



**Momanyi v Spedag Interfreight Limited (Cause 438 of 2019)
[2024] KEELRC 1121 (KLR) (16 May 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 438 OF 2019
NZIOKI WA MAKAU, J
MAY 16, 2024**

BETWEEN

SAMUEL GISAIRO MOMANYI CLAIMANT

AND

SPEDAG INTERFREIGHT LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent Company for wrongful, unfair and unlawful termination of his employment. Through the Statement of Claim and in his Witness Statement, both dated 28th June 2019, the Claimant averred that he worked for the Respondent's Group of Companies known as InterOcean (EA) Ltd, Interfreight East Africa Ltd and later moved to the Respondent Company Spedag Interfreight Kenya Limited, the company that he has sued in the instant suit. The Claimant averred that he was initially employed on 1st April 2001 as an Assistant Marketing Manager in the Respondent's Group of Companies, rose through the ranks due to his good performance and that his salary was subsequently revised upwards vide a letter dated 1st August 2011. The Claimant asserted that he was duly paid the entitlements due to him in regard to the time he worked for the said Group of Companies. He further averred that he had briefly left the Respondent's employment with effect from 28th February 2008 but was later re-engaged as a Branch Manager in a new Contract signed on 22nd December 2011, on a gross salary of Kshs. 202,500/-. That in addition, he entered into another agreement that indicated he would be paid a total annual salary of USD 54,000, a portion of which would be paid in Kenya Shillings as per his Contract dated 22nd December 2011 while the balance would be paid in US Dollars into his USD account. It was the Claimant's averment that he received promotions during his employment with the Respondent and his salary was increased severally as illustrated in para 6 of the Statement of Claim.
2. The Claimant's case was that the Respondent coerced him to sign what it termed to be a mutual separation agreement dated 14th December 2018, in contravention of the provisions of his Contracts



and the law with regard to redundancy procedures. That consequently, his employment contract was wrongfully, unfairly and un-procedurally terminated on grounds of redundancy with effect from 1st January 2019. He averred that he had been assured of a place in the restructured organisation in August 2017 only for the Respondent to push him out of the Company in December 2018, allegedly on the said restructuring. That he was neither advised nor heard on the so-called mutual separation based on redundancy and someone else was appointed in acting capacity to carry out his duties. The Claimant further averred that termination of his employment was driven by subtle discriminatory practices at the Respondent's place of work, based on his race and place of origin. That certain institutionalised biasness in the Organization favoured expatriate persons of Asian origin over local Kenyans, which practices weighed in heavily against his chances of further promotion and he therefore stagnated in his position. The Claimant argued that the said discriminatory treatment was against his rights under the Constitution of Kenya, International Law and Statute and that his services were eventually terminated without sufficient or legal grounds. That in essence, he was shoved out of employment for reasons other than redundancy, that is, based on quid pro quo between senior managers of the Respondent of Asian Origin and his fate had thus been predetermined.

3. It was the Claimant's position that his attempts to settle the matter amicably through dialogue and correspondence from his advocates did not receive a positive response. That upon termination of his employment and after having cleared with the Company, he was issued an erroneous certificate of service. The Claimant averred that the Respondent also made grave underpayments upon the unfair termination of his employment; firstly, based on the Respondent's non-recognition of the income he earned in the basic agreement as part of his terminal benefits and secondly, on its refusal to acknowledge the correct number of years he had served the Respondent Company. He contended that the Respondent's refusal to pay him all his terminal benefits caused him to suffer loss for which he claims damages made up of underpayment of severance pay and 12 months' salary for unfair termination of employment, on both main salary and basic agreement. The Claimant therefore prays for judgment against the Respondent for the following Orders:
 - a. A declaration that, the Respondent's conduct amounts to and is discriminatory against the Claimant under Article 27 of the Constitution.
 - b. A declaration that, the Respondent's conduct, acts and or omissions are unlawful, illegal and or unfair and the same violates Articles 28, 29, 40 and 41 of the Constitution.
 - c. A declaration that the Claimant was forcefully and unfairly terminated on grounds of redundancy.
 - d. An order that the Claimant is entitled to compensation by way of damages for violations under Articles 23, 27(1), (2) and (4), 28, 29(f), 31(c) and (d), 35(1)(a) and (b), 41(1) and (2)(a), 43(1) (e), 47(1), 48, and 50 of the Constitution taking into account damages for loss of employment, career stagnation, injury to reputation and loss of future income.
 - e. That the Claimant herein be paid by the Respondent the sums as tabulated in paragraph B.9 of the Statement of Claim.
 - f. That the costs of this suit be met by the Respondent.
 - g. That the Respondent herein pays interest on items d), e) and f) at Court rates from the date of filing suit till payment in full.
 - h. Any other further and better relief that this Honourable Court may deem just and fit to grant.



4. The Claimant's evidence in Court was that if he did not sign the Mutual Separation Agreement, the Respondent would still have declared him redundant and that there was no notice of the impending redundancy to the labour office or even to the employees. He testified that he vacated the office on 14th December 2018 and handed over the car keys and phone on 31st December 2018.

Respondent's Case

5. The Respondent filed a Response to Memorandum of Claim dated 30th September 2019 averring that it had employed the Claimant on 22nd December 2011 under the terms of the Letter of Appointment made on the same date. It stated that it could not respond to the averments concerning the Claimant and a separate entity named Spedag Interfreight AG, of Birsfelderstrasse 44, 4132 Muttenz (SPIF). The Respondent further averred that the mutual separation agreement referred to by the Claimant was entered into by him in his own free will and fully executed and implemented by the parties herein without any coercion as alleged. It denied the allegations on constitutional violations as itemised and/or their relevance to the Claimant's Claim. Without prejudice to the foregoing, the Respondent averred that the Claimant's employment with it was lawfully terminated upon terms mutually agreed upon and that the Claimant was paid all his dues. That the Claimant having unconditionally accepted payment pursuant to the terms of the agreements reached and mutual promises entered between himself and the Respondent, he cannot claim that the same was wrongful or otherwise and claim any compensation thereof. It further averred that it at no time discriminated upon the Claimant as averred and asserted that it indeed responded to the Claimant's correspondences vide its letter dated 13th June 2019. The Respondent prays that the Claim herein be dismissed with costs.
6. The Respondent also filed a Witness Statement made on 2nd November 2023 by Ms. Caroline Kyomuhendo, who stated that the Claimant worked until 14th December 2018 when the parties herein mutually agreed to part ways. That the Claimant and Respondent mutually agreed to part ways and for the Claimant to be effectively relieved of his duties on account of the restructuring of the Respondent's business, which consequently rendered him redundant. That at no point in time did the Claimant raise any objection to the intended termination and the manner in which it was to be conducted and that he confirmed in the Mutual Separation Agreement to having had the opportunity to consult his legal advisors and to being aware of his legal rights. Ms. Kyomuhendo asserted that upon execution of the said agreement, the Claimant was paid his final dues at Kshs. 3,043,040/- and USD. 17,504, which payment he accepted as full and final settlement. She further stated that the Respondent stands against any form of discrimination and the allegations on the same are thus unfounded and far-fetched. That the Respondent's case is that the Claimant had deliberately misled this Honourable Court by claiming that his constitutional rights have been violated and that he was discriminated against.
7. The evidence of Ms. Kyomuhendo in Court was that clause 5.2 of the unsigned version of the Claimant's Agreement (page 18 of the Claimant's Bundle) came after negotiations and indicates that notice was changed and parties agreed that they would notify the labour officer for redundancies but where there is mutual agreement, they would not notify the labour officer.
8. Claimant's Submissions
The Claimant submitted that the following are the issues for determination by this Court:
 - a. Whether there existed vitiating circumstances to the mutual separation agreement amounting to unfair termination
 - b. Whether the Respondent violated the Claimant's Constitutional rights
 - c. Whether the Respondent discriminated against the Claimant



- d. What remedies are available to the Claimant?
9. It was the Claimant's submission that the *Employment Act* provides for unfair termination under section 45 and that section 43 provides for the statutory burden of proof in termination of employment cases. That the redundancy procedures under section 40(1) of the Act are couched in mandatory terms. He cited the case of Esther Wamaitha *Waweru v MUA Insurance (Kenya) Limited (Cause 397 of 2019)* in which the Court held that the redundancy was not done in accordance with section 40 of the *Employment Act* and was hence unlawful. The Claimant argued that the Mutual Separation Agreement which sought to terminate his employment on account of redundancy was subject to the provisions of section 40 of the Act by virtue of clause 5.5 of the signed agreement which provides that, "This Agreement shall be read and construed according to the laws of the Republic of Kenya". He submitted that the Respondent's failure to inform him of the reasons for declaring him redundant and the criteria used to single him out was contrary to the provisions of section 40(1)(c), which conduct amounts to undue influence and is a vitiating factor to the mutual agreement. That it is trite law that a contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. Furthermore, for it to constitute undue influence, there must be a relationship between the two parties for one to use their dominance or superiority to persuade the other. He further submitted that there existed a fiduciary relationship between him and the Respondent and that the Respondent's failure to inform him of the reasons for declaring him redundant and the criteria to be used was not in his best interest and amounted to breach of the fiduciary duty on the Respondent's part and was thus undue influence. The Claimant submitted that the Respondent's conduct was in further breach of section 45(4)(b) by failing to act in accordance with justice and equity in the circumstances. He noted that the Respondent did not tender any evidence to prove that they complied with the mandatory provisions of section 78 of the Act on notification of termination of employment and of each layoff in writing to the nearest employment service office within two weeks of the termination or lay-off.
10. The Claimant submitted that having established he executed the Mutual Separation Agreement under undue influence, the Respondent by extension breached his Constitutional rights to fair administrative action and to fair labour practices under Articles 47 and 41 respectively. Moreover, that the Respondent's failure to accord him an opportunity to be heard and make his representations on the alleged restructuring offends the provisions of Article 48 of *the Constitution* on fair hearing. The Claimant urged this Court to consequently find that the Respondent breached his constitutional rights. The Claimant further submitted that section 49 of the *Employment Act* provides for remedies for wrongful dismissal and unfair termination and that this Court ought to award the Claimant the maximum compensation because of the undue influence meted upon him, to serve as a deterrence to other employers against such conduct. He urged the Court to award him damages for constitutional breaches as prayed in the suit.
11. It was further submitted by the Claimant that section 5(2) and (3) of the *Employment Act* provides that an employer shall not discriminate against an employee. That the Respondent discriminated against him by offering him a mutual settlement agreement on grounds of restructuring without giving him and the nearest employment office, notice of the intended redundancy with the criteria to be used in selecting the Claimant for redundancy unlike other employees. He urged the Court to also find that the Respondent discriminated against him and to award him damages for discrimination, proposed at Kshs. 7,500,000/- following a similar award for damages for discrimination by the Court of Appeal in Civil Appeal 42 of 2015, Ol Pejeta Ranching Limited v David Wanjau Muhoro.



Respondent's Submissions

12. The Respondent submitted that the function of the Court is to enforce what is agreed between the parties and not what the Court thinks ought to have been fairly agreed between the parties as per *Fina Bank Limited v Spares and Industries Limited* [2002] 1 EA 52 and upheld by Mbaru J. in *Michael Opondo Were v Maths Trading Company Limited* [2016] eKLR. It urged this Court to similarly uphold the above principle and refuse the invitation by the Claimant to re-write the Contract between the parties by disregarding the terms thereof and to enforce the terms of the Mutual Separation Agreement. The Respondent noted that the Claimant was not candid and deliberately misled this Court by producing a draft copy of the Mutual Separation Agreement that was unsigned whereas the copy produced by the Respondent is the signed version. It asked the Court to compare the terms in both the unsigned and signed versions of the mutual agreements in court and to question why the Claimant accepted the payments and benefits and took almost seven (7) months thereafter to bring the instant Claim. It was the Respondent's submission that since clause 2.1 of the Mutual Separation Agreement accepted that the payment and benefits given were in full and final settlement of any or all claims the Claimant may have had arising out of his employment and that the consideration was fair, just and reasonable, it would be grossly unfair to hold otherwise and penalize the Respondent.
13. The Respondent further submitted that contrary to the Claimant's allegations of discrimination against it, the evidence of the Respondent's witness showed that he had been treated respectfully, with utmost dignity and above all, in a fair and just manner. That as held in *Kennedy Omondi Omolo v Kenya School of Monetary Studies* [2023] KEELRC 2500 [KLR], he who alleges discrimination must prove in specific terms that they were treated differently on grounds such as race, health status, ethnic or social origin, belief or culture as set out in Article 27 of *the Constitution*. The Respondent submitted that the Claimant herein has failed to establish or substantiate the claim for discrimination on account of the aforementioned ingredients and the Respondent could not thus be expected to rebut any such claim. It also noted that the Claimant had failed to make out a basis to find that the listed Articles of *the Constitution* were infringed.
14. It was the Respondent's submission that the Respondent's witness rebutted the Claimant's assertion of unfair termination in stating that the restructure process was relooked at with the need for efficiency and that only the Claimant was employed uniquely by both the Respondent and Spedag Interfreight AG. Further, that given there was a discussion and an agreement to mutually separate, the question of failing to give the Redundancy Notice to the Labour Office did not arise. The Respondent argued that the case of *Esther Wamaitha Waweru* (supra) cited in aid by the Claimant can be distinguished and is inapplicable in the instant case because the Claimant herein was the only employee in the unique employment position whereas in the said case, there were several other employees in her grade and not only did the Respondent fail to demonstrate the criteria applied to her but the last in first out principle was also breached. Secondly, there was no mutual separation agreement in the *Esther Wamaitha Waweru* case signifying acceptance of the decision on redundancy. In the upshot, the Respondent submitted that the Claimant had failed to prove his claim to the requisite standard and the same ought to be dismissed with costs, and a finding that the Claimant was treated with utmost dignity, respect and in a fair and just manner and that even the terminal amounts paid to him by far exceeded what he would have otherwise been entitled to in law.
15. Before me is a litigant who has helped shape the course of labour practice. In this case he seeks recompense for alleged discrimination as well as a slew of other relief related to his separation from the Respondent. From all accounts the Claimant served the Respondent with distinction on account of his expertise in the field. He was able to secure his position on account of his relationship with



the management of the company. He later did sign a mutual separation agreement which he now asserts was not voluntary. The mutual separation agreement is dated 14th December 2018 and through it the Claimant accepted a package from the Respondent. There is a copy that is unsigned in the Claimant's bundle. The copy presented by the Claimant shows that there was negotiation as some terms in the package were made more attractive in the copy that was finally executed. For instance, the notice pay was enhanced from Kshs. 457,600/- to Kshs. 1,372,800/-. That proves what the Respondent maintained in the proceedings before me. The Respondent insists at some point in the process, the Claimant negotiated for better terms. This therefore puts paid his assertions that he was not aware of the terms or the provisions of the separation agreement before he was asked to sign it. He alleged it was an ambush and targeted. Despite these assertions, the Claimant did not demonstrate that the position he held was retained. It is clear the position ceased to exist as do positions that are declared redundant. The Claimant therefore was not correct in his assertion that there was malice in his termination. He was allowed to take possession of the vehicle he sought from the Respondent and the Respondent seemingly accommodated his requests because of the high regard it held him in. He did not demonstrate the discrimination that he allegedly faced. He did have an exception as one of the few individuals of African extraction in the company and the actions of the Respondent, unless demonstrated to have been malicious, cannot be said to have been discriminatory as his elevated position in the company could also have been attacked on grounds of discrimination as he was the only person supervising the region unlike the other managers who had smaller fiefdoms. The Claimant did not secure on a balance of probabilities the findings he craved on discrimination or the wanton flouting of the Constitutional provisions cited. As this was not demonstrated the Court has no option but to return the claim is unproved. What of costs? Granted the Claimant was a pioneer in articulating labour issues under the new Constitution by testing its application he will get a pass. There is no order as to costs. Suit dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2024.

NZIOKI WA MAKAU

JUDGE

