

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE NO E769 OF 2024

KATHARYN HAVENS.....
CLAIMANT

VERSUS

PROTO ENEGRY
LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The dispute between the parties arises from the Respondent's decision to terminate the Claimant's contract of service. The Claimant contends that the decision was irregular. On the other hand, the Respondent contends that the parties separated mutually and therefore lawfully.

Claimant's Case

2. The Claimant asserts that the Respondent initially hired her services as Chief Marketing Officer on an indefinite term contract with effect from 1st November 2022. However, she contends that in December 2022, the parties agreed to alter the term of the contract to fixed term for two years effective from 1st December 2022.
3. The Claimant contends that she worked diligently until 9th May 2024 when the Respondent's Chief People Officer handed her a letter titled "Separation Agreement" informing her that her services had been terminated. She contends that the letter, for all purposes and intents, insinuated that her contract was terminated on account of redundancy. Yet,

she avers that the Respondent did not comply with the law on redundancy to close the employment relationship.

4. The Claimant contends that although the letter referred to the separation as mutual, the parties had not agreed on the separation. She concedes that the Respondent's management called her to a meeting on 9th May 2024 to discuss the separation. However, she avers that there was no agreement on the matter. As such, she contends that the impugned letter irregularly terminated her services. Consequently, she prays for the reliefs which are set out in the Statement of Claim.

Respondent's Case

5. On its part, the Respondent affirms the Claimant's assertion that the two had an indefinite term employment relationship which was subsequently converted to a fixed term contract. It further confirms that the Claimant was engaged as Chief Marketing Officer.
6. The Respondent asserts that on 9th May 2024, its Chief Executive Officer had a meeting with the Claimant during which the two discussed the mutual separation of the parties. The Respondent contends that the parties agreed on the terms of the separation following which it issued the Claimant with the mutual separation agreement dated 9th May 2024.
7. The Respondent asserts that although the Claimant did not sign and return the agreement, the two had an oral agreement at the meeting of 9th May 2024 that they were to

separate. As such, it contends that their separation was mutual.

8. The Respondent avers that after the parties separated, it processed the Claimant's clearance and paid her terminal dues. Consequently, it avers that the instant claim is unmerited and should be dismissed.

Issues for Determination

9. After evaluating the pleadings, evidence and submissions by the parties, the following issues present for determination:-
 - a) Whether the contract of service between the parties was legitimately terminated through mutual separation.
 - b) Whether the Claimant is entitled to the reliefs which she seeks through these proceedings.

Analysis

10. The evidence on record demonstrates that the contract of service between the parties was terminated through the Respondent's letter to the Claimant dated 9th May 2024. The letter is christened "Separation Agreement". However, it was not signed by the Claimant. During cross examination of the Respondent's witness, she conceded this fact.
11. The letter notified the Claimant that the Respondent had undergone changes and that it was performing unsatisfactorily. As such, the Claimant was informed that her position had been impacted and her services were to be terminated.
12. The letter further informed the Claimant that her services were to come to an end on 10th May 2024, the following day.

She was advised that her terminal dues to wit: salary for days worked in May 2024; accrued leave days; salary in lieu of notice for one month; and reimbursement of expenses incurred on the Respondent's behalf were to be paid once she completed the clearing process.

13. From the tenor of the letter, it is apparent that the Claimant's contract was terminated due to an alleged redundancy within the Respondent enterprise. However, it is apparent that the Respondent did not close the contract in accordance with section 40 of *the Employment Act*.
14. The Respondent avers that instead of ending the employment relation in terms of section 40 of *the Employment Act*, it persuaded the Claimant to agree to a mutual separation. As such, it contends that the separation was lawful.
15. Although the Respondent contends that the parties entered into a mutual separation agreement, the Claimant denies this assertion. As noted earlier, the Claimant did not sign the purported separation agreement dated 9th May 2024.
16. The Respondent asserts that although the Claimant did not sign the agreement, the parties had nevertheless verbally agreed to separate during the meeting of 9th May 2024. As such, it avers that notwithstanding that the Claimant did not sign the written instrument, the oral agreement to separate remains effective.
17. The court has analyzed the contrasting positions expressed by the parties on the subject and is not convinced that they had firmed up the terms of the separation agreement at the

time the Respondent terminated the Claimant's services on 9th May 2024. This reality is corroborated by the fact that the parties continued to negotiate the terms of the proposed separation after 9th May 2024.

18. The evidence on record shows that between 15th May 2024 and 5th June 2024, the parties were still making offers and counter-offers on the terms of the separation. In the court's view, there would have been no reason to continue with these discussions if the separation agreement between them had been finalized on 9th May 2024.
19. The foregoing demonstrates, without a shadow of doubt, that at the time that the Respondent unilaterally terminated the Claimant's services on 9th May 2024, there was no firm mutual separation agreement between them. As such, the court declares that the contract between the parties was not closed through mutual separation.
20. The foregoing being the case, the only other way that the Respondent would have legitimately terminated the employment relation between them, having regard to the matters that were flagged earlier on in the case, was through a redundancy declaration in accordance with section 40 of *the Employment Act*. This provision obligates the employer to: issue a redundancy notice of one month to the affected employee(s) and or his trade union and the local labour office setting out the reasons for and extend of the proposed redundancy; undertake selection of the employee(s) to be released on account of redundancy having regard to various parameters including the seniority,

skills and reliability of the affected employees; and pay the employee(s) redundancy dues including severance pay, pay in lieu of notice, accrued salary and accrued leave.

21. There is no evidence that the Respondent complied with the aforesaid requirements. As such, its unilateral decision to terminate the Claimant's services was irregular and unlawful. It is so declared.
22. The next question for determination is whether the Claimant is entitled to the reliefs which she seeks through this action. As stated earlier, the Respondent's decision to terminate the Claimant's contract was illegitimate. As such, it has already been declared that the decision was unlawful.
23. The Claimant has prayed for a declaration that her constitutional rights to, inter alia, fair labour practices were violated. As such, she seeks general damages for violation of the rights.
24. However, the court finds that the grievances which the Claimant raises can be adequately redressed by reference to provisions of *the Employment Act* without the need for recourse to *the Constitution*. As such and invoking the doctrine of constitutional avoidance, the court declines to grant her the reliefs which are anchored on alleged violation of her constitutional rights.
25. The Claimant prays for compensation for breach of her contract of service. The court notes that her contract of service was for a fixed term which was to have closed on 30th November 2024. As such, when the contract was terminated

on 9th May 2024, she had a balance of approximately seven (7) months to the sunset date of the contract.

26. The Respondent tendered evidence which demonstrates that after the employment relation between the parties was closed, the Claimant was paid salary for the months of May and June 2024. Consequently, the loss which she suffered due to the irregular closure of her contract was equivalent to her salary for five (5) months.
27. The court takes cognizance of the reality that there is no guarantee for continuous employment until retirement or the sunset date of a contract of service (see ***Simon Patrice Matianyi v G4s Security Services (K) Ltd [2013] KEELRC 911 (KLR)***). As such, it cannot be assumed that the Claimant would have served until the close of her term. There are many other factors which would have operated to legitimately close the contract of service before its sunset date. Taking this reality into account, the court awards the Claimant compensation for unfair termination of her contract which is equivalent to her salary for two (2) months.
28. According to the letter of appointment dated 1st November 2022, the Claimant's monthly gross salary was Ksh. 1,600,000.00. As such, she is awarded Ksh. 3,200,000.00 as compensation for unfair termination of her contract.
29. The amount awarded to the Claimant is subject to the applicable statutory deductions.
30. The Claimant is awarded interest on the amount at court rates from the date of this decision.

31. The Claimant is awarded costs of the case.

Summary of Determination

32. After evaluating the evidence on record, the court makes the following findings and attendant orders:-

- a) The Respondent unlawfully terminated the Claimant’s contract of service.
- b) The Court declines to grant the Claimant’s prayers which are anchored on alleged breach of her constitutional rights.
- c) The court awards the Claimant compensation for unfair termination of her contract in the sum of Ksh. 3,200,000.00.
- d) The amount awarded to the Claimant is subject to the applicable statutory deductions at the time of termination of the contract.
- e) The Claimant is awarded interest on the amount at court rates from the date of this decision.
- f) The Claimant is awarded costs of the case.

Dated, signed and delivered on the 15th day of December, 2025

**B. O. M. MANANI
JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI