



Gitaari v Kenya Hospital Association t/a The Nairobi Hospital (Cause E898 of 2021) [2024] KEELRC 1846 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1846 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E898 OF 2021
NJ ABUODHA, J
JULY 17, 2024**

BETWEEN

WILFRED JACOB GITAARI CLAIMANT

AND

**KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI
HOSPITAL RESPONDENT**

JUDGMENT

1. The Claimant filed his claim on 28th October, 2021 and pleaded inter alia as follows: -
 - a. The Claimant started working for the Respondent in the role of Procurement and Supplies Manager on the 15th July, 2015 in the Finance Division and reporting to the Finance Director and later promoted to the position of Head, Procurement & Stores.
 - b. The Claimant averred that on 10th March 2017, the Claimant was transferred from Procurement & Stores to support services Division as the Head of Support Services in an acting capacity and was given a 10% acting allowance and was verbally advised by the Chief Executive Officer at that time that he will consider and confirm the Claimant's appointment and the Claimant continued to work in the acting role for 3 years and had not been confirmed by the time he was unfairly terminated on 23rd March, 2020.
 - c. The Claimant averred that he was kept acting in the position of Head of Support Services for more than three years without confirmation contrary to the Respondent's Human Resource Manual and the Policy on allowances and together with acting allowance, His Gross Salary in the position at the time of termination would have been Kshs. 770.616/= which was way below the salary that he would have been paid had he been confirmed.
 - d. The Claimant averred that on Thursday 30th January 2020 he was served with a suspension letter which did not disclose any misconduct on the part of the Claimant but indicated that



he was subsequently to be issued with a show cause letter detailing the alleged misconduct and thereafter invited for a disciplinary hearing meeting.

- e. The Claimant averred that on Friday 31st January 2020 he was served with a show cause letter alleging that a forensic audit that was carried out showed that he was part of the tender committee that allegedly was involved in bid rigging .He was required to respond to the letter within 48hours to which he responded on 3rd February 2020 and informed the Respondent and his supervisor that to the best of his knowledge the decision of the Main Tender Committee where he was Secretary did not amount to bid rigging which only upheld the recommendations from the Technical Evaluation Committee and the Clinical Head of Pediatric Department.
 - f. The Claimant further averred that though the suspension letter indicated that his terms and conditions of service would continue to apply during the suspension period, the acting allowance was removed without any communication with effect from February, 2020 and his gross salary reduced from Kshs 770,616 in January 2020 to Kshs 700,560 basic pay only with effect from February 2020 and thereafter.
 - g. The Claimant averred that while waiting for the suspension to be lifted and to be recalled to work, he was called into the Respondent's office and coerced into signing a 'mutual separation agreement'.
 - h. The Claimant further averred that he pleaded to be offered a chance to be heard and to present his defense or at least be presented with the forensic audit that formed the basis of his suspension specifically because the auditor had not sought clarification or talked to him on the matter which pleas were met by the CEO's response that the decision had already been taken by the new board of Trustees and he would either sign the mutual separation agreement' or be summarily dismissed.
 - i. The Claimant averred that having no other option and the uncertainties brought about by the COVID-19 pandemic, he signed the 'mutual separation agreement' on 23rd March 2020.
 - j. The Claimant averred that he was neither taken through any disciplinary hearing nor explained to or presented with formal charges or given any feedback to his response to the show cause letter.
 - k. The Claimant averred that at the time of unfair termination, he was servicing a loan with the NCBA bank which was insured against retrenchment by Britam Insurance but the insurer refused to honor and pay the outstanding premiums on the strength of the mutual separation agreement' arguing that it was apparent the correct retrenchment procedure was not followed which forced him to service the loan despite being jobless.
 - l. The Claimant averred that the action to arbitrarily terminate him from employment without a valid reason amounted to unfair termination.
2. The Claimant prayed for the following against the Respondent;
- a. A declaration that the termination of the Claimant was unfair termination therefore illegal and unlawful.
 - b. A declaration that the Claimant's right to fair labour practices has been breached.
 - c. A declaration that the Claimant's right to fair administrative action has been breached.



- d. A declaration that the Claimant was discriminated against by the Respondent on the basis of age by keeping him in an acting position for 3 years.
- e. A declaration that arising from the discrimination, the Claimant lost equitable salary and retirement benefits that would have accrued from his work in the higher responsibility role as a substantive Head of Support Services had he been confirmed.
- f. A declaration that the Claimant's right to fair hearing has been breached.
- g. A declaration that the unilateral withdrawal of the Claimant's acting allowance without communication is irregular, illegal and a breach of the Claimant's employment terms and the law.
- h. A declaration that the so-called mutual separation agreement dated 23rd March 2020 amounted to unfair termination and/or wrongful dismissal.
- i. A declaration that to the extent that the so – called mutual separation agreement sought to oust reliefs accruing to the Claimant for wrongful termination guaranteed by statute, the same is invalid and/or unenforceable.
- j. A declaration that the Claimant had a legitimate expectation to serve the Respondent till retirement age at 60 years and hence is entitled to compensation and damages assessed on the basis of his monthly gross pay as at 23rd March 2020 till his expected retirement age achievement and eventual normal separation at the end of December, 2021 tabulated to the sum of Kshs. $770,616 * 21 =$ Kshs. 16,182,936/= before factoring annual increments, inflation and interest.
- k. Damages for unfair termination equivalent to 12 months' salary based on the gross salary earned at the time of wrongful termination on 23rd March 2020 totaling to Kshs. $770,616 * 12 =$ Kshs. 9,247,392 /=
- l. Accrued Annual Christmas Bonus for the year ending 31st December 2020 and 31st December 2021 being equivalent to one months' pay for each year Kshs. $2 * 770,616 =$ Kshs. 1,541,232/=
- m. 3 months' Salary in lieu of notice totaling to Kshs. 2,311,848/= $(770,616 * 3)$
- n. Kshs. 641,956.75/= being refund of the Principal and Interest levied by NCBA Bank on a loan taken by the Claimant and guaranteed by the Claimant's employment, whose insurance claim was declined by the insurer following the Respondents mismanagement of the separation process Plus interest.
- o. Kshs. 3,853,080/= $((770,616 * 5)$ being severance pay 1 month pay for each year worked for the Respondent.
- p. Kshs. 1,541,232 /= $(2 * 770,616 =)$ unpaid annual leave for 2020 and 2021. (Equivalent to two month's salary)
- q. 10% Unpaid allowance for acting as the Head Support services from 1st February 2020 – 23rd March 2020 $(70,056 * 2)$ Kshs. 140,112/=
- r. Compensation for violation of the Claimant's right to freedom from discrimination, right to fair labour practices, fair hearing and fair administrative action.
- s. Costs of the suit to be borne by the Respondent
- t. Interests in j - r above at Court Rates from the date of filing the suit until payment in full.



- u. Any other Order as this Honorable Court may deem fit
3. The Respondent filed its Statement of Response and averred inter alia as follows;
- i. That the Claimant was not verbally advised by the Hospital that it will confirm him to the position noting that the letter dated 10th March, 2017 was clear on the terms of appointment.
 - ii. The Respondent further averred that acting appointing to a position does not guarantee appointment to that position.
 - iii. The Respondent averred that the Claimant was called for a meeting with the then Chief Executive Officer (CEO) on 19th March, 2020 and the two discussed and agreed on mutual separation and the terms thereof which were later incorporated and reduced into a document headed "Mutual Separation Agreement for execution .
 - iv. The Respondent averred that the Claimant proposed an improved exit package/or terms vide his email dated 20th March 2020 and sought for a benefit of one and half months for every year worked which was later agreed to 20 days in the mutual separation agreement.
 - v. The Respondent further averred that there was no duress or coercion by the Hospital to have the Claimant sign the agreement.
 - vi. The Respondent averred that having voluntarily executed the Mutual Separation Agreement, the Claimant is bound by its contents therein.
 - vii. The Respondent averred that the Claimant is legally obligated to uphold the terms of the Mutual Separation Agreement, including releasing any claims against the Respondent as the Respondent provided additional compensation to the Claimant in exchange for this agreement, and it would be unfair for the Claimant to try to go back on it while still benefiting from the agreement.
 - viii. The Respondent averred that the Claimant and the Respondent entered into a contract of employment on 15th July 2015 and the same parties could mutually agree to terminate the relationship on the basis of mutual undertakings between them.
 - ix. The Respondent further averred that that there is nothing illegal, unfair, unlawful or uncontractual with an employer and employee entering into a mutual separation agreement effectively ending their relationship and the Claimant cannot be allowed to accept the money offered by mutual separation agreement yet refuse to be bound by it.
 - x. The Respondent averred that the Claimant was not retrenched or declared redundant in terms of Section 40 of the [Employment Act](#), 2007.
 - xi. The Respondent averred that execution of the mutual separation agreement between the parties had the effect of automatically terminating the then ongoing disciplinary process commenced by the Respondent against the Claimant on the basis of serious allegations amounting to gross misconduct contained in the Notice to Show Cause.
 - xii. The Respondent averred that the Court has no jurisdiction to grant any reliefs to the Claimant as he is precluded from turning back after enjoying the fruits of the Mutual Separation Agreement which he signed on 23rd March 2020.
4. The Claimant filed its reply to the Statement of Response and averred inter alia as follows:-



- i. The Claimant averred that the Mutual Separation Agreement's terms were not discussed, negotiated or agreed at the meeting. The meeting was intended to communicate the termination as it was issued to the Claimant at the onset of the meeting and the concerns of the Claimant were not addressed.
- ii. The Claimant averred that having responded to the Show Cause letter he required a chance to defend himself but was asked to sign the Mutual Separation Agreement or be sent home empty handed in the middle of the pandemic.
- iii. The Claimant averred that there were no discussions and consultations at the meeting but the CEO indicated to the Claimant that the decision had already been made.
- iv. The Claimant averred that the Mutual Separation Agreement is illegal and unconstitutional as it violates the Claimants right to fair labour practices among others. It was also intended to curtail the Claimant's right to access justice.

Evidence

5. The Claimant case was heard on 14th November, 2022 and the Claimant testified and called one other witnesses. The Claimant (CW1) adopted his witness statement together with the pleadings filed in court dated 28th October, 2021 and testified that the termination affected him especially due to financial constraints as he had three children in the University as well as medical challenges to his family. CW 1 further stated that he had a loan secured through employment and the insurance refused to pay.
6. In Cross-examination CW1 confirmed that he did not have a termination letter but a mutual separation agreement. He stated that on 18th March 2020 he was invited to a meeting with the CEO and Human Resource Director where there were no discussions save the Mutual Separation Agreement (MSA) which was issued as a final document.
7. CW1 confirmed that he was told to sign the agreement and return it within 24hours and that his services were not required by the new board and failure to sign the MSA he service could be summarily terminated. The claimant further stated that he wrote to the Respondent seeking for improvement of the terms of mutual separation agreement by replacing 15 days for each year to 1 & 1/2 months and that did not mean he was content with the MSA as he had issues with other clauses.
8. CW1 confirmed that out of desperation he signed the MSA but did not seek legal advice because he was under a lot of distress at the time and that his final dues were as per the acting position. He further stated that he wrote to the Respondent an email and did not raise any case of intimidation.
9. It was his contention that he worked in the acting role for many years and should not have been retained to his substantive position which had then been filled.
10. In re-examination CW1 clarified that on 23rd March, 2020 he raised issues of number of days and the findings of the investigations on disciplinary committee hearing and this was not addressed. That save for the show cause letter there were no details given. He clarified that the MSA was initiated by the Respondent when he went to the meeting on 19th March 2020 with CEO and HR where he was told he had been called to discuss the agreement. The HR said that the Respondent had a new board and did not require his services.
11. CW1 clarified that he was in acting role from March 2017 to March 2020 yet the Respondent policy was that he would be on acting capacity for 6 months and beyond that the issue would be resolved



- where he would be confirmed or revert to his substantive role. That the CEO promised to confirm him through a letter which was never issued. He further clarified that his performance was very good.
12. The Claimant's witness CW2, adopted her witness statement dated 6th February 2022 and testified that she had also sued the Respondent and that she was in acting positions especially in the Finance division on dates she could not recall she further stated that the Claimant was acting as head of support services and his substantive role was head of procurement services.
 13. The Respondent's case was on the other hand heard on 24th January, 2024 and they called one witness (RW1) who adopted her statement as well as the Respondent's documents filed in court as her evidence in chief.
 14. In cross-examination RW1 confirmed that she did not know the Claimant in person but knew that the Claimant at some point was appointed as acting Head of support services. That she was aware that acting allowance was paid to those in acting position and the Claimant was paid 10% of his basic pay as allowance for the acting role.
 15. RW1 confirmed that the Claimant was sent on suspension hence could not be paid acting allowance. That clause 5 provided for full pay which is basic pay while on suspension but not allowance. She confirmed that clause 7.1.11 did not provided for acting in excess of 6 months and that HR was to advise upon expiry of 6 months. It was evidence that the Claimant was asked to continue acting until further notice and that the claimant acted for approximately 3 years and was not confirmed to the substantive position.
 16. RW1 further stated that the Claimant was suspended and issued with a show cause letter and that he responded to the show cause letter. She further stated that the Respondent and the Claimant entered into a mutual separation agreement. That under clause 7 on disciplinary and termination process Mutual agreement was one form of separation. RW1 confirmed that she was not part of the meeting but from the record it shows that the separation was mutual.
 17. RW1 testified that an email was sent to the Claimant calling for a meeting and the Claimant given 48 hours to go through the MSA and raise any issue of concern which the Claimant did and he was not coerced. RW1 confirmed that in 2020 there was COVID -19 pandemic globally and jobs were affected. She further confirmed that the letter to NCBA Bank from the respondent informed the bank that the Claimant had been suspended on account of retrenchment.

Claimants' Submissions

18. The Claimant filed written submissions dated 9th February, 2024. On the issue of whether the Claimant was unfairly terminated, the Claimant submitted that RW1 conceded that the Respondent initiated the separation by preparing the mutual separation agreement without prior discussion with the Claimant or reference to the Claimant. It was his submissions that by issuing a show cause letter to him the Respondent initiated a formal disciplinary process which they abandoned soon after receiving a comprehensive response from him. It was the Claimant's submission that RW1 in her testimony did not demonstrate why and how they transitioned from and terminated an ongoing disciplinary process in favor of mutual separation agreement.
19. It was the Claimant's submission that the evidence given by RW1 was pure hearsay as RW1 was not in attendance of the meeting held between the Claimant and Respondent's CEO, and the minutes of that meeting were not tabled in court. The Claimant further submitted that the Mutual Separation Agreement was premeditated and designed to be used to terminate the Claimant's employment just at



- the right time when the claimant was most vulnerable for coercion and when they realized that there was no misconduct on the Claimant after reading his response to the show cause letter.
20. It was the Claimant's submission that the procedure for termination of an employee on the grounds of misconduct was governed by section 41 of the *Employment Act* and further that the respondent had in force a comprehensive Disciplinary Policy that formed part of the Human Resource Policy Manual that clearly provided a procedure for disciplinary termination.
 21. The Claimant submitted that he was issued with a suspension letter dated 30th January 2020 and subsequently a show cause letter dated 31st January 2020. The letter indicated that he had participated in an alleged bid fixing in respect of a tender that had been awarded by the Respondent. He thereafter issued a very detailed response dated 2nd February 2020 where he explained how the various Respondent's Procurement committees and Clinical Heads of Departments decided to recommend Philips EA Ltd for the tender.
 22. The Claimant submitted that RW1 agreed to the fact that the Claimant was never heard after the allegations were levied against him and no panel was convened to hear the matter on merit. The Claimant further submitted that the Respondent's disciplinary policy required that upon receipt of the Claimant's response to the show cause letter the Line Manager was to "give feedback to the employee in writing as to whether their explanation was satisfactory or not" which was not adhered to.
 23. The Claimant submitted that the Respondent failed to furnish a valid and fair reason for termination, failed to prove the grounds that were levied against the Claimant and finally failed in their obligation to conduct a fair trial to allow the Claimant to defend himself against the allegations but instead unilaterally prepared and coerced the Claimant to sign the mutual separation agreement.
 24. The Claimant relied on the cases of *Alice Wanjiku Mbugua v Path Care Kenya Limited* [2018] eKLR and *Simon Muguku Gichigi v Taifa Sacco Society Limited* [2012] eKLR on unfairness of termination under section 45 of the *Employment Act* on fair and valid reasons and an opportunity to be heard.
 25. On the issue of whether the Mutual Separation Agreement was lawful and therefore legally binding, the Claimant submitted that the Mutual Separation Agreement was unlawful and therefore not legally binding. The Claimant submitted that the Respondent had already decided to terminate the Claimant even before the Claimant came for the meeting with the Chief Executive Officer and in the said meeting between the parties, the Claimant was put between a rock and a hard place because what the Respondent was basically telling him was that he should quickly make a decision on the agreement that was being tabled before him or else he would leave his employment with nothing.
 26. It was the Claimant's submission that the Respondent could not claim that the separation was mutual yet only one party made the decision to separate and the other was merely informed of the same and the entire process was heavily one-sided as the employer had a higher bargaining power and decided to take advantage of the weaker Claimant who in this case had everything to lose.
 27. The Claimant submitted that he had an outstanding bank loan with CBA Bank and other family financial constraints and under these difficult circumstances the Claimant was confronted with the question of whether to sign the separation agreement and leave with something, or decline to sign and leave with nothing.
 28. The Claimant further submitted that undue influence and duress played a huge role in coercing the Claimant's hand into executing the mutual agreement that he did not want to sign, and would have completely refused to sign if the timing was different.



29. The Claimant relied on the cases of Royal Bank of Scotland vs. Etridge (No.2) [2002] A.C. 773 and Mohamed Ahmed Abdun & Another v Mini Bakeries (MSA) Limited [2019] eKLR among others on the issue of influence and duress.
30. The Claimant submitted that the Mutual Separation Agreement tried to prevent him from taking legal action against the Respondent by making him agree not to sue them for wrongful termination, compensation claims, personal injury claims, and other related issues.
31. It was the Claimant's submission that the act of taking away the Claimant's right to fair hearing, violated *the Constitution* of Kenya and relied on the case of Pauline Wangeci Warui v Safaricom Limited [2020] eKLR and submitted that he was in actual fact dismissed from employed and coerced into signing the mutual separation agreement which in any event was not mutual.
32. On the issue of whether the Claimant's rights were violated, the Claimant submitted that by terminating him unlawfully and unfairly, the Respondent violated his constitutionally guaranteed rights to administrative action in Article 47 of *the Constitution* of Kenya and the provisions of Section 4 of the *Fair Administrative Action Act* 2015.
33. It was the Claimant's submission that RW1 confirmed that he worked for 3 years in acting capacity as Acting Head, Support Services from 10th March 2017 to 23rd March 2020.
34. The Claimant submitted that the Respondent's HR Policy on acting appointments prohibited acting appointments for vacant substantive positions exceeding 6 months, the Claimant was placed in acting for three years, and was never told the reasons why he was not confirmed and relied on the case of Susan Khakasa Oyatsi v Judicial Service Commission [2022] eKLR.
35. The Claimant submitted that the discontinuation of the acting allowance for which the Claimant was genuinely entitled to was in contravention of *Employment Act* Section 18. The Claimant relied on among others the case of Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Limited [2015] eKLR while submitting that constantly being held in acting capacity subjected the Claimant to unfair labour practice.
36. Claimant submitted that at the time of the separation, the Respondent through the HR Director advised the Claimant, and later formally communicated the same to CBA Bank that the mutual separation agreement he was required to sign was the same as retrenchment but the advice turned out to have been misleading as the claim was rejected by the Bank's insurance company, who argued that if the Claimant had been retrenched, then the correct procedures for redundancy and / or retrenchment as per the *Employment Act* should have been followed while separating with the employee.
37. On the issue of whether the Claimant was entitled to the reliefs sought the Claimant submitted that having established that he was indeed unfairly terminated from employment, he was consequently entitled to statutory reliefs as per Section 49 of the *Employment Act*.

Respondent's Submissions

38. On the other hand, the Respondent filed their written submissions dated 26th February 2024 and on the issue of whether the Claimant was terminated by the Respondent or whether the parties to the contract ended the employment relationship through a Mutual Separation Agreement, it was the Respondent's submission that the Claimant conceded that he was not issued with any termination letter by the Respondent thus the submissions made by the Claimant on unfair termination/dismissal were not well founded.



39. The Respondent submitted that there was no coercion by the Hospital to have the Claimant sign the Agreement and no particulars of the coercion, duress or fraud were pleaded by the Claimant in the Claim to allow the Respondent an opportunity to address the same and the attempts to supply the so called particulars of coercion and duress in the Claimant submissions was un-procedural. Submissions could take place of pleadings or evidence in an adversarial system.
40. The Respondent relied on the case of *Ouma v Synergy Industrial Credit Limited (Cause 1752 of 2017)* [2022] and submitted that duress was neither pleaded anywhere in the Claim nor mentioned in the witness statement. As parties are bound by their pleadings, this court lacked the requisite powers to investigate claims of duress or undue influence as submitted by the Claimant further that the *Employment Act* did not bar the employer and employee from discussing, separating cordially and mutually where parties have decided to end the relationship. That it was only where the termination was at the initiative of the employer for reasons of misconduct and poor performance that such decision must follow the provisions of Section 41, 43 and 45 of the *Employment Act* and in this case, there is no pleading by the Respondent that the Claimant was terminated due to gross misconduct based on the matters stated in the show cause letter dated 31st January, 2020.
41. It was the Respondent's submission that the chronology of the events leading to the execution of the Agreement by the parties shows that the same was voluntary considering that the Respondent invited the Claimant to a meeting with its CEO, and then both parties discussed and agreed on ending the employment relationship.
42. The Respondent submitted that the Claimant was given time to review and consider the agreement before signing it. That after requesting an improvement in the separation package, the Claimant was offered an increased service pay and given until the end of the day to decide.
43. The Respondent submitted that the Claimant voluntarily signed the revised agreement five days after the initial meeting. The Claimant signed and dated both the last page and the first page of the Agreement, fulfilling the requirements and the Hospital made a payment based on the Claimant's agreement in the Mutual Separation Agreement. It was the Respondent's submission therefore that the Claimant was given an ample opportunity to not only review but to write and protest against the mutual separation as per Clause 10 of the Agreement.
44. The Respondent submitted that the Claimant relied on the case of *Mohamed Ahmed & Another v Mini Bakeries (MSA) Limited* [2019] eKLR which supported the Respondent's case in that the Claimant had an opportunity to protest and disclaim the agreement prior to signing it and further that the Claimant was 58 years old, well experienced and holding a senior position and knew the import of what he was signing and was exercising free will as per his email of 20th March, 2020.
45. The Respondent further submitted that the Claimant had relied on the case of *Pauline Wangeci Warui v Safaricom Limited* (2020) eKLR but the facts were not similar to the present case considering in the present case, the Claimant was invited for a meeting by a formal and documented email with the then CEO on 19th March, 2020 and the two discussed and agreed on mutual separation and the terms thereof which were later incorporated and reduced into a document headed 'Mutual Separation Agreement and the Respondent's defence was that the separation was on account of misconduct which is not the case in the present case.
46. The Respondent submitted that the Claimant also relied on the case of *Sandhu v Jan De Rijik Transport Ltd* [2007] EWCA Civ 430 where the court observed that the Claimant had no time to reflect yet in the present case the Claimant had ample time between 19th to 23rd to make up his mind and had a room to negotiate the terms presented to him.



47. The Respondent relied on the case of Frederick Kariuki Kamau v Bank of India [2015] eKLR among others and submitted that Parties to an employment contract can mutually agree to terminate the contract on the basis of mutual undertakings between them.
48. The Respondent submitted that the Claimant in this case could not have been taken through the entire disciplinary hearing after he exercised his choice by signing the Agreement to which the Hospital forfeited its right to pursue the disciplinary hearing while the Claimant waived his right to file a lawsuit against the Hospital to claim anything outside the Agreement.
49. The Respondent relied on the cases of Gilbert Mugambi v Michimikuru Tea Factory Limited (2018) eKLR, Ephraim Gaitho Githongori v Timaflor Limited (2018) eKLR, Felix Mutie Musango v Tin Can Manufacturers Limited [2020] eKLR, Wokabi v British American Tobacco Kenya Limited (Cause 31 of 2016) [2022] KEELRC 12694 (KLR) (29 September 2022) and Werunga v Foremost Limited (Cause 52 of 2020) [2022] KEELRC 1142 (KLR) (24 June 2022) (Judgment) to submit that the mutual separation agreement entered between the parties herein was a legally binding contract and only elements of fraud, coercion, duress or undue influence can vitiate such the contract if pleaded and more importantly cogent evidence adduced to prove such beyond balance of probabilities.
50. The Respondent submitted that the Claimant voluntarily agreed to separate with the Respondent and there were no elements of duress or undue influence in his signing the agreement acknowledging the terms of separation. The Claimant did not make any efforts to show what could have been the consequences of failing to sign the agreement. He could not be terminated prior to the conclusion of the disciplinary hearing provided for in the Human Resource Policy.
51. On the issue of whether the Claimant was entitled to the reliefs sought the Respondent submitted the Claimant was paid final dues enumerated in Clause 1 of the Agreement. If the Claimant felt that he was entitled to other remedies including Bonus, nothing prevented him from raising the same prior to signing the Agreement which contained the compensation package. If he was able to raise the issue of severance pay, it goes without saying that nothing prevented him from raising the issue of 10% acting allowance although the Respondent's witness was able to explain that acting allowance cannot be paid to an employee who is on suspension.
52. The Respondent relied on the case of Felix Mutie Musango v Tin Can Manufacturers Limited [2020] eKLR while submitting that the Mutual Separation Agreement binds the parties and the Claimant was estopped from making any additional claims against the Hospital without any evidence of fraud, coercion or undue influence to sign the same.
53. The Claimant relied on the case of Beatrice Kananu Imathiu v British American Tobacco (K) Ltd [2020] eKLR while submitting that it is a settled principle of equity that a party cannot approbate and reprobate at the same time.

Determination

54. The Claimant in his testimony alleged that the termination of his services was on account of gross misconduct after being issued with a suspension notice dated 30th January 2020 and a show cause letter dated 31st January 2020 which pinpointed bid fixing as the ground. The Claimant responded to the show cause letter and got no response from the Respondent line manager if his response was satisfactory or not as required by the Respondent's policy manual.
55. The Respondent on the other hand stated that the claimant was not terminated on the basis of the allegations raised in the show cause letter but the Mutual separation agreement. In fact according to the



- respondent there was not termination letter but a Mutual Separation Agreement (MSA). According to the respondent the MSA cut short the disciplinary process that had been initiated by the respondent.
56. From the evidence the claimant was issued with the draft MSA and given time to consider the same which he did and made suggestion for changes. He suggested replacing 15 days for each complete year of service to 1 & 1/2 months and this was incorporated in the MSA. The document was finally engrossed and signed by the parties and the claimant paid his terminal dues based on the MSA which also included a term that the claimant accepted the MSA as a final settlement of the rights and obligations between the parties and that of the parties and that no legal action would be brought arising out of the employment contract subject of the MSA.
57. The claimant has alleged that the MSA was introduced by the respondent to short-fuse the disciplinary process which had been commenced by the respondent by issuing him a show cause letter to which he comprehensively responded and the respondent as per the HR Policy Manual never responded to him but called to a meeting in which the MSA was introduced. From the record, nothing was alleged or exhibited by the claimant which to show he protested the turn of events and that he was coerced into signing the MSA.
58. A disciplinary process once initiated more often than not results in a termination of employment even for invalid reasons. A decision to resolve a disciplinary issue through other means such as MSA or resignation of an employee usually becomes a soft landing. In any event, the claimant had every right to refuse the MSA and insist on the disciplinary process. He cannot be heard to elect to take the MSA route, receive proceeds arising therefrom and turn around and allege the process was unfair and that he was coerced into it.
59. In the case of *Beatrice Kananu Imathiu v British American Tobacco (K) Ltd* [2020] eKLR relied on by the respondent, this Court confronted with a similar situation had the following to say:
- “while It is a settled principle of equity that a party cannot approbate and reprobate at the same time. That is to say no one is allowed to pick and choose only the favourable aspects of a transaction and reject the rest. The claimant did not deny accepting the sum of Kshs 11,826,000/= as evidenced by the letter dated 8th July, 2014 from her advocates. This payment was a part and consequence of the mutual separation agreement. Further, when the claimant saw the figures for the first time when she received the draft mutual separation agreement, she was very happy if not excited about them and for once thought the aspect on bonus was erroneous. What the court can reasonably conclude from the claimants conduct as observed above was an attempt to accept the money offered by mutual separation agreement yet refuse to be bound by it. This according to the court’s view was an inequitable conduct which the court cannot support.”
60. Similarly in this matter the Court cannot allow the claimant and approbate and reprobate at the same time. His allegation that the termination of his employment was unfair in the face of the MSA which he voluntarily participated in the crafting thereof and eventually accepting payment which were proceeds of the MSA are unsustainable.
61. The suit is therefore found without merit and is hereby dismissed with costs.
62. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JULY 2024

DELIVERED VIRTUALLY THIS 17TH DAY OF JULY 2024



ABUODHA JORUM NELSON
JUDGE

