



**Pathenol v Indian Ocean Forwaders and Logistics Company (K) Ltd (Cause E068 of 2023) [2023] KEELRC 3453 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3453 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E068 OF 2023  
M MBARÚ, J  
NOVEMBER 23, 2023**

**BETWEEN**

**ODERA OGUTU PATHENOL ..... CLAIMANT**

**AND**

**INDIAN OCEAN FORWADERS AND LOGISTICS COMPANY (K)  
LTD ..... RESPONDENT**

**JUDGMENT**

1. The matter proceeded ex parte. The respondent was served with summons but failed to enter appearance or file a response. There are returns to confirm service.
2. The claimant in the Memorandum of Claim aver that he was employed by the respondent on 21<sup>st</sup> March 2023 as a transport manager based at Nairobi office. He reported at work on 24 March 2023 but on 13 June 2023 he gave a one months' notice and resigned effective 4 July 2023 due to non-payment of his salaries resulting to constructive dismissal.
3. The claim is that the agreed salary was Kshs. 70,000 per month, it was not inclusive of house allowance of Kshs. 10,500 hence gross salaries ought to have been Kshs. 80,500 per month.
4. The claimant worked for 7 days in march 2023 and was paid Kshs. 18,000 and the pending balance of Kshs. 21,673.08 is unpaid. For April, May and June 2023 the due salary was not paid amounting to Kshs. 241,500. For 3 days worked in July 2023, a salary of Kshs. 9,288.45 is unpaid.  
There were NSSF non-remittances amounting to Kshs. 8,640.
5. The claimant's case is that he suffered constructive dismissal due to non-payment of his salaries and is seeking the following terminal dues;
- 6.



- a. A declaration that there was constructive dismissal;
  - b. 12-month compensation Kshs. 966,000;
  - c. One-month notice Kshs. 80,500;
  - d. Unpaid March 2023 Kshs. 3,673.08;
  - e. Unpaid salaries Kshs. 210,000;
  - f. Unpaid house allowances Kshs. 31,500;
  - g. 3 days in July 2023 Kshs. 9,288.45;
  - h. NSSF remittances Kshs. 8,640;
  - i. Certificate of service;
  - j. Cost of the suit.
16. The claimant filed his letter of appointment and his letter of resignation dated 13 June 2023.
17. The claimant testified in support of his claim and reiterated that he was forced to tender his resignation due to non-payment of his salaries from March to 3 July 2023 when he left his employment. This was constructive dismissal since he could not continue reporting to his workplace without any means of upkeep and support for self and family and the claims made should be awarded with costs.
18. Without any response, the claim is not challenged. It shall be assessed based on the law and evidence.
19. The non-payment of salary to the employee is a fundamental breach of the employment relationship as held in *Jonathan Spangler v Centre for African Family Studies (CAFS)* [2017] eKLR where the Court found that that an employee who offers their labour and does not receive a salary is reduced to inhuman conditions. And in *Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others* [2021] eKLR.
20. Without a salary for days worked, an employee is reduced to begging. This is dehumanising and servitude prohibited under *the Constitution* and the *Employment Act*, 2007. The resignation of the claimant given context of non-payment of his salaries for long periods without any response, this was intolerable and in breach of contract. Such allowed him to terminate employment through resignation, and the concept of constructive is properly applied.
21. The claimant worked for a total of 4 months. Compensation equivalent of 4 months' gross salary of Kshs. 70,000 is hereby found appropriate at Kshs. 280,000.
22. The claimant was under a written contract and salary was agreed at Kshs. 70,000 per month. This was not a minimum wage to apply a house allowance provisions. This claim is declined save Notice pay is hereby awarded at Kshs. 70,000.
23. For days worked in March 2023 and not fully paid for, the full salary due from April to June 2023 a total sum of Kshs. 214,673.08 is due.
- Remittances to NSSF are statutory and not due to the employee.
24. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- 25.



- a. A declaration that employment terminated through constructive dismissal;
- b. Compensation Kshs. 280,000;
- c. Unpaid salaries Kshs. 214,673.08;
- d. Notice pay Kshs. 70,000;
- e. Certificate of service shall issue in terms of Section 51 of the *Employment Act*, 2007.
- f. Costs of the suit.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet Muthaine

..... and .....

