



**Mosongo v Pathologists Lancet Kenya (Cause 0341 of 2022)  
[2024] KEELRC 13313 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13313 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 0341 OF 2022  
DKN MARETE, J  
NOVEMBER 27, 2024**

**BETWEEN**

**EDWIN MOSONGO ..... CLAIMANT**

**AND**

**PATHOLOGISTS LANCET KENYA ..... RESPONDENT**

**JUDGMENT**

1. This matter came to court vide the Memorandum of Claim dated 12th May, 2022. It does not disclose any issue in dispute on its face.
2. The Respondent in a Written Statement of Defence dated 25th August, 2022 denies the claim and prays that it be dismissed with costs.
3. Again, the Respondent in a Statement of Response dated 13th July, 2022 further denies the claim and brings out a Counter Claim and set-off.
4. The Claimant in finality brings out a Reply to Statement of Response dated 2nd August, 2022 in support of the claim.
5. The Claimant's case is that his claim is brought under Article 22 of *the Constitution* of Kenya, 2010 on account of violation of his vested constitutional rights and also on the ground of unfair termination of employment by way of constructive dismissal.
6. The Claimant's further case is that on 1st July 2016, he entered into employment contract as a Sales Management Trainee through a Respondent's letter of offer.
7. The Claimant's other case is that as result of his exemplary performance in his role he was on 23rd May, 2021 through a notification of salary review promoted to the team leader of the Sales and Marketing team and earned an aggregate salary of Kshs.233,400.00 with a bonus of Kshs.60,000.00 per month payable on quarterly basis.



8. The Claimant avers that vide an email correspondence dated 2nd October, 2021, being routine updates of the Respondent's CFO, it was so apparent that the revenue of the Respondent was growing exponentially despite the scourge of the Covid-19 variant. The Respondent realized a trend in revenue growth during the time the Claimant was at the helm of the sales and marketing team hence it beats logic and common reasoning to claim that the Claimant was a poor performer. He had exemplary performance and was feted on the same.
9. The Claimant further avers that he performed his duties distinctively and in terms with his conditions of service until 8th February 2022 when Respondent started engaging in various acts of unfair legal practices and creating unreasonable working conditions and environment that violated his constitutional rights. He was subjected to extreme forms of harassment in regards to his terms and condition of employment and all other matters arising out of his employment in clear disregard of Section 5(3)(b) of the Employment Act, 2007 and Article 19(3) of the Constitution. These were as follows;
- a. Deliberate and Malicious attacks on the Claimant's employment status thus portraying him as a non-performer.
  - b. The Chief Executive Officer demanding that the team send's reports directly to her instead of sending them to the Claimant in a bid to edge the Claimant out;
  - c. Denying the Claimant leave and instead proceeding to subject the Claimant to hostile working conditions despite the reasons for leave being valid and known to the Respondent;
  - d. Outright refusal to pay the bonus due to the Claimant by the Respondent despite the Claimant's several fruitless attempts to follow up on the same.
  - e. Sabotaging the Claimant and ensuring that he does not deliver on his mandate by withholding funds and diverting them to other departments and later claiming poor performance on his part. The Respondent essentially created artificial barriers to inhibit his performance.
  - f. Unduly influencing and coercing the Claimant to enter into a unlawful, illegal and involuntary mutual separation agreement under duress;
  - g. Stigmatizing the Claimant in the workplace and declaring him a persona non grata by the actions of the Respondent and further subjecting the Claimant to ridicule by his juniors.
- Again, the Respondent engaged in various acts aimed at demoting the Claimant herein and victimizing him key amongst them being;
- a. Demanding for reports from his junior team members during the business review meetings as opposed to the standard criteria of going through the team leader.
  - b. The Respondent appointing the County General Manager to preside over his meetings which essentially was a silent demotion.
10. The Claimant's other case is one of an antagonizing and compromised work environment where even his leave application was issue ridden when this leave was for him to nurse his mother who had been diagnosed with cancer and was hospitalized for a long time. As search for extension of such leave to allow him have his mother airlifted to India was met with silence from the Chief Executive Officer of the Respondent. In total, this resulted in a toxic and tough working environment that was draining to the Claimant.



11. The Claimant further avers that he was on 3rd February, 2022 and two days upon his return from leave informed of the Respondent intension to terminate his employment through a mutual separation agreement. He was further informed that he had no choice in the matter as the company no longer require his services. Ultimately, the Claimant was led into to this botched up, involuntary and unconscionable separation agreement despite his protests and denial of participation in its formulation.
12. He prays as follows;
  - a. A declaration that the so called mutual separation agreement dated 7<sup>th</sup> February 2022 amounted to unfair termination and/or wrongful dismissal.
  - b. A declaration that to the extent that the so called mutual separation agreement sought to oust relief accruing to the Claimant for wrongful termination guaranteed by statute that the same is invalid, and/or unenforceable.
  - c. A declaration that the Claimant's dismissal from employment by the Respondent was un-procedural, unfair, unlawful, unconstitutional and amounted to constructive dismissal.
  - d. A declaration that the actions of the Respondent as enumerated in paragraph 3-47 herein constitutes violation of the Claimants rights as guaranteed in the Bill of rights specifically Article 10, 28 and 41 of the Constitution and equally section 5(3) and 46 of the Employment Act as duly incorporated under Article 19(3) of the constitution.
  - e. Payment of 12-months gross salary compensation for unfair termination being Kshs.2,800,800.00
  - f. A bonus payment of Kshs.4,088,000.00
  - g. Payment of salary in lieu of notice Kshs.233,400.00.00
  - h. Payment of accrued and untaken leave days.
  - i. Payment of Kshs.5,000.000.00 in general and punitive damages with court interest from 3<sup>rd</sup> February 2022 until payment in full.
  - j. Costs of the suit and interest thereon on b, c, d and e
13. The Respondent's case is a denial of the claim.
14. The Respondent denies the purported violation of the Claimant's constitutional rights or even unfair termination of employment as alleged. She states thus;
  - a. The Claimant was employed as a Sales Management Trainee and was subsequently engaged as a Business Development Manager by the Respondent.
  - b. According to his terms of employment, the Claimant in the course of his employment as the Business Development Manager was reasonably required and expected to update his supervisor (the Line Manager) on the various matter the Business Development team and the progress made on a regular basis.
15. Again, the Respondent denies the contents of paragraph 5 of the claim on the award of pay on an on-target-basis (OTB) and avers as follows;
  - a. The Claimant was entitled to a basic salary of Kshs.148,400.00 and a quarterly bonus award of Kshs.60,000.00 which was subject to achievement of individual set objectives.



- b. The Respondent denies that the Claimant tenure of employment was one of exemplary performance as alleged or at all. All the employees of the Respondent were awarded salary increment and there was nothing exceptional about the Claimant's promotions or salary increments.
  - c. The Claimant was supposed to undergo a performance appraisal and objective setting process and meeting that would ultimately inform the basis of the award of pay on an on-target-basis (hereinafter referred to as "OTB") bonus.
  - d. The award of OTB bouns was strictly on basis of achievement of the set criteria and parameters of the performance appraisal.
  - e. The Claimant deliberately failed, ignored and neglected to submit reports and undergo the performance appraisal thus disentitling him any OTB bonuses as there would be no basis for such award.
16. The Respondent in penultimate avers that the separation/termination of the employment of the Claimant was mutual and agreed on inter partes. She denies any violation of the Claimant's rights to labour practices and provides as follows;
- a. At all material times, the Claimant was well-advised on the basis for the award of the OTB bonus which included set criterial and parameters of the performance appraisal and the repercussions of his failure to submit the same.
  - b. However, the Claimant failed, ignored, refused and/or neglected to submit the basis for the award of the OTB bonus thus disentitling the Claimant to the said bonus.
  - c. The Claimant breached the terms of his employment contract by failing to perform his duties as directed by his Line Manager.
  - d. The Claimant displayed defiant behavior towards the Respondent by refusing to submit feedback and occasional direct reports at the expected time despite receiving advice from the Line Manager on the same.
  - e. Furthermore, the Claimant refused to align and cooperate with the new management at the time, in the implementation of the organizational.
  - f. Notably, the Claimant was the only employee from the entire Senior Management Team (SMT) that failed to submit proposals on the yearly objectives despite numerous requests by the management.
  - g. Accordingly, upon evaluating the performance and implementation of the organizational goals, it emerged that the Claimant was unable to work effectively with the new management in the achievement of the organizational goals and objectives.
17. Overall, the Respondent's case is that the termination of employment was occasioned by a mutuality of arrangement inter partes prompted by the Claimant's inability to perform as required by the Respondent.
18. The Respondent also raises a Counter Claim in terms of paragraphs 27 to 34 of the Response which comes out as follows;
27. The Claimant and the Respondent herein agreed to mutually terminate their employment relationship by entering into a Mutual Separation Agreement dated 7<sup>th</sup> February 2022, both



parties negotiated the terms of separation and voluntarily agreed on a final consolidated amount of Kshs.1.3 Million.

28. By virtue of the executed Mutual Separation Agreement dated 7<sup>th</sup> February 2022, both parties negotiated the terms of separation and voluntarily agreed on a final consolidated amount of Kshs.1.3 Million.
  29. The Respondent accepted payment of Kshs.1.3 Million as full and final payment of all monies payable by the Claimant employer to him.
  30. The Claimant subsequently paid to the Respondent the agreed amount of Kshs.1.3 million an amount that was in consideration of the mutual separation of the Claimant and the Respondent's employment relationship.
  31. Clause 6 of the Mutual Separation Agreement stated that upon signing the agreement, the Respondent had agreed to discharge the Claimant all claims and liabilities arising out of the employment relationship including disputed wages and benefits, employment discrimination, unfair termination, wrongful discharge or breach of any employment contract.
  32. Accordingly, the Claimant avers that the Respondent acknowledged by voluntarily signing and thereafter accepting the separation package, that he had no claim against the Claimant in respect to the employment relationship and subsequent separation.
  33. By virtues of Clause 11 of the Mutual Separation Agreement, the Claimant avers that the Respondent acknowledged by voluntary signing and accepting the separation agreement, that he had been provided reasonable opportunity to review and consider the Agreement.
  34. In light of the foregoing, the Claimant therefore claims the sum of Kshs.1.3 Million as the amount paid to the Respondent as consideration for the mutual termination of the employment contract.
19. The matter came to court variously until the 1st November, 2023 when the parties agreed on a disposal by way of written submission.
  20. The issues for determination therefore are;
    1. Whether the Claimant was constructively terminated from his employment by the Respondent.
    2. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful.
    3. Whether the Respondent is entitled to the counter claim.
    4. Whether the Claimant is entitled to the relief sought.
    5. Who bears the costs of this cause?
  21. The 1st issue for determination is whether the Claimant was constructively terminated from his employment by the Respondent. The Claimant in his written submission dated 16th January, 2024 submits a case of constructive, unfair and unlawful termination of his employment by the Respondent.
  22. He seeks to rely on the authority of Section 45(2) of the *Employment Act*, 2007 which provides that a termination of employee contract of service is unfair if the employer fails to prove that the termination was;



- a. grounded on a valid and fair reason (s) relating to the employees conduct, capacity and compatibility or bases on the employer's operational requirements; and,
  - b. that a fair procedure was followed.
23. This is enunciated in the authority of *Walter Anuro vs Teachers Service Commission [2013] eKLR* the court observed thus;
- “For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness, substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
24. The Claimant submits that his termination of employment, disguised as a mutual separation was a gross violation of Section 45(2) in that;
- a. that the Respondent lacked sufficient reason if at all to terminate him;
  - b. the respondent never disclosed to the claimant the grounds for the separation;
  - c. the process was based on a take it or leave it basis thusly devoid of free will; and
  - d. the procedure followed was marred with ultimatums, threats, coercion, duress and undue influence.
24. It is the Claimant's other submission that the Respondent in contravention of Section 43 of the *Employment Act, 2007* did not adduce any reasons for such termination. The mutual separation Agreement by the Respondent does not offer any reasons or justification for the separation. The agreement was only utilized as a legal innovation to create an illusion of mutual separation in avoidance of the law and process of termination of an employment contract.
25. The Claimant in buttressing his case poses as follows;
- Assuming that the Claimant's behavior as pleaded by the Respondent's witness was unsatisfactory, the questions that begs answering are;
- a. why did the respondent not state the issues of misconduct as alleged in pleadings in the separation agreement? In any event the same was confidential.
  - b. Why did the Respondent not raise disciplinary issues at a disciplinary hearing?
  - c. Why these were pertinent issues not a part of the separation agreement?
  - d. If indeed the claimant was inefficient, why was he not put on performance improvement programs or subjected to a disciplinary process?
  - e. Why did the Respondent not issue the Claimant with warning letters?
26. It is his submission that the mutual separation agreement was a ploy by the Respondent with a view to frustrating and summarily dismiss an employee through back handed method not recognized by law.



27. The Claimant further rubbishes the Respondent's citation of the Claimant's failures and inefficiencies for coming out too late in the day. These ought to have been raised before termination and are not the subject of a court's determination at this stage. He puts it thus;

Disciplinary issues ...cannot be raised against the Claimant through pleadings, their place is only within a disciplinary hearing and the fact that they are being ventilated through pleadings shows that the respondent blatantly breached Section 43 of the Act.

28. It is his further submission that the alleged mutual separation was indeed a summary dismissal disguised as an agreement of parties to part ways. The Claimant broadly relies on authority of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR in support of his submissions on lack of ground and reasons for termination of his employment.

29. The Claimant further faults the Respondent's unfounded and fabricated allegations of poor performance for not being validated by evidence. The Respondent did not demonstrate any parameters used to measure the Claimant's performance to determine that it was substandard. He relies on authority of *Jane Samba Mukala v Oltukai Lodge Limited Industrial Cause Number 823 of 2010*: [2010] LLR 255 (ICK) (SEPTEMBER, 2013) where the court held as follows;

“ a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof... the employer must show that in arriving at the decision of nating the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance...it will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.

30. The Claimant again submits a case of unfair and unlawful termination of employment in which he was never afforded an opportunity to be heard in terms of section 41 of the *Employment Act*, 2007. He cites the authority of *Simon Muguku Gichigi v Taifa Sacco Society Limited* [2012] eKLR where the court observed the following;

Labour rights are now anchored in the Bill of Rights and protected under Article 41 of *the Constitution*. An employer cannot therefore at the spur of the moment tell an employee “you are a non-performer and for that reason you are fired. Such knee jerk decisions have no place in modern employment law...I find that the termination of the claimant ...without affording him opportunity to be heard was unfair within the meaning of section 45 of the *Employment Act*.”

31. The Claimant in the penultimate submits a case of constructive termination of employment and seeks to rely on authority of *Pauline Wangeci Warui v Safaricom Limited* [2020] eKLR which relied on *Sandhu v Jande Rulk Transport Ltd* [2007] Ewa CIV 430 (10 May 2007) where the court observed thus;

“The appellant was being dismissed. In my judgment it simply cannot be argued that he was negotiating freely. He had no warning that the purpose of the 6 December meeting was to dismiss him; he had no advice, no time to reflect. In my judgment, he was doing his best on



his own to salvage what he could from the inevitable fact that he was going to be dismissed. This, in my judgment, is the very antithesis of free, unpressurised negotiations."

1. Evidently, in uttering such threats and ultimatums, the Respondent blatantly abused its dominant financial position by flexing muscle on its employee to coerce an exit, which was abhorred in the SANDHU V JAN DE RIJIK decision above where the Court held thus:

"Employers of the size of the respondent should not be encouraged to behave as the respondent has done, nor should they think that proper procedures for disciplining or dismissing the employees are unnecessary ... and that an employer should not be able to use its dominant position to exploit its employee's position."

2. In further attempts to coerce the Claimant's execution of the agreement, the CEO informed the Claimant that the exit package would enable his family foot his mother's ballooning medical bill.
3. Additionally, on 3<sup>rd</sup> February 2022, the Claimant was presented with a template agreement that was bereft of any specific terms applying to his termination (Refer to CB-5 in the Claimant's documents), thus curbing any efforts he would have at consulting an advocate.
4. Despite his efforts to procure the more specific version of the agreement on 4<sup>th</sup> February 2022, which was a Friday, the Respondent's CEO was ignored and his request (Refer to CB-6).
5. Evidently, the Respondent's conduct and behavior throughout this process reeks of more efforts at constructive dismissal than attempting a mutual separation.
6. Faced with significantly similar facts, the court in PAULINE WANGECI decision held that:

"The claimant as called to a meeting, informed that her employment had been terminated then presented with a mutual separation agreement...The totality of the above set of facts negates an atmosphere of free and unpressurised negotiations as per the Sandhu decision.

The claimant was not taken through a hearing. She did not chose to leave employment. She was not heard and found guilty of misconduct. She was not presented with a choice between mutual separation and dismissal. Had she been presented with charges, and given the opportunity to forego a disciplinary hearing while fully aware of the charges and the evidence to back them, the situation would have been different she would be making an informed decision.

Here, she was called in, then informed of the separation and presented with a separation agreement to sign...I find this case to be similar with Sandhu's case on all fours. Like in that case, the claimant did not have any room to negotiate an agreement



presented to her for signature without prior notice. The truth is that a decision was made to dismiss her without a hearing and the “mutual separation agreement” prepared. She was then called, informed about the dismissal and presented with the agreement to sign.

Taking into account that the respondent’s defence was that the separation was on account of misconduct...and that there was no disciplinary hearing or a discussion to agree on terms of separation, the respondent cannot avoid liability by reference to the signing of the mutual separation agreement.

From the foregoing, I find that the claimant was in actual fact dismissed from employment and coerced into signing the mutual separation agreement which in any event was not mutual.

7. Given the above, the Claimant calls upon this Honourable Court to find that the Claimant was coerced to execute the mutual separation agreement dated 7<sup>th</sup> February 2022 consequent to which the same amounted to unfair termination and/or wrongful dismissal.
32. The Respondent in her written submission dated 14th February, 2024 submits a case of fair and valid termination of employment through the mutual separation agreement inter partes. She goes out of her way to justify the validity of the mutual separation agreement and assert its voluntary nature.
33. The Respondent seeks to rely on authority of *Max Masoud Roshankar & Another v Sky Aero Limited [2015] eKLR* where the court laid out the legal requirement of a valid and binding mutual separation agreement as follows.

Termination and resignation are matters of law or can be agreed upon by mutual consent of the contracting parties. An employee is allowed to resign and or terminate the contract of service upon giving notice or making payment in lieu of the agreed notice period. Equally and employer can exercise similar right of terminating an employee with notice or make a payment in lieu of such notice.
34. The Respondent’s case is dismal, to say the least. It does not get out to controvert the elaborate case of the Claimant in the circumstances. It is overwhelmed in toto by the Claimant’s case and supporting evidence.
35. I find a case of constructive termination of employment of the Claimant by the Respondent. This is in the circumstances where the Respondent created a work place environment that was toxic, horrendous, and unpalatable and in many ways unattractive and unaccommodating to the Claimant’s continued stay in employment. It is not in dispute that the Claimant left employment through a separation agreement inter partes. What is not clear and disputed is whether the separation agreement was mutual or otherwise. All circumstances and available evidence in this matter point to a situation where the employment of the Claimant by the Respondent was at some stage frowned upon and he had to create way through exit. He had not choices in the matter. I therefore find a case of constructive, wrongful, unfair and unlawful termination of the Claimant’s employment by the Respondent and hold as such. And this answers the 1st and 2nd issues for determination.
36. The 3rd issue for determination is whether the Respondent is entitled to the Counter Claim. An analysis of the Counter Claim has its basis on the nature and validity of the separation of the Claimant



and the Respondent. In the circumstances, this court has made a finding that the separation indeed amounted to a constructive dismissal from employment that was also unlawful. The Respondent's Counter Claim is therefore pegged on an illegality of termination of employment. It has no legs of its own and must fail.

37. Besides, the Respondent has not tendered any evidence in support of the Counter Claim. It is not even supported by any legal authority or submission. I therefore find that the Respondent is not entitled to a Counter Claim and find as such. This answered the 3rd issue herein.
38. The 4th issue for determination is whether the Claimant is entitled to the relief sought. He is. Having won on a case of constructive and unlawful termination of employment, he become entitled to the relief sought.
39. I am therefore inclined to allow the claim and order relief as follows;
  - i. A declaration be and is hereby issued that the so-called mutual separation agreement dated 7th February, 2022 amounted to unfair, wrongful and unlawful dismissal of the Claimant.
  - ii. A declaration be and is hereby issued that to the extent that the so-called mutual separation agreement intended to oust relief accruing to the Claimant for wrongful termination guaranteed by statute is invalid, and or unenforceable.
  - iii. A declaration that the Claimant's dismissal from employment by the Respondent was unprocedural, unfair, unlawful, unconstitutional and amounted to constructive dismissal.
  - iv. A declaration that the actions of the Respondent as enumerated in paragraph 3-47 of the claim constitute violations of the Claimants rights as guaranteed in the Bill of rights specifically Article 10, 28 and 41 of *the Constitution* and equally section 5(3) and 46 of the *Employment Act* as duly incorporated under Article 19(3) of *the constitution*.
  - v. One (1) months salary in lieu of notice.....Kshs.233,400.00
  - vi. Compensation for accrued and untaken leave days..Kshs 155,427.00
  - vii. Six (6) month's salary as compensation for unlawful termination of employment  
.....Kshs.1,400,400.00
  - viii. Unpaid bonus .....Kshs.4,088,000.00  
Total of Claim.....Kshs.5,877,227.00
  - ix. Interest at court rates from the date of judgment till payment in full.
  - x. The costs of the claim shall be borne by the Respondent.

**DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

**Appearances:**

1. Miss Muraguri instructed by MMW Advocates LLP for the Claimant.
2. Mr. Kamau Muturi instructed by Mwaniki Gachoka & Company Advocates for the Respondent

