



Yattani v Eco Oil Kenya Limited (Employment and Labour Relations Cause 1575 of 2017) [2022] KEELRC 13293 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13293 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1575 OF 2017**

L NDOLO, J

NOVEMBER 24, 2022

BETWEEN

ABDINOOR ROBA YATTANI CLAIMANT

AND

ECO OIL KENYA LIMITED RESPONDENT

JUDGMENT

1. Abdinoor Roba Yattani, the Claimant in this case, was an employee of the Respondent, Eco Oil Kenya Limited, having been employed on October 1, 2012.
2. The Claimant worked for the Respondent until December 22, 2016, when he resigned. He now brings the present claim seeking compensation for constructive dismissal. The claim is documented by a Memorandum of Claim dated August 2, 2017 and filed in court on August 7, 2017. The Respondent filed a Reply on September 14, 2017 to which the Claimant responded on November 6, 2017.
3. At the trial, the Claimant testified on his own behalf. The Respondent did not call any witness despite being availed adequate opportunity to do so. The Respondent also opted not to file written submissions. This judgment however takes into account the Respondent's pleadings and supporting documents on record.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent on October 1, 2012, in the position of Accountant at a starting salary of Kshs 40,000 which was later increased to Kshs 75,000 effective January 2015.
5. The Claimant further states that he was promoted to the position of General Manager effective September 2015. He adds that as at January 1, 2016, his salary was Kshs 165,400.



6. The Claimant avers that at the end of August 2016, the Respondent made a fundamental change in the contract of employment by paying the Claimant half the monthly net salary, being Kshs 60,000. The Claimant further avers that the Respondent did not pay him salary from September 2016 to January 2017.
7. The Claimant accuses the Respondent of breaching the employment contract by failing to pay him his monthly salary. The Claimant states that this breach made his employment so intolerable that he was unable to continue working. The Claimant therefore tendered his resignation in December 2016 by giving the Respondent one month's notice.
8. The Claimant claims that the Respondent's actions amount to constructive dismissal and now seeks the following remedies:
 - a. 1 month's salary in lieu of notice. Kshs 165,400
 - b. Unpaid wages for August 2016 to January 2017. 834,685
 - c. Leave pay for 4 years & 6 months. 534,369
 - d. House allowance. 24,810
 - e. Severance pay. 372,150
 - f. 12 months' salary in compensation. 1,984,800
 - g. Certificate of service
 - h. Costs plus interest

The Respondent's Case

9. In its Reply dated September 13, 2017 and filed in court on September 14, 2017, the Respondent admits having employed the Respondent as set out in the Memorandum of Claim.
10. The Respondent further admits having failed to pay the Claimant his salary from September 2016 to January 2017 but attributes this to low business season.
11. The Respondent accuses the Claimant of extending credit facilities in the sum of Kshs 379,853 without due authorisation from management. The Respondent adds that the Claimant had taken a salary advance of Kshs 18,750.
12. The Respondent claims to have addressed these issues at a meeting with the Claimant before he tendered his resignation. The Claimant is said to have agreed that the said amounts be deducted from his outstanding salaries.
13. According to the Respondent, once the deductions are made, the outstanding salary amount would be Kshs 57,862.
14. The Respondent denies having breached the employment contract. The Respondent further denies the allegation of constructive dismissal and maintains that the Claimant's resignation was voluntary.
15. The Respondent adds that the Claimant tendered his resignation after he was found culpable of misconduct, which included acts of negligence in performance of his duties as well as insubordination by undertaking transactions that were outside the scope of the Company, without authorisation.



16. The Respondent states that in mid-year 2017, it received notice that the Claimant had negligently handled petroleum products in transit, that had been imported for resale. According to the Respondent, the mishandling resulted in the product being dumped locally, leading to a claim from the Kenya Revenue Authority for unpaid taxes.
17. The Respondent further accuses the Claimant of unilaterally making decisions without consultation or approval by his superiors. The Respondent points out incidences where the Claimant purchased products that were outside the scope of the Respondent's business.
18. The Respondent avers that the Claimant was called to a meeting to show cause for his misconduct, which he failed to do and thereafter tendered his resignation.
19. The Respondent claims that the Claimant is yet to clear with the management of the Company, especially in relation to Account Receivables and Stocks.

The Claimant's Rejoinder

20. In his response to the statement of defence dated November 6, 2017 and filed in court on November 15, 2017, the Claimant denies that the Respondent's failure to pay his salary was occasioned by low business.
21. The Claimant states that the occurrence of low business was not his fault either directly or indirectly and adds that the payment of his salary was not conditional upon the level of business.
22. Regarding the allegation that he had extended unauthorised credit facilities, the Claimant states that the alleged credit facilities were errors occasioned by the Respondent's Accountant. The Claimant avers that it was not his responsibility to advance credit facilities or to reconcile accounts.
23. The Claimant asserts that the breach by the Respondent was so fundamental that it frustrated the Claimant, forcing him to resign from employment. He adds that the resignation was not voluntary.
24. In denying the accusations of poor performance the Claimant states as follows:
 - a. That he was never negligent in the performance of his duties while working for the Respondent;
 - b. That he was never served with any notice or warning regarding non- performance, under performance, poor performance, negligence or insubordination;
 - c. That he was never served with any notice to show cause for the alleged, negligence, insubordination or any wrongdoing;
 - d. That he was never called for any disciplinary hearing;
 - e. That he was an obedient and diligent employee who discharged his duties with utmost regard to his superiors, the terms of his employment contract and the law.
25. The Claimant maintains that he was constructively dismissed and states that failure to pay or withhold his salary was a fundamental breach of his employment contract.

Findings and Determination

26. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of constructive dismissal;



- b. Whether the Claimant is entitled to the remedies sought.

Constructive Dismissal?

27. On December 22, 2016, the Claimant wrote to the Respondent as follows:

' The Managing Director,
Eco Oil Kenya Limited,
PO Box 27580-00506
Nairobi.

Dear Ahmed Yasin,

RE: RESIGNATION FROM ECO OIL KENYA LIMITED

Please accept this letter as my formal resignation from my role as Head of Supply & Planning. My last day with Eco Oil Kenya Limited will be January 10, 2017.

In order to ease the transition after my departure, I am happy to hand over all that was under my control during my final week on the job. I intend to leave thorough instructions and up-to-date records for my replacement.

I would like to take this opportunity to thank you for the knowledge and experience I have gained by working here. I am very grateful for the time I have spent on your team and the professional relationships I've built. It's been a pleasure working for you, and I hope our paths will cross again in the future.

Sincerely,

(Signed)

Abdinoor Roba Yattani.'

28. The Claimant's case is that his resignation was not voluntary and thus accuses the Respondent of constructive dismissal. *Black's Law Dictionary (Tenth Edition)* defines constructive dismissal or discharge as:

' An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.'

29. In the persuasive decision in *Western Excavating ECC Ltd v Sharp (1978) 2 WLR 344*, Lord Denning rendered himself on the subject of constructive dismissal in the following terms:

' 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 in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say 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. Moreover, he must



make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.'

30. Closer home, in the binding decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR* the Court of Appeal stated the following:

' The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.'

31. The Court of Appeal went further to set out the following as guiding principles in determining the issue of constructive dismissal:

- a. What are the fundamental or essential terms of the contract of employment?
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
- c. The conduct of the employer must be a fundamental or 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.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must- within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

32. In the present case, there is evidence that the Respondent had failed to pay the Claimant's salary over a significant period of time. This could well have been a fundamental breach or repudiation of the employment contract but a key question to ask is whether there was a causal link between the Respondent's failure and the Claimant's resignation so as to create a situation of constructive dismissal.

33. To answer this question, one must interrogate the Claimant's resignation letter vis-a- vis the obtaining circumstances. I have read the resignation letter carefully and did not find even a mention of the outstanding salaries as a reason for the Claimant's resignation. It would therefore not be far-fetched



to conclude that the Claimant's resignation may have been motivated by other reasons other than the withheld salaries.

34. On this score, I find and hold that the Claimant failed to establish a causal link between his resignation and the Respondent's failure to pay his salary. The claim for constructive dismissal was thus not proved and is disallowed.
35. The corollary finding is that the Claimant's resignation was voluntary and he is therefore not entitled to notice pay.
36. The claims for leave pay and house allowance were not proved and are dismissed. Further, no basis was laid for the claim for severance pay which also fails and is dismissed.

Final Orders

37. In the end, the only claim that succeeds is the one for withheld salary which was confirmed as Kshs 600,000 in a partial decree issued on June 8, 2018.
38. I therefore enter judgment in favour of the Claimant in the sum of Kshs 600,000 which figure shall attract interest at court rates from the date of partial decree being, June 8, 2018 until payment in full.
39. The Claimant is also entitled to a certificate of service plus costs of the case.
40. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022

LINNET NDOLO

JUDGE

Appearance:

Mr. Adano for the Claimant

Mr. Hassan for the Respondent

