



**Sehmi v Henkel Polymer Co. Ltd t/a Henkel Chemical (EA) (Cause E299 of 2021) [2024] KEELRC 1293 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1293 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E299 OF 2021**

**JK GAKERI, J**

**MAY 9, 2024**

**BETWEEN**

**RABINDER SINGH SEHMI ..... CLAIMANT**

**AND**

**HENKEL POLYMER CO. LTD T/A HENKEL CHEMICAL (EA) .. RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim dated 9<sup>th</sup> April, 2021 alleging discrimination and refusal by the Respondent to pay salary arrears and terminal dues.
2. It is the Claimant's case that he joined the Respondent in Sales and Marketing and was later promoted to the General Manager for a period of 2 years, from January 2019 to November 2020 at a salary of Kshs.250,000/= per month.
3. That the Respondent refused to pay his salary rendering him destitute and treated him in a cruel and unfair manner which culminated in his resignation in November 2020.
4. The Claimant prays for;
  - a. A declaration that termination of employment was unfair, unlawful and wrongful.
  - b. Sum of Kshs.12,150,000/= comprising;
    - i. Unpaid salary Kshs.4,600,000.00
    - ii. Annual leave Kshs.437,500.00
    - iii. House allowance Kshs.862,500.00
    - iv. Service Pay Kshs.250,000.00
    - v. Damages for unfair termination Kshs.3,000,000.00



- vi. Damages for discrimination Kshs.3,000,000.00
- c. Certificate of service.
- d. Costs of this suit plus interest from date of filing the suit.
- e. Any other relief as the court may deem fair, just and expedient.

### **Response**

5. By a memorandum of response dated 16<sup>th</sup> May, 2022, the Respondent admits that it employed the Claimant as a General Manager and treated him with respect, fairly and reasonably.
6. It is the Respondent's case that the Claimant was responsible for preparation and processing of the payroll for staff and refused or neglected to pay himself on the ground that he could not do so before other staff were paid and refused to remit statutory deductions.
7. That the Claimant resigned voluntarily but refused to hand over to the supervisor or directors and refused to hand over his personal file despite reminders.
8. The Respondent denies having subjected the Claimant to a hostile working environment and the alleged constructive termination lacked particulars.
9. It is the Respondent's case that the Claimant's salary was consolidated.
10. The Respondent prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

11. The Claimant's undated written witness statement rehashes the contents of the Memorandum of Claim.
12. On cross-examination, the Claimant confirmed that he had attached a copy of his contract of employment yet he had not and confirmed that it was not among the documents listed on list of his documents dated 9<sup>th</sup> April, 2021.
13. He confirmed that he was the Respondent's General Manager having been promoted from Sales and Marketing.
14. He admitted that his duties were spelt out in paragraph 2 of the contract of employment and reported to the Director, one Ruth Henkel.
15. That Human Resource and Accounts were not part of the hierarchy.
16. The witness admitted that he was in a WhatsApp group with the director and acknowledged the messages availed by the Respondent on his resignation and contract of employment. That he left because the director would send messages at anytime and he was not being paid for the trouble.
17. The witness admitted that he had stated that the working environment was hostile and notified the director that he was resigning and did so voluntarily.
18. The witness admitted that he had no evidence to show that he was not paid house allowance.
19. Concerning the alleged discrimination, the witness confirmed that it related to some information not given to him by the Respondent and was not being paid and had complained to the director.



20. It was his testimony that he was not in charge of payroll or remission of statutory deductions and was unaware of the status of the company.
21. Finally, the witness admitted that he was a member of the National Social Security Fund (NSSF) but the Respondent was not remitting deductions.

### **Respondent's evidence**

22. RWI, Arti Issa confirmed that the Claimant's personal file was missing and the contract of employment was missing too in the office file. That she took over the files from the Claimant and worked with him for sometime and was the custodian of the files.
23. The witness confirmed that she joined the Respondent in August 2020 and was unaware of whether the Claimant was paid.
24. RWI confirmed that the Claimant's salary was consolidated.
25. The witness testified that although she had the payroll from May 2019 to November 2020, she was not sure whether the Claimant was paid and had not filed controverting evidence.
26. The witness further admitted that part payments were made not to the NSSF owing to the financial challenges the company was facing.
27. The witness confirmed that the Claimant approved the Respondent's payroll prepared by Accounts and for the duration they served together, the Claimant did not wish to be paid before other employees were paid as it was his duty to ensure that salaries were paid.
28. However, the witness admitted that she had neither filed a copy of the payroll nor other evidence to show that the Claimant approved the payroll.
29. RWI could not confirm that the Claimant was paid after resignation.
30. On re-examination, the witness testified that she remembered the WhatsApp messages on the availment of the contract of service by the Claimant as the file had no copy and he had agreed to do so but did not and did not handover after resignation.

### **Claimant's submissions**

31. Counsel for the Claimant submitted on whether the Claimant was discriminated, constructively dismissed and entitlement to the reliefs sought.
32. Concerning discrimination, counsel submitted that the facts that the Claimant continued working without payment and others were being paid amounted to discrimination.
33. Reliance was made on the sentiments of the court in *Milton M. Isanya V Aga Khan Hospital Kisumu* (2017) eKLR and *Peter Kaburu Karanja V Kirinyaga Construction (K) Ltd* (2020) eKLR on constructive dismissal and the guiding principles respectively, to urge that the Respondent breached a fundamental term of the contract by non-payment of the Claimant's salary and as a consequence he resigned and the Respondent failed to prove that it was facing financial constraints.
34. Counsel submitted that the Claimant was constructively dismissed.
35. As regards the reliefs sought, counsel submitted that the Respondent owes the Claimant Kshs.4,600,000/= and had admitted the sum of Kshs.1,450,000/= and was thus entitled to Kshs.3,150,000.00.



36. That the Claimant was entitled to pay in lieu of annual leave and house allowance and service pay as well as damages for discrimination and constructive dismissal.
37. Reliance was made on the decision in *John Kimingi V Damco Logistics Kenya Ltd (2021) eKLR* among others.

### **Respondent's submissions**

38. As regards the terms of employment, the Respondent's counsel submitted that while the Claimant availed no evidence, the Respondent had shown by WhatsApp messages that the Respondent refused to hand over the file containing the contract and job description to urge that notwithstanding the employer's duty to keep employment records, the court ought to take judicial notice of the fact that the Claimant did not hand over the file in question.
39. Reliance was made on the holding of Radido J. in *Harrison Okallo Alinda V Double Delight Restaurant & Supermarket Cause No. 64 of 2014* on the employee's duty to seek production of employment records by the employer.
40. Counsel submitted that the Claimant had failed to prove that his salary was not consolidated and was owed annual leave as he who alleges must prove the allegations as ordained by Section 107 of the [\*Evidence Act\*](#).
41. On service pay, counsel urged that the Claimant admitted having been a member of the NSSF and availed no evidence of non-remittance of deductions and no particulars were given.
42. Reliance was made on the decision in *Boaz Mochama Machogu V New World Auto Ltd (2012) eKLR* to urge that the Claimant's allegation of non-remittance of NSSF deductions by the Respondent had no supportive evidence.
43. That the Claimant was not entitled to house allowance as his salary was consolidated as per the payslip.
44. Finally, as regards damages for discrimination and unfair dismissal, counsel submitted that the Claimant had not provided the particulars of the alleged discrimination or the salaries paid to others and the claim was unsustainable.

### **Determination**

45. It is common ground that the Claimant joined the Respondent as a Sales and Marketing official and was later promoted to General Manager from January 2019 to November 2020 when he resigned.
46. It is also not in dispute that neither of the parties produced a copy of the Claimant's contract of employment or job description.
47. Puzzling, neither the Claimant's written statement or oral evidence nor the claim is specific on the date or month of employment or date of resignation.
48. The issues for determination are;
  - i. Whether the Claimant was discriminated by the Respondent.
  - ii. Whether the Claimant was constructively dismissed from employment.
  - iii. Whether the Claimant is entitled to the reliefs sought.
49. As regards the alleged discrimination, the Claimant maintains that the non-payment of salary by the Respondent was discriminatory.



50. The Respondent on the other hand denies that the Claimant was discriminated and willingly stayed on without a salary on the premise that he could not be paid before other employees were paid, a statement repeated by RWI.
51. That he is the one who approved the Respondent's payroll, an allegation the Claimant did not expressly deny.
52. Although the Claimant downplayed the scope of his duties as the Respondent's General Manager, he did not file his job description despite admitting on cross-examination that he was given a written contract of service which he had and referred to paragraph 2 which identified his responsibilities.
53. These disclosures by the Claimant reinforce the Respondent's evidence that indeed the Claimant refused to hand over the file which contained the employment records and/or the contract itself as evidenced by WhatsApp communication on record dated 10<sup>th</sup> December, 2020 after the Claimant had resigned.
54. In one of the messages, the Claimant admitted that he had found a copy of his contract of employment but had not seen the file. This message appear to suggest that he was looking for the file at his residence. It is unclear how it could have gotten there?
55. From the messages, it is also clear that the Claimant did not do a formal handover save for the files allegedly given to RWI.
56. The foregoing leaves no doubt that the Claimant was aware of what was happening at the place of work including the reason why no pay was forthcoming.
57. For instance, a copy of the payslip for March 2019 reveals that he was paid salary arrears of Kshs.134,339.00 over and above and his salary of Kshs.341,281.00.
58. From the documents on record, it is clear that the payment of less salary or none at all to the Claimant started sometime in 2019 or earlier, a fact the Claimant did not testify about to enlighten the court on the factual circumstances.
59. Was the non-payment of salary by the Respondent discriminatory?
60. The Claimant adduced no evidence to prove that it was only him who was not being paid or paid less than the salary earned and payable.
61. RWI confirmed on cross-examination that the Respondent's profit had plummeted from Kshs.30 million to 7 million and the number of employees had fallen from 140 to 12 and the company was still struggling to remain afloat.
62. It cannot be gainsaid that as General Manager, the Claimant had access to all sections and departments of the Respondent and cannot feign ignorance of how salaries were being paid for almost 2 years and did not raise the issue with the director or anyone else in writing.
63. Significantly, by letter dated 4<sup>th</sup> December, 2019, the Respondent acknowledged owing the Claimant's salary arrears of upto Kshs.1,450,000/= between May and November 2019. These are facts the Claimant was aware of but opted to remain in employment.
64. In the circumstances, the court is in agreement with the Respondent counsel's submission that the allegation of discrimination grounded on salary payment lacks particulars and supportive evidence to sustain.



65. Analogous to article 27(4) of *the Constitution* of Kenya, 2010, Section 5(3) of the *Employment Act*, 2007 outlaws discrimination directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
66. Section 5(3)(b) of the *Employment Act*, 2007 prohibits discrimination in recruitment, training, promotion, terms and conditions of employment or other matters arising out of employment.
67. In *Nyarangi & others V Attorney General* (2008) KLR 688, the court stated as follows;
- “Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances.”
68. Similarly, in *Peter K. Waweru V Republic* (2006) KLR, the court stated;
- “. . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description . . .
- Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”
69. Wilson J. expressed similar sentiments in *Andrews V Law Society of British Columbia* (1891) 1 SCR 321.
70. Granted that the Claimant availed no evidence to demonstrate that all other employees of the Respondent received their regular pay from January 2019 to November 2020 and was left out unfairly on account of an unjustifiable reason, it is difficult to sustain a claim grounded on discrimination.
71. This position is buttressed by the fact that the Tax Deduction Card for Saiqa Jabee M for the year 2019 reveals that he was paid full salary in January and February only for the entire year.
72. The Claimant was paid in February 2019 only. This would appear to suggest that the non-payment of salary affected other persons as the Claimant’s evidence shows.
73. In a nutshell, the allegation that the Claimant was discriminated by the Respondent is unsubstantiated.
74. Concerning constructive dismissal, the Claimant’s counsel submitted that the Respondent breached a fundamental term of the Claimant’s contract of employment by non-payment of salary and thus committed a repudiatory breach of contract and the Claimant had no option but to leave.
75. The Respondent’s counsel did not address the issue specifically.
76. The locus classicus exposition of the concept of constructive dismissal are the celebrated sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (1978) ICR 221 as follows;
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat



himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once . . .”

77. See also Nathan Ogada Atiagaga V David Engineering Ltd (2015) eKLR and Milton M. Isanya V Aga Khan Hospital Kisumu (2017) eKLR for the proposition that constructive dismissal occurs when the employer's conduct or behaviour renders the employees remaining in employment intolerable and thus untenable and quits owing to frustration.
78. In Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (2017) eKLR, the Court of Appeal domesticated the concept of constructive dismissal by adopting the contractual approach test and enunciated the guiding principles of constructive dismissal including fundamental terms of the contract and fundamental breach, causal link between the employer's conduct and the resignation; resignation within a reasonable time of commencement of the employer's conduct or behaviour and absence of waiver, acquiescence or estoppel by conduct.
79. I will now proceed to apply the forgoing principles of law to the facts of the instant case.
80. Although the Claimant alleged that the work environment was hostile, he neither particularised the Respondent's conduct nor adduce evidence on it including when the alleged hostility begun.
81. On cross-examination, the Claimant alleged that he left because the director sent WhatsApp messages at anytime and he was not being paid for the trouble. However, the Claimant did not avail a single copy of the alleged WhatsApp messages to demonstrate their frequency and timing.
82. He also testified that he notified the director that he was resigning and resigned on an undisclosed date without articulating the reasons for the resignation or attributing it to anything.
83. As adverted to elsewhere in this judgment, some of the essential elements of constructive dismissal include a fundamental breach of the contract of employment by the Respondent, such as non-payment of salary as in this case, prompt resignation or within a reasonable time, absence of acquiesce, waiver or estoppel and causal link between employer's conduct and the resignation.
84. In this case, if the non-payment of salary commenced in March 2019 as the KRA Tax Deduction Card for the Claimant for 2019 shows, and he stayed on until November 2020, almost 2 years later, he either waived the fundamental term the Respondent had blatantly breached or acquiesced to the breach and the long delay creates estoppel by conduct and cannot sustain the allegation of having been constructively dismissed.
85. Significantly, since the Respondent's conduct started in March 2019 and the resignation took place in November 2020, there is no nexus between the two for constructive dismissal to be inferred or gleaned.
86. For the foregoing reasons, it is the finding of the court that the claim that the Claimant was constructively dismissed by the Respondent lacks supportive infrastructure, has not been proven and fails.

Whether the Claimant is entitled to the reliefs sought

- a. Declaration



87. Having found that the Claimant’s employment was not unfairly terminated or he was constructively dismissed by the Respondent, the declaration sought is unmerited and is declined.
- b. Unpaid salary Kshs.4,600,000/=
88. The Respondent has not denied owing the Claimant unpaid salary arrears as at the date of resignation and the sum of Kshs.1,450,000.00 was admitted vide letter dated 4<sup>th</sup> December, 2019 but remains unpaid as confirmed by RWI.
89. As the Claimant remained an employee of the Respondent for the entire duration, he is entitled to the total salary earned and payable to him less any amount paid.
90. The prayer for unpaid salary is merited.
- c. Annual leave
91. Neither the Claimant’s written witness statement nor the oral testimony adduced in court make reference to any outstanding leave days, number or when they accrued.
92. In the absence of relevant particulars, the prayer is unproven and is disallowed,
- d. House allowance
93. While the Claimant argued that he was not paid house allowance, the Respondent maintained that his salary was inclusive of house allowance.
94. The Claimant relies on the payslip on record which shows that the salary paid was styled as “basic pay” as opposed to basic salary.
95. Strangely, none of the parties filed a contract of employment.
96. Whereas the Respondent testified that the Claimant did not hand over his personal file which had a copy of the employment contract, the Claimant confirmed that he had a copy of the contract but did not file it in court and thus denied the court the opportunity to peruse and appreciate the terms of employment and in particular whether his salary was consolidated as testified by RWI.
97. As regards the payslip, the court is guided by the sentiments of the Court of Appeal in *Grain Pro Kenya Inc. Ltd V Andrew Waithaka Kiragu* (2019) eKLR as follows;
- “Counsel for the appellant invited us to look at the payslip that indicated that the sum of USD 600 was the gross salary. We hold the primary document of contract here was the letter of appointment as the payslip does not constitute a contract. It is merely issued by the employer the employee has no part in its preparation or even a place to sign it . . .”
98. The foregoing sentiments apply on all fours to the Claimant’s counsel’s submission that the payslip on record does not include a house allowance.
99. Having failed to avail the contractual document at his disposal, it is disingenuous for the Claimant to rely on the payslip.
100. In the end, the prayers for house allowance is unproven and is declined.
- e. Service pay



101. The Claimant testified that he was a member of the NSSF but added that the Respondent was not remitting NSSF dues and relies on Section 35(5) of the [Employment Act](#), 2007 to justify the claim for service pay.
102. Regrettably, the Claimant availed no evidence to prove that indeed NSSF deductions were not remitted.
103. A statement would have effortlessly demonstrated the true state of affairs.
104. Similarly, the Claimant has not demonstrated what was not remitted as employers remit the employees contribution and the employers' and only the employees' contribution is recoverable if it was deducted but not remitted.
105. In the court's view, where no salary has been paid by an employer, no refund is payable.
106. Finally, Section 35(6)(d) of the [Employment Act](#), 2007 is unambiguous that;  

“ This section shall not apply where an employee is a member of the National Social Security Fund (NSSF).”
107. This provision is couched in mandatory tone and uses the term membership. Thus, the fact of membership disqualifies an employee from service pay.
108. Flowing from the foregoing, it is clear that the prayer for service pay is unsustainable and is declined.
  - f. Damages for unfair termination
109. The provisions of the [Employment Act](#), 2007 are silent on the award of damages for unfair termination of employment but are explicit on compensation of upto a maximum of 12 months gross salary. However, having found that the Claimant was not constructively dismissed by the Respondent, the claim for damages or compensation under Section 49(1)(c) of the [Employment Act](#), 2007 is unmerited and is disallowed.
  - g. Damages for discrimination
110. Having found that the Claimant has failed to demonstrate that he was discriminated as against other employees of the Respondent, the prayer for damages is unmerited and is declined.
  - h. Certificate of service
111. Section 51(1) of the [Employment Act](#), 2007 is explicit that an employer shall issue a certificate of service to an employee upon termination of employment save for persons who have not been in employment for at least 4 consecutive weeks.
112. The Claimant is entitled to a certificate of service and the same should issue.
113. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;
  - a. All unpaid salaries.
  - b. Certificate of service to issue within 30 days.
  - c. 50% of the costs of the suit.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF MAY 2024

**DR. JACOB GAKERI**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

