



**Muthoni v Ericsson Kenya Limited (Cause 1267 of 2018)  
[2024] KEELRC 2647 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2647 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1267 OF 2018  
J RIKA, J  
OCTOBER 31, 2024**

**BETWEEN**

**WAIGI EVELYN MUTHONI ..... CLAIMANT**

**AND**

**ERICSSON KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed her Statement of Claim, dated July 30, 2018.
2. She states that she was employed by the Respondent for 6 years, and 1 month, between 7<sup>th</sup> February 2011 and 30<sup>th</sup> March 2017. She was employed as the IFS Manager, based at Eden Square, Westlands in Nairobi.
3. At the time of leaving employment, she earned a monthly basic salary of Kshs. 171,570.
4. There were some allegations made by the Respondent and its Human Resource Manager in September 2016, concerning financial loss, suffered by the Respondent.
5. The Claimant was forced to tender a letter of resignation, dated 30<sup>th</sup> March 2017. She states that she had contributed a pension sum of Kshs. 2,235,881 with Jubilee Insurance. The Respondent refused to grant the Claimant clearance letter and certificate of service, to enable her access the pension. She had a loan with the Standard Chartered Bank, which she was not able to pay. She was not able to sustain her house rent at Nairobi at Kshs. 25,000 monthly, and was compelled to move to her rural home. Withholding of her pension, resulted in emotional distress and psychological torture.
6. She prays for Judgment as follows: -
  - a. Declaration that withholding of the Claimant's pension of Kshs. 2,135,881 amounts to unfair termination within the meaning of Section 45 [4] [b] of the *Employment Act*.



- b. The Respondent to issue the Claimant with a certificate of service.
  - c. Declaration that withholding of the Claimant's pension amounts to violation of Article 41 of *the Constitution*, and unfair labour practice.
  - d. Declaration that withholding of the Claimant's pension amounts to breach of contractual terms, contained in paragraphs 15.1, 15.2 and 15.3.
  - e. Payment of 1-month salary in lieu of notice at Kshs. 172,856.
  - f. Pension contributions at Kshs. 2,135,881.
  - g. 12 months' salary in compensation for unfair termination, at Kshs. 2,074,274.  
Total...Kshs. 4,383,012.
  - h. Costs.
  - i. Interest.
  - j. Any other suitable relief.
7. In a ruling dated 9<sup>th</sup> November 2021, the Court found that the certificate of service and the clearance certificate, had been issued to the Claimant by the Respondent. The Respondent wrote to the pension scheme administrator, facilitating release of the Claimant's pension.
  8. The Court found that what remains of this dispute, is the claim for unfair termination. A substantial part of the Claim, revolving around the withholding of the pension, has been settled.
  9. Pursuant to the leave of the Court, granted in the ruling dated 9<sup>th</sup> November 2021, the Respondent filed a Statement of Response and Counterclaim, dated 23<sup>rd</sup> November 2021. The averments made by the Claimant are denied, and the Respondent counterclaims a staggering amount of Kshs. 21,547,578 from the Claimant. The sum is stated to be the loss suffered by the Respondent, as result of a conspiracy to defraud the Respondent, involving the Claimant and others. The Respondent further counterclaims general damages for breach of trust.
  10. The fraud came to the attention of the Respondent around March 2014. Investigations revealed the involvement of the Claimant and others. The Respondent confirmed that it sustained the loss. Before the Respondent could initiate disciplinary action against the Claimant, she tendered her resignation. The fraud was reported to the DCI Head Office, at Nairobi.
  11. The Respondent states that it facilitated the Claimant on payment of pension; it released her certificate of service; and released the certificate of clearance, on 13<sup>th</sup> August 2018.
  12. The Respondent prays the Court to dismiss the Claim and allow the Counterclaim with costs.
  13. The Claimant filed a Reply to the Statement of Response and Defence to the Counterclaim, dated 14<sup>th</sup> December 2021. She reiterated the averments in her Statement of Claim, while denying those contained in the Response and the Counterclaim.
  14. She gave evidence, and rested her case, on 12<sup>th</sup> July 2023. Head of security Tom Mboya, forensic investigator Antonio Jordan, and forensic expert Paul Classen, all gave evidence for the Respondent, on 17<sup>th</sup> November 2023. Head of human resources, Margaret Mutisya, gave evidence on 14<sup>th</sup> February 2024, closing the hearing. The Claim was last mentioned on 30<sup>th</sup> July 2024, when the Parties confirmed filing and service of their Closing Submissions.



15. The Claimant relied on her witness statement and documents on record, in her evidence-in-chief. She confirmed that the Respondent issued her a certificate of service, and a certificate of clearance, only after the Court intervened. She was paid her pension. Withholding of her pension resulted in her listing by the Credit Reference Bureau. She could not look for alternative work without her certificate of service. She had outstanding bank loan.
16. Cross-examined, she told the Court that she was not pursuing the items which were granted to her, through her interlocutory application.
17. She was forced to resign. She did not have any document showing compulsion. She was compelled physically. There was a phone-recording on compulsion. The recording was not part of her evidence. She thanked the Respondent in her resignation letter. She said resignation was driven by personal reasons. She was aware about the Counterclaim.
18. Investigations started after she was told to resign. She had reported loss of cash. She resigned on 30<sup>th</sup> March 2017. The allegations concerning loss, arose in September 2016. Investigations were concluded, after she left employment. There was no confirmation of loss. She was not involved in the investigations. She was however summoned by DCI in 2022, and cleared.
19. Redirected, she told the Court that she has never been charged with any criminal offence. She was summoned by the DCI in 2022, while the Claim herein was already in Court. She was called by the Human Resource Manager, and told that her life was in danger.
20. Tom Mboya told the Court that he investigated fraudulent purchase order. He found out that the orders issued without the knowledge of responsible managers. The orders totalled about Kshs. 14 million. Investigations were carried out internally, against the 2 involved service providers. About Kshs. 3.2 million was recovered. The Respondent realized that the fraud was more widespread than initially thought. It engaged a forensic investigator. The forensic investigation led to initiation of disciplinary process. The Claimant resigned before she could be taken through the disciplinary process.
21. Cross-examined, Mboya told the Court that Employees implicated in the fraud were subjected to disciplinary proceedings. They were dismissed, except 2 of them, who resigned. There was at the time Mboya gave his evidence, an ongoing criminal case relating to the fraud. The Claimant requested for, and issued the fraudulent purchase orders. The customer project manager, was the ultimate approver. The project planner, initiated the process. It was the Claimant's duty to initiate purchase orders. She did not do so procedurally. The approver was not aware. Mboya was not familiar with the terms and conditions of service of the Claimant. Over Kshs. 21 million was lost. The orders were hastily invoiced and submitted for payment. The haste raised a red flag. The Claimant's role was on signing the purchase order request, not on payment. Redirected, Mboya told the Court that he was not aware of any document filed by the Claimant, challenging his findings.
22. Jordan told the Court that he was handed the relevant computers by Mboya for forensic investigation. He made forensic image, and handed back the physical computer to Mboya. The computer had digital details. Jordan created a working copy, and handed the data to the Respondent. Cross-examined, he stated that he did not access private data. He did not know if others, beyond the Claimant, were using the laptop handed to him for investigation.
23. Classen was contacted by the Respondent, to review e-mails extracted from the Respondent's computers. He concluded that there was conspiracy among Employees, to defraud the Respondent. He was not able to say if the Employees had any monetary benefit from the fraud. He could not access their bank statements. The Claimant and one Karinga, exchanged messages. They created fraudulent



- purchase orders. Karinga instructed the Claimant to create the orders. Classen did not have the chance to speak to the Claimant.
24. Cross-examined, Classen told the Court that he mostly relied on the evidence gathered by Mboya, in his own investigations. He did not have authority to investigate the Claimant's bank transactions. The Claimant created purchase orders in the system. She was not involved in their payment. Redirected, Classen reiterated that the Claimant colluded with other Employees, to defraud the Respondent. She created fraudulent purchase orders.
  25. Mutisya relied on the documents [1-32] filed by the Respondent, and her witness statements filed on 23<sup>rd</sup> November 2021 and 8<sup>th</sup> August 2022, as her evidence-in-chief.
  26. On cross –examination she stated that the Claimant was a project planner. The Claimant created purchase orders, leading to invoicing. Mutisya could not confirm, that the Claimant's duty, ended with creation of purchase orders. Linked to the Claimant was loss of about Kshs. 2.5 million. There was a bigger loss overall. Mutisya was not responsible for investigations. She was not the Claimant's Line Manager. Patricia Karanja was the Claimant's Line Manager. She too was investigated over the fraud, and continues to work, for the Respondent. The Claimant ran away. If she was not guilty, she would not have run away. She was found by the forensic investigators to have been involved, with other project managers, in the fraudulent scheme. Mutisya did not know if the Claimant was investigated and prosecuted by the DCI. Her resignation was voluntary. Redirected, Mutisya told the Court that her role does not include investigation. Patricia Karanja was not implicated. She was the whistleblower.
  27. The issues are whether withholding, or /delay in release of the Claimant's pension, certificate of service and clearance certificate, amounts to unfair termination, unfair labour practice and breach of contract; whether the Claimant's contract was terminated unfairly, or at all, by the Respondent or whether she resigned voluntarily; whether she merits the prayers sought; and lastly, whether the Respondent has established its Counterclaim against the Claimant.

**The Court Finds: -**

28. The withholding of, or delay in, the release of the Claimant's pension, certificate of service and certificate of clearance, was remedied through the orders issued by the Court, pursuant to an application filed by the Claimant on 30<sup>th</sup> July 2018.
29. The Respondent also remedied the Claimant's pension grievance, by writing to the scheme administrators, for release of the pension to the Claimant. The Respondent facilitated the Claimant, and it would be improper for the Court to grant the Claimant declaratory orders as pleaded, based on a grievance that was remedied.
30. The declaratory orders sought under paragraph 19 [i] to 19[v] and 20 [b] of the Statement of Claim, have no merit, the underlying dispute on pension, having been resolved through the interlocutory orders of the Court.
31. There is no evidence that the Claimant was forced to resign her position, as pleaded. She did not provide the Court with any document, pointing to a forced resignation. She did not give clear evidence, about who compelled her to resign. On cross-examination, she told the Court that she wrote the letter of resignation. She did not have any correspondence to show that she was compelled to resign. She alleged that forced resignation was recorded in a phone conversation. She did not have this recording. She told the Court that she thanked the Respondent for the opportunity to serve. She stated that she resigned for personal reasons. There is no hint of a forced resignation, in this evidence.



32. Her prayers for compensation for unfair termination and for notice pay, are misplaced. She instigated termination. Her contract was not terminated unfairly or at all, by the Respondent. The Claimant was faced with investigations, and possible disciplinary proceedings, on allegations of fraud directed at her, and opted to resign.
33. Prayers 20 [a] and 20 [b] of the Statement of Claim, are declined.
34. The only thing the Respondent managed to show through the evidence of its witnesses, who included forensic investigators, was that there was a fraud against the Respondent, concerning issuance of purchase orders.
35. The Respondent merely made allegations about the Claimant's involvement with the fraud, without establishing liability on her part, for loss of Kshs. 21,547,579.
36. Citing the Court of Appeal decision, in Civil Appeal No. 132 of 1987, Jogoo Kimakia Bus Services Limited v. Electracom International Limited [1992] e-KLR, the Respondent submits that special damages must be specifically pleaded, and strictly proved.
37. What strict proof has the Respondent placed before the Court, to show that the Claimant owes the Respondent Kshs. 21,547,579?
38. The evidence adduced by the Respondent's witnesses was not adequate to establish the Counterclaim. Classen's expert evidence was cloned from that of Mboya and Jordan. Mutisya told the Court she was not privy to the investigations. Classen did not interview the Claimant. Jordan was handed by Mboya, for examination, a laptop which he did not know, whether, it was being used by other Employees, besides the Claimant. Mboya confirmed that the Claimant was not involved in payment of purchase orders. He told the Court that over Kshs. 21 million was lost and that about Kshs.3.2 million was recovered. Margaret Mutisya in her affidavit sworn on 14<sup>th</sup> August 2018, paragraph 8, stated that approximately Kshs. 8,080,442 was lost. In her evidence-in-chief and cross-examination, the amount lost was stated to be approximately Kshs. 2.5 million. The figures, as told by the Respondent's witnesses, were inconsistent.
39. The Court of Appeal decision cited by the Respondent above, requires that special damages are specifically pleaded and proved. The Respondent did not establish that it is owed a sum of Kshs. 21,547,579, or any other sum, by the Claimant.
40. Neither was it shown that the Claimant was in breach of the fiduciary duty of trust, to warrant grant of the prayer for general damages to the Respondent.
41. The allegations of fraud were reported to the DCI, over 7 years ago. The Claimant has not been arrested or prosecuted, casting doubt on the veracity of the allegations of fraud, upon which the Counterclaim rests.
42. It is ordered: -
  - a. The Claim is declined.
  - b. The Counterclaim is declined.
  - c. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31<sup>ST</sup> DAY OF OCTOBER 2024.**



**JAMES RIKA**  
**JUDGE**

