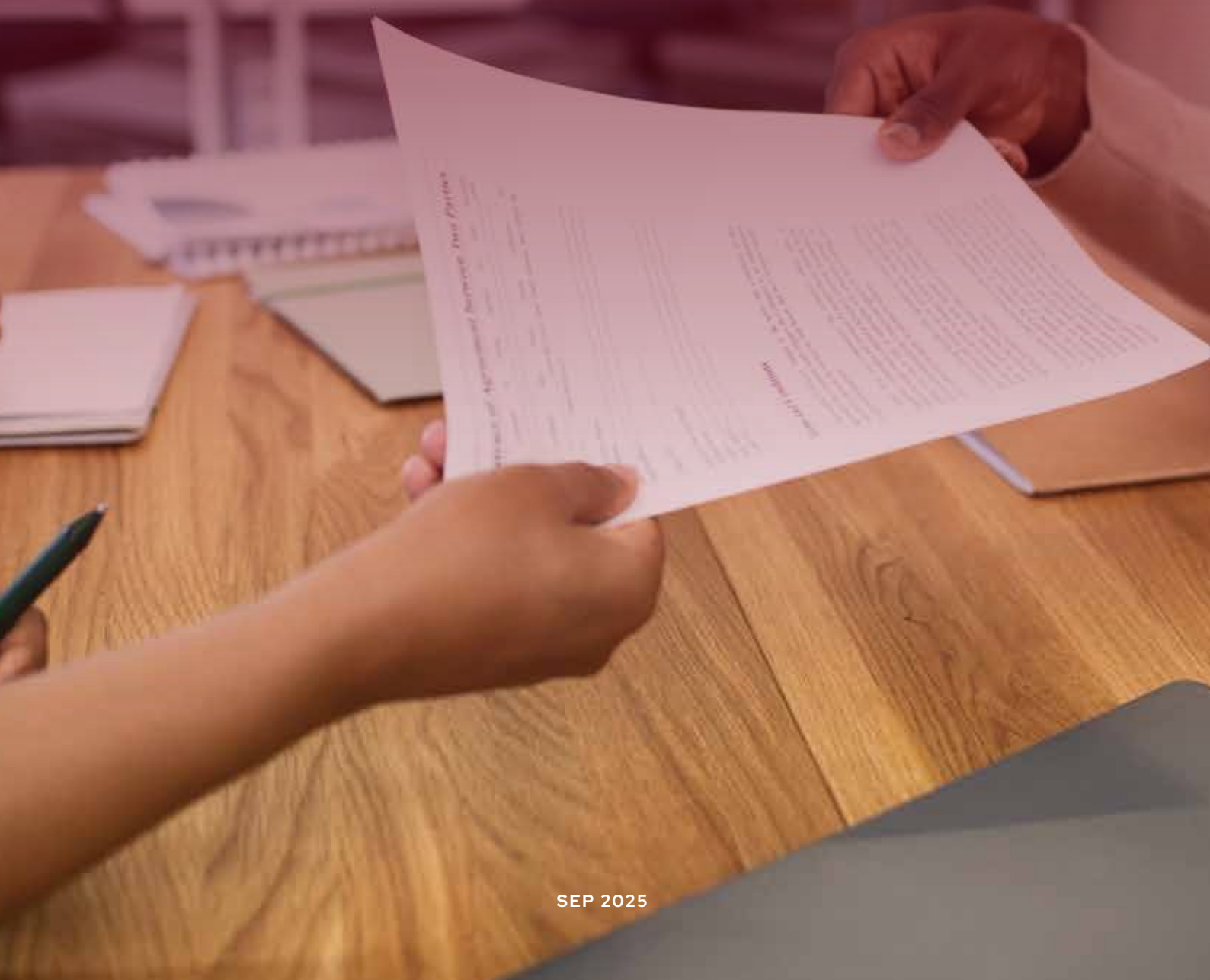


CONSTRUCTIVE RESIGNATION



INTRODUCTION

We are familiar with the concept of constructive dismissal – when the workplace gives an employee no choice but to walk the plank. In the vast seas of employment law, the ship of constructive dismissal has long charted a course through cases where hostile or intolerable working conditions force an employee to resign. In this article, we set sail into the new jurisprudential waters with the emerging concept of constructive resignation -where the employee leaves the employer with no choice but to conclude that they chose to voluntarily call it quits.

Constructive resignation is a fairly new concept that has been introduced in the Kenyan legal sphere by dint of the appellate case of **Firimbi t/a Sinai Hotel v Imungu (Appeal E131 of 2024) [2025] KEELRC 1283 (KLR) (the Firimbi Case)**. In the Firimbi Case, Firimbi t/a Sinai Hotel (Firimbi) asked the Employment and Labour Relations Court (the Court) to set aside the decision of the lower court which had deemed the termination of the Respondent (Imungu) as unfair.

BRIEF FACTS:

Imungu was employed by Firimbi as a room steward from 2017 to 2021. Due to the government-imposed movement restrictions during the COVID-19 pandemic, Firimbi temporarily closed its business. When the restrictions were lifted, business began picking up and Firimbi opted for employees to work in shifts as opposed to laying them off.

Imungu, being dissatisfied with the shift arrangement, abandoned her duties and filed a complaint against Firimbi with the Labour Office. She alleged that her employment had been unfairly terminated.

Firimbi successfully appealed against the judgment. While determining the appeal, the Court found that the Magistrate's Court erred when it found that Imungu's employment had been unfairly terminated. Consequently, the Court set this particular finding aside and, in its place, found that Imungu constructively resigned from her employment. In the Court's own words, **'where an employee explicitly expresses her unwillingness to return to work, despite being called upon by the employer, as was the case in the interaction between the Appellant and the Respondent, the employee's conduct should be considered constructive resignation.'**

Therefore, constructive resignation from employment may be found to occur where an employee has refused, without a valid or lawful reason, to comply with their employer's instruction to return to their place of employment. The employee's conduct intimates that they have resigned from their duties. In essence, the employee deliberately and willingly walked out of their employment relationship.

PARALLELS TO EXISTING TERMINATION PROCEDURES

i. Similarity to constructive dismissal

The doctrine of constructive dismissal is aptly defined by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)** as where the employee must have been entitled to or have the right to leave without notice because of the employer's frustrating conduct. The Court of Appeal further defined the phrase 'entitled to leave' within the scope of the test of unreasonableness and contract as follows:

a) under the unreasonableness test - the employee could leave when the employer's behavior towards him becomes so unreasonable that he could not be expected to stay; and

b) under the contractual test - the employer's conduct is so terrible that it constitutes a significant breach going to the root of the contract of employment.

On the other hand, constructive resignation gives the employer no choice but to consider that the employee, by their conduct, deliberately and willingly walked out of the employment relationship. The key difference between the two is that constructive dismissal is involuntary while constructive resignation is voluntary.

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ii. Termination as a result of desertion/absconding of duty

One may ask, why not treat the employee's absence as misconduct on account of desertion or absconding of duty?

Desertion and absconding of duty have been defined in the case of **Javan Kisoi Mulwa v SAA Interstate Traders (K) Ltd [2018] eKLR** as:

c) desertion occurs where the employee has no intention of resuming work; and

d) absconding occurs where the employee fails to seek permission for work absence.

For termination of employment by desertion of duty to occur, the court in the case of **James Okeyo v Maskant Flowers Ltd (2015) eKLR** summarized the issue as follows:

"In this sense, the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.

Where an employer alleges desertion, it must prove the ingredients of desertion. A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract). Establishing the intention not to return to work will depend on the facts as presented in evidence."

In order to prove desertion or abscondment, the employer must demonstrate that they put efforts in tracing the employee who is alleged to have absconded their duty, as was

highlighted in the case of **Stanley Omwoyo Onchweri v BOM Nakuru YMCA Secondary School [2015] eKLR**. Additionally, in the case of **Albanus Mbuithi Mutiso v Fresh Breeze Limited Cause No.851 of 2017**, the court held that where the employer alleges that the employee has absconded duty, the employer must demonstrate what steps were taken to bring the employee to account.

In comparison, the Court in the *Firimbi Case* found that the Respondent, despite being requested to resume her duties, failed to do so and explicitly expressed her unwillingness to return to work. Imungu's conduct was therefore found to be constructive resignation and there was no need for a disciplinary procedure.

While both constructive resignation and termination on account of desertion or absconding from duty involve an employee demonstrating no intention of returning to work, the fundamental difference lies in who initiates the termination and the **procedural requirements involved**.

In constructive resignation, termination of the employment relationship is initiated by the employee without regard for due procedure under the terms of his or her contract, while in desertion or abscondment, the employer is

the one who terminates the employment relationship.

Additionally, in cases of constructive resignation, the employee's conduct is followed by an explicit expression of unwillingness to return to work. Conversely, in cases of desertion or abscondment, the employee's unexplained absence is treated as misconduct warranting disciplinary action. In the latter case, the employer must adhere to the principles of procedural fairness – including issuance of a notice to show cause and invitation to a disciplinary hearing – before effecting a termination.

In the *Firimbi Case*, Imungu expressed dissatisfaction with the shift arrangement, abandoned her duties, and made it clear that she had no intention of returning to work. Had she failed to provide this clarification or even respond to Firimbi's request or calls, then Firimbi should have treated her absence as a misconduct and conducted a disciplinary process.

CONCLUSION

The doctrine of constructive resignation is new and, while its tenets overlap with abscondment or desertion of duty, both can co-exist in the seas of employment law.

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