



**Njogu v Deekem Petroleum and Industrial Chemicals Ltd (Cause
1786 of 2017) [2022] KEELRC 3999 (KLR) (10 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3999 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1786 OF 2017**

**J RIKA, J
JUNE 10, 2022**

BETWEEN

ALBERT NJAGI NJOGU CLAIMANT

AND

**DEEKEM PETROLEUM AND INDUSTRIAL CHEMICALS
LTD RESPONDENT**

JUDGMENT

1. The claimant filed his statement of claim on September 5, 2017.
2. He states that he was employed by the respondent on the January 1, 2014, as an accountant. His last salary was Kshs 50,000 monthly.
3. He was denied his salary for a period of 6 months, and was unable therefore, to discharge his duty. He was left with no option but to resign. He sought to have the dispute resolved through conciliation at the labour office. The respondent failed to participate in the process. The claimant holds that he was constructively dismissed by the respondent.
4. He prays for judgment against the respondent as follows: -
 - a. Salary for 6 months at Kshs 300,000.
 - b. Annual leave for the period of 2 ½ years worked at Kshs 125,000.
 - c. Service pay at 15 days' salary for 2 complete years of service at Kshs 50,000.
 - d. House allowance for the period of service at Kshs 225,000.
 - e. Declaration that the claimant was constructively and unfairly dismissed.
 - f. Declaration that the claimant is entitled to terminal dues and compensatory damages.



- g. The respondent to pay terminal dues totaling Kshs 1,300,000.
 - h. Interest from the date of judgment.
 - i. Costs.
5. There is an affidavit of service on record indicating that notice of summons and the statement of claim were served upon the respondent on March 27, 2017. The respondent did not file appearance or statement of response. Hearing proceeded on formal proof, on November 5, 2021. The claimant gave evidence and rested his case. The claim was last mentioned on March 30, 2022, when the claimant confirmed filing of his closing submissions.
6. He adopted his witness statement and documents [exhibit 1-6]. He restated his employment history with the respondent, and his terms and conditions of service, as summarized above. He was denied his salary for 6 months. The respondent was not experiencing financial distress, so as to be unable to meet its salary obligation to the claimant. He was frustrated. He resigned. NSSF contributions were not remitted. He never went on annual leave.

The Court Finds: -

7. The claim is undefended.
8. The claimant has established through oral and documentary evidence that he was employed by the respondent as an accountant, on a monthly salary of Kshs 50,000. He did not supply pay slips, but exhibited a bank statement, showing that the respondent paid to him Kshs 60,000 on December 4, 2014, which he explained was his salary. It was not clear when the salary changed to Ksh 50,000 monthly.
9. He worked for 2 ½ years from January 1, 2014 to June 30, 2016. He resigned after he was denied his salary for 6 months. He claims that his resignation amounted to constructive dismissal.
10. The court would agree with him. he was denied salary for no less than 6 months. Payment of salary is a fundamental aspect of the contract of employment, and once an employer declines payment, without an explanation, it would reasonably be concluded that such an employer is no longer willing to continue being bound by the contract. When an employer demonstrates such an unwillingness, the employee is justified to conclude that he has been constructively dismissed.
11. The prayer for compensation for constructive and unfair dismissal is allowed. The claimant worked for 2 ½ years. His prayer for 12 months' salary in compensation, considering the length of service, is an overshoot. He is granted compensation equivalent of 2 ½ months' salary at Kshs 125,000.
12. His prayer for unpaid salary of 6 months is allowed at Kshs 300,000.
13. At the labour office, the claimant lodged a complaint for 6 months' salary at Kshs 300,000, and nothing else. He did not seek leave, gratuity or house allowance. He is an accountant, and would not be expected to omit these are prayers at the labour office, by oversight. The court is not persuaded that he is owed these items. Although section 47 [3] of the *Employment Act*, allows employees to lodge claims that were not ventilated before the labour office on conciliation, new claims before the court must be founded on clear evidence, and a reasonable explanation on why such claims were omitted at conciliation, would give credence to the claims when they are presented before the court. The claimant is an accountant. He was a white collar employee, who would be expected to articulate his grievances in full, from the inception, and not struggle like a blue collar employee, to put his claims together.
14. The court declines the belated prayers for leave, gratuity and house allowance.



In Sum, It Is Ordered: -

- a. It is declared that the claimant was constructively and unfairly dismissed.
- b. The respondent shall pay to the claimant salary arrears at Kshs 300,000; and compensation for constructive and unfair dismissal, equivalent of 2 ½ months' salary at Kshs 125,000 – total Kshs 425,000.
- c. Costs to the claimant.
- d. Interest allowed at court rates from the date of judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 10TH DAY OF JUNE 2022.

JAMES RIKA

JUDGE

