



Gichara v Tropiqua Group Limited & another (Employment and Labour Relations Cause 2052 of 2017) [2025] KEELRC 389 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 389 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2052 OF 2017**

**K OCHARO, J
FEBRUARY 6, 2025**

BETWEEN

SUSAN NYAKIO GICHARA CLAIMANT

AND

TROPIQUA GROUP LIMITED 1ST RESPONDENT

MIKE KARANJA 2ND RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 13th October 2017, later amended with leave of this Court, the Claimant sued the Respondents jointly and severally seeking the relief that; her dismissal from employment was unfair, unlawful and illegal; a declaration that the Respondents' actions infringed on her constitutional right to fair labour practices; general damages for wrongful, unlawful or constructive dismissal; service pay; costs of the suit and interest.
2. The Respondent resisted the Claimant's claim through the Amended Response to Statement of Claim dated 27th January 2023, contending that the Claimant resigned from her employment, and as such, her claim that her employment was terminated unfairly or that she was constructively dismissed is unfounded.

Claimant's case

3. She first came into the employment of the Respondents as a sales consultant on a two-year fixed-term contract with effect from 19th May 2014. The contract was set to lapse by effluxion of time on 18th May 2016. His monthly salary was set at KShs. 247,000/= . The contract was extendable for a further term of 2 years subject to an exceptional performance on her part and mutual consent.



4. Her responsibilities included reporting to the Chief Executive Officer and providing leadership in business development, sales and marketing, customer service, and client management.
5. The Claimant stated that she faithfully and diligently discharged her contractual obligations as a Sales Consultant, adhering to the set standards and requirements by the 1st and 2nd Respondents, until 23rd December 2015, when the Respondents summarily dismissed her without a just cause, notice, or compensation.
6. She stated further that on this day when she was summarily dismissed, the 2nd Respondent coerced her into signing a resignation letter. He had made the signing of the letter a pre-condition for payment of her dues.
7. Further, the 2nd Respondent, paid the Claimant's withholding tax returns at the collector of income tax for the months of September, October, December 2015 and January 2016 at the rate of KShs. 260,000 per month. She couldn't fathom then why the Respondents weren't paying her dues.
8. The dispute was reported to the Ministry of Labour, Social Security and Services but the Respondents have refused to compensate the Claimant.
9. She argues that in the alternative, this Court should find that the following Respondents' actions amounted to constructive dismissal, thus during an office party on 23rd December 2015, the 2nd Respondent verbally dismissed the Claimant and handed her KShs. 10,000, telling her to "go have a drink for Christmas"; coercing her into signing a letter dated 23rd December 2015; misleading her into resigning by giving her a false assurance that they were to engage her under a consultancy arrangement [through an agency agreement], which was to be more lucrative than serving under the fixed term contract.
10. Cross-examined by Counsel for the Respondent, the Claimant testified that the word "consultant", was deliberately used in her employment contract, though it wasn't a contract for service. She had insisted on a minimum basic salary of KShs. 250,000, and without such an arrangement, the Respondents would have ended up paying her KShs. 350,000, inclusive of tax. Her position was General Manager of Sales.
11. She refuted the claim that she was a consultant, asserting that if she was one, she could have had terms of reference from the Respondent. Further, the Respondent was paying her a salary.
12. Her contract had a business target of KShs. 50,000,000. During her tenure, she closed a business worth close to 150,000,000.
13. Her salary was either paid in cash or through Mpesa.
14. She rejected the agency offer, though, through her letter dated 30th September 2015, she had indicated that she could duly accept the same. She didn't report to the office to start her agency work, instead, she went to the Labour to report a dispute.
15. She further testified that the offer for the agency arrangement came in after she had been dismissed.
16. Asked why she enjoined the 2nd Respondent into the instant proceedings, she answered that she intentionally did it. The 2nd Respondent was in the habit of starting enterprises and winding them up. Her intuition told her that the 1st Respondent would go the same way.
17. In the resignation letter she indicated that it was flowing from a conversation which she had had with the 2nd Respondent. She claimed for pay in lieu of notice, notwithstanding that she initiated the termination of her employment through a resignation.



18. The Respondents didn't conduct any appraisal of her performance.
19. The issue of the Agency relationship that parties were to enter into, was initiated by the Respondents. If her performance was as bad as they wanted it believed, they couldn't have made the initiation.

Respondent's case

20. It was the Respondents' case that the Claimant was employed as a Sales Consultant under a two-year contract that commenced on 19th May 2014, under the terms and conditions of the letter of appointment dated 28th April 2014. The contract would be reviewed subject to good performance and mutual consent of the parties.
21. On or about 22nd December 2015, following a meeting between her and the 2nd Respondent, the Claimant issued a resignation notice to the 2nd Respondent.
22. Prior to the resignation, on 17th September 2015, she had engaged the 1st Respondent and as a result thereof, they agreed on a plan and sales targets. She was supposed to present a report on 18th December 2015 on her performance weighed against the targets.
23. On the above-stated date, 22nd December 2015, her performance was reviewed and it was noted that she hadn't met the targets. It is at this point that she indicated that she would resign and take up the offer of being an agent of the 1st Respondent to earn commission rather than work as an employee for a salary.
24. Following the voluntary resignation by the Claimant, the 1st Respondent proceeded to prepare a letter dated 22nd December 2015 terminating her employment as a sales consultant and subsequently offered her an agency contract.
25. By her letter dated 23rd December 2015, the Claimant reaffirmed that she had resigned and was awaiting the Respondent's agency contract for further engagements.
26. The foregoing notwithstanding, on the 8th of January 2016, the 1st Respondent received a letter from the Ministry of Labour informing it that the Claimant had lodged a dispute with them. The Respondents responded to the letter on 12th January, and 15th March 2016. Eventually, this process didn't bear any fruit.
27. The Claimant was not summarily dismissed from employment as she alleged. The employment relationship between her and the 1st Respondent came to an end at her initiative.
28. At the separation, the Claimant was paid all her dues.
29. Cross-examined by the Claimant's Counsel, the 2nd Respondent testified that the Claimant was not served with a non-performance notice. However, she was placed on a performance improvement plan.
30. He admitted that they didn't place before the Court any document[s] to demonstrate that the Claimant was paid her September, October, November, and December 2015 salaries.
31. The 2nd Respondent testified that contrary to the Claimant's assertion, he wasn't personally paying her withholding tax.
32. The 2nd Respondent stated that none of his letters was the reason for the Claimant's resignation.

Claimant's submissions

33. The Claimant raised the following issues for determination thus; whether the Claimant was constructively dismissed; whether the Respondent unlawfully terminated the Claimant's



employment; and whether the Claimant is entitled to the reliefs sought in her Memorandum of Claim dated 13th October 2017.

34. The Claimant submitted that she was constructively dismissed. She was employed as a Sales Consultant with responsibilities in business development, sales, marketing, and client management. The 1st Respondent set unrealistic targets to frustrate her. On 23rd December 2015, the 2nd Respondent suggested she transition from employment to an agency role. Subsequently, the 2nd Respondent coerced her into signing a resignation letter on the same date under the threat that, if she didn't, her dues would not be paid. The Respondents' actions amounted to forceful and unwelcome pressure to make her leave her job.
35. The Claimant relied on the case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, where the Court of Appeal expressed itself as follows: -

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which give rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment- this is the contractual test.”

To fortify her submissions that in the circumstances of the matter, she was constructively dismissed.

36. The Claimant alleges that the actions and conduct of the 1st and 2nd Respondents of bullying and verbally dismissing her, giving her giving her Ksh. 10,000 to "have a drink for Christmas," deceiving her into resigning under the pretence of offering a consultancy role through an agency agreement, which never materialized, all amounted to constructive dismissal.
37. On the second issue, the Claimant submitted that under section 45[2] of the *Employment Act*, termination of an employee's employment is unfair, if it was without a valid and fair reason. The duty lies on the employer to prove that the reason for the termination was valid and fair. To fortify this submission, the case of *Patrick Asuma v Arm Cement Limited* [2019] eKLR, was cited. In our legal system, there is no longer room for termination of employment without cause. To buttress this point reliance was placed on the case of *Kenfreight (E. A) Limited v Benson K.Nguti* [2019] eKLR,
38. The reason is fair if it relates to the employee's conduct, capacity and compatibility, or the employer's operational requirements. The procedure is only fair if there is compliance with the provisions of Section 41 of the Act.
39. Considering the material placed before the Court, it becomes very clear that the Claimant's employment was terminated without her first being accorded an opportunity to defend herself on the alleged poor performance. This rendered the termination of her employment unfair. To support this submission, reliance was placed on the case of *Kenya Union of Commercial Food and Allied Workers Union vs Meru North Sacco Farmers Limited* [2013] eKLR.
40. On the third issue, the Claimant submitted that having established that the Respondent neither had a valid reason for termination nor followed the fair procedure for termination as set out in the law, she is entitled to the reliefs sought.



Respondent's submissions

41. The Respondents proposed the following issues for determination thus; whether the 2nd Respondent is properly joined in this suit; whether the Claimant has proved constructive dismissal; whether the Claimant has proved that she was unfairly and unlawfully terminated; and whether the Claimant is entitled to the prayers sought in the claim.
42. On the first issue, the Respondents submitted that the 2nd Respondent [a Director of the 1st Respondent] was improperly enjoined in the suit. The contract of employment was between the Claimant and the 2nd Respondent, a company duly incorporated under the *Companies Act*, 2015. As such, the 1st Respondent was a legal person distinct from its Director[s] and shareholders. The claim should have been filed solely against the 1st Respondent. To support this submission reliance was placed on the cases of *Salmon vs. A. Salmon & Company Ltd* (1896) UKHL1, (1897) AC 22 and the case of *Civil Appeal No. 247 of 2005 Victor Mabacha & Another versus Nurtun Bates Limited* (2013) eKLR.
43. On the second issue, the Respondents submitted that the Claimant did not prove that she was constructively dismissed. She didn't establish the legal principles necessary as were set out in the case of *Coca-Cola East & Central Africa Limited versus Maria Kagai Ligaga* [2015] eKLR.
44. The Claimant anchors her claim for f constructive dismissal, on matters that do not support the claim at all. Matters that are deliberately misleading. The Claimant argues that the Respondent set unrealistic targets for her. She hasn't disclosed that the targets were contained in her job description, Clause under Clause 3.0 of the Sales Consultancy Contract, which she willingly agreed to.
45. The Claimant neither established that the Respondent did commit a repudiatory breach or create a hostile work environment that left her with no choice but to resign. To support this point, the Respondent urged this Court to be persuaded by the holding in *Muikamba v Radio Africa Group Limited* (Cause E245 of 2021) [2023] KEELRC 1251 (KLR) thus: -

“The Claimant asserts constructive dismissal. This was held in preceding cases such as the *Maria Ligaga* case and others, entails the employer creating such an environment that the employee has no option but resignation. In this case, the Claimant did not show the toxic environment caused her to terminate her contract. Indeed, only one incident was reported and action was taken promptly resulting in an apology and a rather feeble warning. The conduct of the Claimant in not raising any issue previously indicates either acquiescence or the absence of such alleged violations which would have created the basis for a finding that the toxic work environment brought on by a misogynist and racist employee was the cause for her termination. While the Court agrees that in any employment space, people come from different backgrounds with the result that employees may not behave toward each other as expected, it does not excuse racism or misogyny exhibited by its employee Pete Sinclair. It is my finding that in accordance with the evidence adduced, the Claimant left employ with the Respondent for greener pastures despite the Respondent offering an enhanced package. The Claimant having left the Respondent voluntarily did not establish the elements necessary for her to recover damages from the Respondent.”
46. On the third issue the Respondents submitted that the Claimant failed to establish that her separation from the 1st Respondent was unfair, unlawful, or illegal. In fact, the issue of termination doesn't arise at all in the circumstances of this matter. The Claimant resigned from her employment by her letter dated 23rd December 2015.



47. On the relief sought for a declaration that her rights were infringed on, it was submitted the Claimant failed to plead with precision the specific actions of the Respondents that amounted to an infringement of her constitutional right to fair labour practices as required in law. That an alleged infringement of a constitutional right[s] and how it did present itself, must be pleaded with specificity, reliance was placed on the case of Anarita Karimi Njeru vs Republic [1976-1980] KLR 1272.

Analysis and determination

Issues for determination

1. Was the 2nd Respondent properly enjoined in this matter?
2. How did the separation occur?
3. If by termination was the termination of her employment fair?
4. Whether the Claimant is entitled to the reliefs sought.

Was the 2nd Respondent properly enjoined in the suit?

48. The separate entity principle that finds its roots in the old age decision in *Salmon vs. A. Salmon & Company Ltd* (1896) UKHL1, (1897) AC 22, and which has been applied in many jurisdictions for decades now, dictates that an incorporated company is a different legal person from its Directors and Shareholders. Seldom, therefore, can the Directors and or Shareholders be forced into the business of shouldering its liabilities.
49. With great respect to the Claimant, her answer to the question as to why she enjoined the 2nd Respondent in this matter, was most unsatisfying and unreasonable. Matters of who should or shouldn't be joined as a party in a suit aren't matters of intuition. They are informed by whether or not There exists a cause of action against the person or whether that person is a necessary party to the suit.
50. I agree with the Respondents that the employment contract was between the 1st Respondent and the Claimant. There is no sufficient reason why the 2nd Respondent was made a party to this matter. The Claimant's case against him is dismissed.

How did the separation occur?

51. The parties took diametrically opposite directions on the separation between the Claimant and the Respondent took place. The 1st Respondent's position was that the Claimant voluntarily resigned from her employment, while the Claimant wasn't very clear on the exact manner of her exit from the Respondent's employment. On the one hand, she asserted that she was constructively dismissed and on the other that she was verbally dismissed from her employment. This position is apparent, on her pleadings, and witness statement, in her testimony and submissions.
52. An employee's employment is terminated at the initiation of the employer either by way of a termination or summary dismissal, constructive dismissal or operational requirements of the employer. It cannot be through any of them combined or all of them. Where an employee isn't clear on how he or she was dispensed with, by the employer, her or his case will certainly fail, as it cannot go beyond the hurdle erected by Section 47[5] of the Act, proving that an unlawful termination occurred. The Claimant's Claim should fail at this hurdle.
53. In most circumstances, resignation of employment, save where it is a result of an intolerable conduct of the employer, is deemed by law as termination by mutual agreement.



54. I have carefully considered the Claimant's letter, first, it acknowledges a meeting held on 22nd December 2015, second, in its penultimate paragraph, she offered a formal resignation from her employment.
55. In the same letter, and I find this to agree with the evidence of the 2nd Respondent, she expressed that resignation was pending the execution of an agency agreement.
56. The Claimant asserted that her resignation was influenced by coercion from the 2nd Respondent. I have carefully considered the tone of the letter, in my view, it doesn't come out at all, that there was coercion of any form following which the resignation letter was written. Secondly, it isn't expressive of any protest against the discussions of 22nd December 2015, or the Respondents' action[s] or the then intended agency relationship.
57. The evidence placed before me by the Claimant didn't at all establish the alleged undue influence and or duress into her resignation. To contextualise this, it becomes imperative to define these two concepts. Halsbury Laws of England 4th Edition Volume 9 defines them thus:
- “The compulsion under which a person acts through fear of personal suffering” Whereas undue influence has been defined as the conscientious use by one person of power possessed by him over another to induce the other to enter into a contract.”
58. Actual undue influence is a species of fraud. There is no doubt therefore, that like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction into which he didn't willingly enter is entitled to have the transaction set aside. However, it must be pointed out therefore, that the burden to prove undue influence is heavy, it shall not suffice for one to make bald assertions about it and hope that the court will agree with him to set aside the transaction. Cogent evidence must be placed forth. See also CIBC Mortgages PLC V Pitt {1993} 4 ALL ER 433.
59. Having found that the Claimant voluntarily resigned from employment, I find it unnecessary to delve into whether she was constructively dismissed or verbally dismissed, and whether there was an unfair termination.
60. In the upshot, the Claimant's claim for unfair termination is hereby dismissed

Whether the Claimant is entitled to the reliefs sought

61. The reliefs sought by the Claimant were a combination of those allied to her claim for unfair termination and independent of the claim. Those tied to the claim for unfair termination could be automatically non-available to the Claimant at the fall of the Claim. Those independent of the claim could be interrogated, granted or declined depending on their merits. As a result, I decline to grant the compensatory relief sought under section 49[1][c] of the *Employment Act* and notice pay.
62. The Claimant sought unpaid salaries for:
- September 2015. 22,660/=;
- October 2015. 247,000/=;
- November 2015. 247,000/=;
- December 2015. 247,000/=;
- TOTAL - 763,660/=
63. The Respondent asserted that contrary to the Claimant's contention, it paid her the salary for the above-stated months. Section 74 of the *Employment Act* places a duty upon the employer to keep



employees' employment records. Where a controversy arises between the employer and employee over a matter that can be resolved by referring to the employment records, it behoves the employer to tender the record in evidence. Any default by the employer will have an unpleasant effect on them. An adverse inference shall be drawn against them. In the circumstances of this matter, I make an adverse conclusion that if the record were to be produced, it couldn't aid their case. Therefore, I am persuaded, by the Claimant that the salary wasn't paid to her.

64. In the upshot Judgment is hereby entered for the Claimant in the following terms.

- I. She shall be paid by the 1st Respondent the unpaid salary amounting to KShs. 763,660.
- II. Interest at court rates on the sum awarded from the date the salaries became due, till full payment.
- III. Costs of the suit.

READ, SIGNED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2025.

OCHARO KEBIRA

JUDGE.

In the presence of:

Ms. Nadongo for the Claimant.

Mr. Murage for the Respondent.

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