of thirty-five (35) women who were subject to it. As contended by the Petitioner, at that moment, the employees were confronted not only with the vulnerability occasioned by the intrusive mortifying nature of the search itself, but also with the circumstances surrounding the degrading reality of their backstage ultimatum: a choice between Their source of income and their right to dignity.

The Petitioner's case was that the Respondent had violated her right to privacy and human dignity, that she had been discriminated against, and her resignation was not voluntary but amounted to constructive dismissal, and therefore to unfair termination of her employment. The Respondent, for its part, disputed the allegation of a toxic working environment and maintained that the circumstances did not establish that the Petitioner's resignation was involuntary. It further denied having discriminated her, maintaining that she had resigned voluntarily.

On the issue of the inspection, the Respondent argued that certain senior employees, "while on a frolic of their own", had contravened its policies on privacy rights and sexual harassment in seeking to establish the source of the sanitary pad found in the company's dustbin. It was further asserted that the two (2) senior employees were ultimately dismissed from employment following a disciplinary hearing, and that all the female employees who had been subjected to the undignified search were thereafter offered counselling sessions.

WHAT THE COURT HELD

The ELRC found that the conduct in question violated the Petitioner's right to human dignity under Article 28 of the Constitution of Kenya, 2010 as well as her right to privacy under Article 31 which includes the right not to have their person, home or property searched.

In arriving at its determination, of particular significance to the ELRC was the fact that the doors to the Respondent's premises had reportedly been left open during the incident.

At paragraph 51 of the judgment, the ELRC questioned how two (2) female employees could have subjected approximately thirty-five (35) other employees to the degrading treatment, particularly in circumstances where the doors had allegedly remained open. While the ELRC was not persuaded that a reasonable employee in similar circumstances would have behaved as the 35 did for fear of losing their employment, it observed that the Petitioner having worked at the Respondent's undertaking for five (5) years ought to have known how to avoid violation of her rights.

This raises an interesting consideration in employment law concerning the friction between institutional hierarchies and individual autonomy. Workplace policies and procedures often contemplate that an employee faced with unlawful treatment may exercise their right to object, report the conduct or pack their belongings and walk out. Yet, this sterile contemplation ignores the reality of workplace hierarchies and the influence of authority within an employment relationship. The availability of an apparent opportunity to leave does not, in itself, necessarily establish that an employee felt sufficiently empowered to exercise that choice. Similarly, as in the CWK vs Sun Power Products Ltd case, the open door for the 35 women subjected to the inspection, invited everything but the liberty to leave. The ELRC also considered the fact that the Petitioner made no attempt to take advantage of pre-established reporting pathways.

Despite having admitted during her cross-examination to having read and understood the Respondent's Staff Policy Manual and Code of Ethics, the Petitioner did not report the incident to anyone and the ELRC observed that she could have done it on email as she did for her resignation.

However, it's all too easy to assume a clinical view on the situation and disregard the fact that, in a diminishing circumstance, written policies can become inconsequential in the face of fear. The effectiveness of internal reporting procedures must also be considered against the circumstances in which the alleged misconduct occurred. In particular, the existence of written policies does not necessarily resolve the question of whether an employee felt able to invoke them in the circumstances. Nevertheless, the ELRC took note of the Petitioner's failure to utilize those mechanisms.

The Respondent, on its part, presented evidence of how it handled the situation by the book wherein a disciplinary hearing was conducted, the senior officers in question were dismissed, and psychological counseling sessions were administered on the 35 employees. The Respondent maintained that the conduct of the senior officers was contrary to its internal policies and was attributable to their individual actions rather than an institutional practice.

Even so, while resolution may quiet and address the dissonance, it does not automatically absolve the conductor from a haunting performance. The ELRC challenged the Respondent's efforts to discipline the two (2) senior employees by analyzing whether the Respondent was vicariously liable for their conduct.

In addressing this question, the ELRC considered the principles cited in Muwonge v Attorney General of Uganda [1967] EA 17, where the Court of Appeal for East Africa held:

"A master is liable for acts of his servant committed within the course of his employment or, to be more precise, in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is were the acts done in the course of his employment or, in this case within the exercise of the policeman's duty."

The principle as applied holds the Respondent accountable for its former officer's misconduct because, in spite of acting expressly against company policy, they were enabled to do so by the authority placed in their hands due to the seniority of their positions.

While the ELRC recognised the infringement of the Petitioner's constitutional rights arising from the incident, it approached the separate claims of discrimination and constructive dismissal with a distinct evidential analysis. On these claims, the ELRC found that the evidence presented did not sufficiently establish the requisite legal elements

The Petitioner's evidence in support of her claim for unfair termination and discrimination were arid. It was established that working conditions remained consistent subsequent to the incident and that claims of 'toxicity' within the environment were seemingly baseless and could not provide tangible nexus to substantiate the alleged hostility, intolerable working conditions and her resignation, which was effected a year later. In fact, the Petitioner's resignation letter thanked the respondent for the trajectory it had provided and did not evidence an employee who was leaving employment on account of a hostile work environment. As for the claims on discrimination, there were two main causes of action brought by the Petitioner. One involved the incident itself; however, it was evidently dismissed because although the incident was inherently sex-specific, that alone did not establish the particular legal claim of discrimination that was pleaded.

In regard to the supposed bias in overtime applications, it was proven that she was not the only employee subjected to rejection as verified by documentary evidence on record. The ELRC's thorough and firm findings demonstrate that courts are both willing and able to penalize the severe indignity of the search itself, but simultaneously uphold a precise standard when scrutinizing claims of constructive dismissal, overtime, and discrimination; demonstrating that courts require evidence capable of demonstrating tangible causal nexus rather than broad, generalized assertions of toxicity. The ELRC did not simply sympathize and conform to all the Petitioner's claims, but conducted it with enough balance to serve justice where it was due.

CONCLUSION

The CWK vs Sun Power Products Ltd case defines not only the idea that institutional respect, liberty and bodily autonomy are non-negotiable and shouldn't be left at the factory gate, but also that recognition of dignity should not have to wait for a humiliating spectacle. Nonetheless, the uncomfortable truth is that one bad performance does not entitle the instrumentalists to rewrite the entire score. In this case, while the ELRC recognised the infringement of the Petitioner's dignity and privacy, it did not allow that finding, in itself, to determine the outcome of the separate claims of discrimination and constructive dismissal, each of which required independent evidential substantiation.

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