

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO. E258 OF 2024

DANIEL MATSUKHU

MWISUNJI.....CLAIMANT

VERSUS

MASTERCARD EAST AFRICA

LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. For determination is the Memorandum of Claim dated 8th April, 2024, wherein the Claimant seeks the following reliefs as against the Respondent: -
 - i. A declaration that the Claimant's termination of employment by the Separation Agreement dated 23rd May 2023 was unfair and unlawful;
 - ii. A declaration that the Claimant is entitled to compensation for the said unlawful and unfair termination of employment;
 - iii. A declaration that the Claimant is entitled to the illegally withheld housing allowance for the duration of his employment at the Respondent;
 - iv. An order for payment of the Claimant's terminal dues in terms of paragraph 18 herein and any other further

salaries and allowances irregularly withheld by the Respondent;

- v. An order for issuance of a certificate of service;
- vi. Costs of this suit.

2. The Respondent opposed the Claimant's Claim vide an Amended Memorandum of Reply and Counterclaim dated 15th April 2025, denying the claim. The Claimant subsequently filed a Response to the Amended Memorandum of Reply and Counterclaim dated 28th April, 2025.
3. Parties' attempt to settle the matter out of court did not bear fruit, resulting in the matter being set down for hearing.
4. Both the Claimant's and the Respondent's cases were heard on 8th October, 2025. The Claimant testified in support of his case, adopted his witness statement, and produced his list and bundle of documents as exhibits. A Mr. Daniel Huba testified on behalf of the Respondent, adopted his witness statement, and produced the Respondent's list and bundle of documents as exhibits in the case.
5. Submissions were filed for both parties and have been duly considered.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent in May 2016 as Leader, Strategic Partnerships, earning a gross annual salary of KES 6,250,000, comprising a

basic salary of KES 5,000,000 and a car allowance of KES 1,250,000.

7. He avers that in February 2020, due to his diligence and loyalty, he was promoted to Manager, Business Development, with an annual salary of KES 8,131,065, inclusive of car allowance. He states that his strong performance was reflected in his 2022 year-end performance review, where he exceeded expectations and received a 7% salary increase and a 15% bonus.
8. The Claimant states that on 29th April 2022, the Respondent's Vice President, Community Pass Market Development, Daniel Huba, informed him in a virtual meeting that his position was being considered for redundancy and stated he had negotiated a favourable deal for him. He avers that on 3rd May 2022, he was summoned to another virtual meeting by the Manager, People Business Partner, Akinola Akinrin, which was also attended by senior executives, including the Senior Vice President and Global Head of Community Pass Sales and Markets.
9. It is his case that the virtual meeting on 3rd May 2022 was attended by the Claimant's line manager, Daniel Huba; the global head of sales and markets, Ricardo Pareja; and the Manager, People Business Partner, Akinola Akinrin, who represented Human Resources. The Claimant states that the presence of senior management caused him anxiety, but he remained in the meeting.

10. The Claimant avers that he was informed that his services would no longer be required and that a separation agreement would be issued, with termination to take effect one month later, which would serve as contractual notice. The Claimant states that he was further informed that if he agreed to exit amicably, the Respondent would offer a generous compensation package and provide a positive recommendation. He avers that he was shocked by this request, having diligently performed his duties and recently received a positive performance review.
11. It is his case that shortly after the meeting, on 3rd May 2022, the Manager, People Business Partner, emailed him a Separation Agreement and required it to be signed and returned within 24 hours. He avers that upon reviewing the document, he discovered that it had already been signed by the Respondent and witnessed by a senior executive, leaving no room for negotiation.
12. The Claimant states that the Separation Agreement required him to exit employment on 3rd June 2022, and avers that the 24 hour deadline denied him a reasonable opportunity to seek legal or independent advice. It is his case that, feeling troubled and unduly influenced by the senior management's representations, the short notice, and the pre-signed agreement, he signed and returned the Separation Agreement on 4th May 2022.
13. The Claimant states that he was induced by the Respondent's management to sign a Separation Agreement

providing for a total payout of KES 6,142,035, comprising of basic salary for 23 days in June 2022 of KES 512,045.09, transport allowance for 23 days in June 2022 of KES 80,492.43, leave encashment of KES 371,609.50, Prorated bonus of KES 4,609,282.69 and a severance pay of KES 568,605.23.

14. The Claimant contends that the Respondent had already decided to dismiss him without a valid reason and merely used redundancy as a pretext to pressure him into signing the Separation Agreement, noting that another person was subsequently employed to his former position. The Claimant further avers that if the position was genuinely redundant, the Respondent failed to follow the mandatory statutory redundancy procedures and to pay lawful redundancy dues.
15. He asserts that his termination was unfair, unlawful, and wrongful, as he was denied a fair hearing, the reasons for termination were invalid, and he was not paid all terminal dues.
16. The Claimant further states that throughout his six-year employment, the Respondent failed to pay statutory housing allowance, did not issue a certificate of service upon termination, and failed to pay one month's salary in lieu of notice.
17. Consequently, the Claimant seeks an order for payment of one month's salary in lieu of notice at KES 662,646.59, withheld housing allowance for 72 months of KES

7,156,583.10, and damages for unfair termination: KES 7,951,758.96.

18. The Claimant expressly denies having at any time expressed an interest in disengaging from the Respondent's employment to pursue other endeavours. He further reiterates that there were no discussions, negotiations, or agreements regarding a mutual separation during the meeting on 29th April 2022.
19. The Claimant states that the alleged mutual separation agreement was prepared by the Respondent prior to the meeting held on 23rd May 2022, without any consultation or involvement of the Claimant. He further states that the email transmitting the said agreement was drafted in a manner that afforded him no opportunity to negotiate or to seek independent advice, as it required him to sign and return the agreement within twenty-four (24) hours.
20. The Claimant further states that his annual remuneration comprised only an annual basic salary and an annual car allowance, and did not include a housing allowance, contrary to the requirements of the employment laws of Kenya.
21. The Claimant contends that clauses 3.5 and 4 of the Mutual Separation Agreement are invalid, unlawful, and unenforceable because they purport to waive his statutory rights and allow the Respondent to evade its obligations under the Employment Act.

22. In response to the Respondent's counterclaim, the Claimant states that it is the Respondent's established practice to make ex gratia payments to all departing employees, and therefore, the ex gratia payment made to him should not be recovered.
23. On cross-examination, the Claimant confirmed that he was informed that, due to a restructuring, his position was going to be declared redundant. He admitted that he had not mentioned the restructuring and reorganization of the Respondent in his claim.
24. The Claimant further confirmed on cross that he was invited to a meeting to discuss his exit. It is his further testimony that the meeting discussed only the separation agreement, and not the redundancy.
25. The Claimant confirmed receipt of the sum agreed under the separation agreement and that he did not return the same to the Respondent owing to the need to meet his obligations after the termination.
26. It is his position that he was never issued with notice of redundancy. He stated that he expected that 23 leave days would be paid, but the Respondent paid for only 17 days.
27. It is the Claimant's prayer that his claim be allowed.

The Respondent's Case

28. The Respondent states that it employed the Claimant as Leader Strategic Partnerships on 18th May 2016, earning a total annual remuneration of KES 6,250,000, comprising a basic salary of KES 5,000,000 paid in monthly installments and a car allowance of KES 1,250,000.
29. It avers that on 29th April 2022, it informed the Claimant of a planned business reorganization that could affect his position, during which the Claimant allegedly expressed openness to a mutual separation, stating he was ready to leave the company to pursue other ventures, and agreed to discuss the terms of disengagement.
30. The Respondent avers that on 23rd May 2022, the Claimant met with a team from the Respondent, including the Manager, People Business Partner, Akinola Akinrin, and the Senior Vice President, Ricardo Pareja, to discuss and agree on the terms of his separation. It avers further that the Claimant was reportedly optimistic about the opportunity, expressed a desire to pursue other ventures, and willingly negotiated a mutual separation agreement.
31. The Respondent states that it then prepared the agreement based on the discussions and shared it with the Claimant for consideration and signature, allowing him to propose changes if he was dissatisfied with any terms.
32. The Respondent further states that upon receiving the Mutual Separation Agreement, the Claimant signed and

returned it without expressing any reservations or requesting additional time for legal review.

33. It is the Respondent's case that by signing the mutual separation agreement, the Claimant warranted that he had taken legal advice. It avers that the Claimant was not unduly influenced, as the Agreement was mutually discussed and agreed upon, offering him a generous separation package that included an ex-gratia payment of one month's salary for every year worked.
34. The Respondent contends that the termination was by mutual separation, not redundancy, and that the Claimant was paid KES 6,142,035, which included an ex-gratia payment, exceeding the statutory 15 days per year redundancy payment. The Respondent avers that the Claimant was issued with a Certificate of Service.
35. The Respondent avers that the Claimant's gross salary already included a housing allowance, which was the basis of their employment contract, and that the Claimant never raised any housing allowance issue during his employment and, at the point of separation, acknowledged that the settlement under the Mutual Separation Agreement was in full and final settlement of all claims, rights, or entitlements under law, contract, or the Employment Act of Kenya.
36. Alternatively, and without prejudice, the Respondent states that, even if housing allowance were payable, it would only

be calculated as 15% of the employee's basic salary for each applicable month of service.

37. The Respondent contends that if Clauses 3.5 and 4 of the Mutual Separation Agreement are found to be ineffective, it counterclaims against the Claimant for recovery of the ex-gratia payment of KES 4,609,282.95, asserting it was paid by mistake or in the belief that the waiver was valid.
38. On cross-examination, RW1 told the court that he invited the Claimant for a meeting on 29th April, 2022, to inform him of the restructuring and re-organization decision, but admits that he did not provide him with a restructuring proposal.
39. It is RW1's evidence that he informed the Claimant that his position would be restructured. RW1 further confirmed that there was no letter to the Claimant stating that his position would be declared redundant.
40. It is his further testimony that the meeting of 29th May, 2022, discussed the separation agreement and the agreement shared with the Claimant after the meeting. He states that no minutes were taken in the meeting.
41. RW1 confirmed that the Respondent had already signed the mutual separation agreement by the time it was shared with the Claimant, and that he was given 24 hours to sign and return the same to the Respondent.
42. RW1 further states that the payment made to the Claimant was in full and final settlement.

43. It is his testimony that the Claimant's salary was a basic of Kes.5,000,000/- and the clause does not provide for a house allowance.

44. The Respondent prays that the Claimant's claim be dismissed with costs, and its counterclaim be allowed.

Analysis and Determination

45. I have considered the pleadings, the witnesses' testimonies, the evidence adduced, and the rival submissions. The Court isolates the following issues for determination: -

- i. Whether the Claimant's termination via the Separation Agreement dated 23rd May 2022 was unfair and unlawful.
- ii. Whether the Claimant is entitled to the reliefs sought.
- iii. Whether the Respondent is entitled to the counterclaim for recovery of the ex gratia payment.
- iv. Who bears the costs of the suit.

Whether the Claimant's termination via the Separation Agreement dated 23rd May 2022 was unfair and unlawful

46. The Claimant seeks that the termination of his employment by the Separation Agreement dated 23rd May, 2022, be declared unfair and unlawful. It is his contention that he was coerced into signing the Separation Agreement under pressure from the Respondent's senior management, with short notice (24 hours), and with a pre-signed agreement. It

is his further assertion that redundancy was a pretext, as his position was subsequently filled by another employee.

47. The Respondent, on its part, contends that the termination was by mutual separation voluntarily entered into, and that the Claimant was aware and accepted the terms.

48. The evidence before the court shows that, indeed, the Claimant was verbally informed of a restructuring and potential redundancy. It is also evident that he was given a pre-signed agreement to execute on short notice.

49. Ordinarily, a restructuring and reorganization of an entity would result in redundancies, which the law under Section 40 of the Employment Act provides steps that an employer must adhere to in declaring an employee redundant.

50. In ***Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR***, the Court of Appeal held that: -

“The employer has the managerial prerogative to restructure its business, but such prerogative must be exercised lawfully and fairly.”

51. Although the Respondent started the separation with the Claimant as a redundancy by holding meetings to discuss the separation, no other requirement under Section 40 of the Employment Act was adhered to. The Claimant was not given written notice of the intended redundancy, nor was the Labour Office notified of the redundancy. The Respondent

instead shifted the focus to a purported mutually agreed separation with the Claimant.

52. The question then is whether the termination of the Claimant by way of mutual separation was fair and lawful.

53. It is now settled that mutual separation agreements are enforceable if entered into freely, voluntarily, and with full knowledge of statutory rights (**see Kenya Airways Ltd v. Njiru [2016] eKLR**). It therefore follows that any waiver of statutory rights must be explicit and cannot be coerced (**Republic v. Kenya Revenue Authority Ex Parte Githongo [2003] eKLR**).

54. For the reason that the Employment Act emphasizes procedural fairness, employees must be allowed adequate time to consider separation agreements and seek independent legal advice.

55. In my considered view, the 24 hour window given to the Claimant to execute and return the Separation Agreement to the Respondent, coupled with the fact that the agreement was pre-signed, indicates undue influence, creating grounds for unfair termination.

56. It is also evident that the Claimant signed the separation agreement under pressure, which does not constitute voluntary acceptance.

57. In the upshot, I find and hold that the termination of the Claimant's employment by Separation Agreement was procedurally unfair and unlawful.

Whether the Claimant is entitled to the reliefs sought
Damages for Unfair Termination

58. The finding that the termination of the Claimant's contract of service was unfair and unlawful entitles him to an award of compensation pursuant to Sections 49 and 50 of the Employment Act, 2007. (See ***Benjamin Langwen v National Environment Management Authority (2016) eKLR.***)

59. In ***Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR***, it was held that the measures of compensation should be guided by the statutory capping at the time of termination. Further in ***Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR***, the Court cited the case of ***D.K. Marete v Teachers Service Commission Cause No. 379 of 2009***, where it was held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, but they are meant to redress economic injuries in a proportionate way.

60. Considering the Claimant's length of service with the Respondent, coupled with the fact that the Respondent paid the Claimant ex-gratia at termination, I deem an award of 7 months' salary sufficient compensation for the unfair termination, and which is hereby awarded.

Withheld Housing allowance

61. The Claimant's position is that the Respondent only paid him a basic salary and a car/transport allowance, but did not pay him a house allowance in the 6 years he served.
62. The Respondent maintains that the Claimant's gross salary already included a housing allowance, which was the basis of their employment contract, and that the Claimant never raised any housing allowance issue during his employment and, at the point of separation, acknowledged that the settlement under the Mutual Separation Agreement was in full and final settlement of all claims, rights, or entitlements under law, contract, or the Employment Act of Kenya.
63. RW1 in his oral testimony confirmed to the court that the Claimant's salary was a basic of Kes.5,000,000/- and the clause does not provide for a house allowance.
64. Section 31 of the Employment Act provides as follows on housing: -
- “An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***
- (2) This section shall not apply to an employee whose contract of service:-***

- (a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***
- (b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

65. By the foregoing provision, it is clear that where the employment contract does not provide for a consolidated wage/salary, the employer is under an obligation to provide housing or pay a housing allowance.

66. It therefore follows that the Claimant is entitled to a house allowance for the 72 months that he was in the service of the Respondent at 15 per cent of the basic salary.

67. This claim is thus merited and is allowed.

Payment of one month's salary in lieu of notice

68. The claim for notice has not been opposed, and nothing shows that the Claimant was issued notice prior to the unfair termination nor paid in lieu thereof.

69. The claim is valid and is allowed as prayed.

The Counterclaim

70. The Respondent's position under the counterclaim is that if Clauses 3.5 and 4 of the Mutual Separation Agreement are found to be ineffective, it counterclaims against the Claimant for recovery of the ex gratia payment of KES 4,609,282.95, asserting it was paid by mistake or in the belief that the waiver was valid.
71. The Claimant admitted receipt of the amount of the counterclaim and further confirmed that he did not refund the amount upon his decision to challenge the separation.
72. The ex gratia payment, in my view, was given as a gesture of goodwill on the part of the Respondent. To allow the Claimant to keep both the awards given herein and the ex gratia will, in my opinion, amount to this court unjustly enriching the Claimant.
73. In the premises, I hold that the Respondent shall recover the amount of ex gratia from the awards given herein.
74. The counterclaim thus succeeds in terms of paragraph 73 of this Judgment.

The Final Orders

75. In whole, the Claimant's claim succeeds and orders granted as follows: -

- a) A declaration is hereby issued that the Claimant's termination by the Separation Agreement of 23rd May, 2022, is unfair and unlawful.
- b) That the Respondent shall pay the Claimant 7 months' salary as compensation for the unfair termination at Kshs. 4,638,526/-
- c) That the Respondent shall pay the Claimant the withheld house allowance at Kshs.4,500,003/-
- d) That the Respondent shall pay the Claimant one month's salary in lieu of notice at Kshs. 662,646.59/-
- e) That the Respondent shall recover Kshs. 4,609,282/- from the total sum awarded herein, being the amount already paid to the Claimant.
- f) The Respondent shall issue the Claimant with a certificate of service within 14 days of this Judgment.
- g) The Respondent shall bear the costs of the suit and interest on b, c & d above at the court rate from the date of this judgment until payment in full.

76. Judgment accordingly.

SIGNED, DATED, AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 28TH DAY OF JANUARY, 2026.

C. N. BAARI
JUDGE

Appearance:

Mr. Masake present for the Claimant
Mr. Tanui h/b for Mr. Amoko for the Respondent
Ms. Esther S- C/A