



REPUBLIC OF KENYA



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**Maingi v Ltsdl Kya Solutions Ltd & 3 others (Constitutional Petition
E082 of 2023) [2024] KEELRC 325 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 325 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E082 OF 2023**

B ONGAYA, J

FEBRUARY 23, 2024

**N THE MATTER OF ARTICLES 22, 23(3), 24, 27, 28, 29 (F), 35 (1)(B),
41(1), 47, 48, 162 (2) (A), AND 258 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTIONS 2 AND 5(3) EMPLOYMENT ACT NO. 31 OF 2016

AND

**IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT
AND LABOUR RELATIONS COURT ACT, 2011**

AND

**IN THE MATTER OF ARTICLE 1 OF THE INTERNATIONAL
LABOUR ORGANISATION DISCRIMINATION**

(EMPLOYMENT AND OCCUPATION) CONVENTION, 1958 (NO. 111)

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 27,
28, 35(1)(B), 41(1), 47 AND 48 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
SECTIONS 5(3), 40, 43,45 AND 74 OF THE EMPLOYMENT ACT, 2012**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF SECTION
4 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

BETWEEN

PRISCILLA MUTHONI MAINGI PETITIONER

AND



| | |
|-------------------------------|----------------------------|
| LTSDL KYA SOLUTIONS LTD | 1 ST RESPONDENT |
| DEEL KE | 2 ND RESPONDENT |
| DEEL KE | 3 RD RESPONDENT |
| CHANGE.ORG | 4 TH RESPONDENT |

JUDGMENT

1. The petitioner filed the Amended Petition dated 09.11.2023 through James Oketch & Company Advocates. The petitioner prayed for:
 - a. A declaration that the respondents jointly and severally violated the petitioner’s constitutional rights as guaranteed under Articles 27, 28, 35(1)(b), 41(1), 47 and 50 of the Constitution of Kenya 2010.
 - b. A declaration that the respondents jointly and severally violated the petitioner’s rights as guaranteed under sections 5(3) of the Employment Act and that the termination is unfair pursuant to sections 40, 43(2) and 45 of the Employment Act, 2012.
 - c. A declaration that the respondents jointly and severally violated the petitioner’s rights guaranteed under section 5 of the Labour Relations Act.
 - d. A declaration that the Respondents jointly and severally violated the petitioner’s rights guaranteed under section 4 Fair Administrative Actions Act.
 - e. A declaration that the respondents jointly and severally violated the petitioner’s rights guaranteed under section 4 of the Access to Information Act.
 - f. A declaration that the Mutual separation agreement was executed under misrepresentation, duress, coercion, undue influence as well as an unequal bargaining power and therefore voidable in so far as it excluded inclusion of all terminal dues of the petitioner being the petitioner’s insurance cover and personal loan insurance.
 - g. An order that the respondents jointly and severally pay to the petitioner:
 - i. Insurance cover being Kshs. 450,000/= per month for 12 months
Kshs 5,400,000
 - ii. Personal loan insurance being Kshs. 117,641/= per month for 12 months
Kshs 1,411,692
 - iii. Damages for unlawful termination being twelve (12) months’ salary in accordance with section 49 of the Employment Act amounting to Kes 11,730,996/=.
 - iv. Costs of the petition.
 - v. Interest at court rates.
2. The petition was based upon the petitioner’s amended supporting affidavit and exhibits thereto filed together with the amended petition. The petitioner’s case is as follows:
 - a. On 29.10.2021 the petitioner received a letter from the 4th respondent informing her of an offer of appointment as the 4th respondent’s country director.



- b. In the email, the 4th respondent informed the petitioner that it uses an Employer of Record (EOR) to hire its team in many countries it operates in. That its EOR in Africa is Deel, the 2nd respondent, and that the 4th respondent would inform the 2nd respondent of her response to the offer if she agreed to the offer and that a contract of employment would be provided by Deel for her to sign.
- c. Through a contract of employment, dated 15.11.2021 the 1st respondent entered into an employer – employee relationship with the petitioner.
- d. Clause 1.1. of the contract stated
- “ You shall be employed with effect from January 3rd, 2022 for an indefinite period of time unless such employment is terminated as provided in clause 6 below.”
- e. At clause 6 the contract further provided that:
- “ This agreement may be terminated by you or the company upon giving one (1) month written notice or two (2) months base salary *in lieu* of such notice of termination of employment.”
- f. After undertaking the role as Country Director of the 1st and 4th respondent, the petitioner received a call on 13.02.2023 from the 4th respondent concerning a transition being experienced by the 4th respondent. The 4th respondent’s representatives informed the petitioner that she would be retrenched on account of “transitions” happening at the 4th respondent.
- g. On 13.02.2023 the petitioner received an email from the 4th respondent which read as follows;
- “Dear Muthoni,
- First of all, I am very sad that United had to go through such a tough transition and that your role has been impacted.
- This is an exceptionally difficult time and I hope you know that this retrenchment is not a reflection on you or your performance...”
- h. On 15.02.2023 the 4th respondent sent the petitioner an email wherein it indicated that the petitioner had requested for the termination of her employment to be reported as being due to ‘retrenchment’.
- i. The petitioner responded to the said email stating that she was not amenable to the use of the term ‘retrenchment’ in the email directed to her on 13.02.2023 because use of the said term would be injurious to her insurance claim.
- j. The 1st respondent then served the petitioner with a ‘mutual termination agreement’ which both parties executed.
- k. The petitioner states that it was the 1st respondent’s position that subject to the mutual termination agreement the parties had mutually and amicably agreed to end the employment relationship on 17.02.2023. However, the petitioner insists that from the email correspondence the termination had already been carried out on 13.02.2023 days before the mutual separation agreement was executed.



- l. Through an email received on 01.04.2023 it came to the petitioner's realization that the position that she had initially filled, Country Director of the 1st respondent, had been handed to another individual.
 - m. On 05.04.2023, 06.04.2023 and 07.04.2023 the petitioner requested the 1st respondent for the notice of termination letter on account of redundancy. To which the 1st respondent reverted on the even dates citing that they were in the process of determining what documents could be availed but none was ever sent to her.
 - n. On 07.04.2023 through an email, the 1st respondent expressed to the petitioner that the mutual termination agreement replaced the expected termination notice on account of redundancy.
 - o. It is the petitioner's case that all through the termination process the 1st respondent intimated that the petitioner was being retrenched, a term akin to being ejected from employment on account of redundancy. However, the process followed did not conform to the law making the termination unfair and illegal and in the process and she alleges it violated her fundamental rights and freedoms.
 - p. The petitioner states that the gravamen of the petition is that the termination on account of redundancy did not follow due process and is therefore unfair and illegal. The respondents subjected her to unfair labour practices through unfair and illegal termination of employment. Further, the termination of her employment was based on discriminatory grounds because of her gender.
 - q. The petitioner maintains that the 1st respondent contravened her right under articles 41(1) and 47(1) and (2) by disregarding the need for providing her with requisite notice with written reasons of the intention to terminate her employment and thereafter failing to provide her with a fair hearing.
 - r. The 2nd and 3rd respondents are vicariously liable for the actions of the 1st respondent. The 3rd respondent is the sole shareholder/owner of the 1st respondent.
 - s. The 2nd respondent is the 3rd respondent's agent in Kenya as can be observed in the payslips in which the 2nd respondent is noted to operate in Kenya on behalf of the 3rd respondent. On the payslips, the 1st respondent is referred to as a cost center for the 2nd respondent. The 3rd respondent's presence in the transaction is evident on the top left edge of the payslips. It is through the 1st respondent that the 2nd and 3rd respondents pay the petitioner salary.
 - t. The 4th respondent is a non-profit public benefit corporation owned by Change.org. Foundation.
 - u. The petitioner states that by virtue of the aforesaid relationships among the parties, the 2nd, 3rd and 4th respondents are equally liable for the unlawful actions of the 1st respondent.
3. The 1st, 3rd and 4th Respondents filed the Replying Affidavit of Lovanya Moodley, the senior legal counsel of the 3rd respondent, sworn on 09.06.2023 through Kieti Law LLP. It was stated and urged as follows:
- a. The 2nd respondent is unknown to the 1st and 3rd respondent. The 3rd respondent's subsidiary in Kenya is the 2nd respondent.
 - b. The 4th respondent is a public benefit corporation registered in California.



- c. By employment contract dated 03.01.2022 the petitioner was engaged by the 1st respondent to offer consultancy services as Country Director for the 4th respondent in Kenya. The engagement was pursuant to a commercial agreement and associated scope of work between the 3rd respondent and 4th respondent where the 3rd respondent (through the 1st respondent) acts as an employer of record where the 4th respondent does not have a local entity in a jurisdiction.
- d. The main terms of the employment contract were that the petitioner would report to the regional director of Africa of the 4th respondent and be paid a basic salary of Kes. 11,731,000 per year less all applicable deductions.
- e. On 13.02.2023 the petitioner was notified by the 4th respondent that the company was going through a transition which was to affect the petitioner's role and position. She was notified that the 4th respondent had embarked on a reorganization of its business to cushion it against the current global economic downturn. This would include cutting down operational expenses to reduce the 4th respondent's overall budget by 20% and entail the reduction of staff on a country and global level.
- f. Following discussions held with the petitioner, alternatives to the declaration of a redundancy were explored and an option of a mutual termination of employment as an alternative to the redundancy was presented to the petitioner for her consideration.
- g. Upon reviewing the proposed terms of the mutual termination agreement, the petitioner agreed to the same. The respondent maintains that the terms were more favourable than a statutory redundancy package would have been.
- h. The petitioner requested if the mutual termination agreement could be rephrased to enable her lodge an insurance claim.
- i. The 4th respondent acceded to her request and informed the 3rd respondent to incorporate the word "retrenchment" in clause 1.2 of the mutual termination agreement.
- j. On 16.02.2023 the petitioner voluntarily and freely accepted the terms of the mutual termination agreement and signified her consent by signing the same.
- k. As per the terms of the mutual termination agreement, the petitioner received a generous package of Kshs 3,333,837.87 being all dues owed to her as agreed.
- l. The respondent maintains that there was no need to proceed with the redundancy exercise as the petitioner agreed to the mutual separation at the consultations stage. As such the requirement for the issuance of the notices to the labour office was therefore not applicable.
- m. The respondent states that the petitioner was content with the terms of the separation, apparent by her signature thereon and it was only when her insurance company failed to honour her claim that the petitioner began alleging that her termination was unlawful.
- n. The allegations that the petitioner's previous position was filled by one Mr. Lenny Ruvaga and as such her termination was orchestrated so that she could be replaced by a gentleman on account of the petitioner's gender are false for the reasons that the transition that the 4th respondent was going through required it to implement cost cutting measures which resulted in the petitioner's mutual separation in a bid to save on costs. The said Lenny Ruvaga was offered a position as country lead role which is a lower job group and pay grade than



the petitioner which made economic sense at the time of the transition. The petitioner's termination of employment was by mutual agreement and not redundancy.

- o. The petitioner's claim for compensation for her insurance cover and personal loan insurance as against the respondents is baseless and misguided for reasons that the petitioner's employment was terminated by mutual agreement that had been preceded by a consultation by the 4th respondent explaining the changes that it was going through.
 - p. The respondents counter claim and states that on or about 10.04.2023 the petitioner uploaded disparaging accusations on her social media accounts particularly on twitter and linkedin alleging that she was unfairly terminated and her dues not paid with full knowledge that the same was false and malicious and contrary to the non-disparagement clause in her mutual termination agreement.
 - q. The petitioner maliciously skewed the turn of events with the clear and sole intention to disparage the respondent's reputation and standing among right thinking members of society. The petitioner proceeded to create an online petition based on these false accusations.
 - r. The petitioner proceeded to target partner organisations of the 4th respondent including but not limited to Bill and Melinda Gates Foundation with the malicious intention to tarnish and lower the reputation of the 4th respondent among right thinking members of society.
 - s. The immense social media activity has had an impact on the activities of the 4th respondent and has lowered its reputation among right thinking members of society.
 - t. By the petitioner's actions of maligning and disparaging the 4th respondent online, she has breached clause 2.5 of the mutual termination agreement and the respondents hold the petitioner liable for breach of contract.
 - u. Pursuant to the mutual termination agreement it was agreed that the petitioner would be paid an agreed package of Kshs 3,333,837.87 being all dues owed to her.
 - v. The respondent inadvertently overpaid the petitioner the sum of Kshs 96,000, which they have requested the petitioner to refund on numerous occasions, but the petitioner has failed, refused and ignored to do.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows:
- a. There is nothing on record to invalidate the mutual separation agreement. The petitioner agreed to separate and to end the employment relationship. The parties are bound with their own mutual separation agreement. It is not rebutted that it was with better pay than the claimant would have earned under redundancy.
 - b. The petitioner has not established discrimination as alleged and claimed. Indeed, she had in the mutual separation agreement agreed to terminate employment upon the agreed terms and conditions in that agreement. The mere fact that a man was subsequently employed in what the respondents say was lower remuneration and different position did not amount to discrimination at all.
 - c. In the circumstances, the Court finds that the petitioner has failed to establish the alleged violation of rights including discrimination and the petition must fail.



- d. The Court finds that in view of the mutual separation agreement dated 15.02.2023; provisions of the Employment Act in section 40 on redundancy were inapplicable. Paragraph 164 of the petitioner's submissions confirm that she signed the agreement and returned it on 16.02.2023. The Court finds that she consciously and voluntarily signed it. As submitted for the respondents, upon her request, clause 1.2 of the mutual separation agreement was framed to reflect retrenchment. If the petitioner ran into trouble with her insurance policy against redundancy, it appears that such dispute is with the insurance company and not the respondents. Misrepresentation, duress, coercion have not been shown to have existed at the time the petitioner signed the mutual separation agreement. She testified that she showed the agreement to her insurer on 15.02.2023 prior to lodging it with the insurer on 16.02.2023. Her testimony was that the insurer needed notices to show the retrenchment or redundancy took place. It then appears to the Court that the petitioner's case is that the insurer declined to honour the insurance policy and not that she did not voluntarily sign the mutual separation agreement.
- e. The Court considers that the respondents were entitled to rely upon their initial and further replying affidavits in opposing the amended petition, both affidavits being properly on record. In any event, the petitioner testified in Court and confirmed she voluntarily signed the mutual separation agreement, the main issue in the instant case. The respondents belatedly filed their final submissions and each party to bear own costs of the petition.

In conclusion judgment is hereby entered for the respondent for dismissal of the petition with orders each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 23RD FEBRUARY 2024.**

BYRAM ONGAYA

PRINCIPAL JUDGE

