REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 442 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PAULINE WANGECI WARUI.................................CLAIMANT

VERSUS

SAFARICOM LIMITED.....................................RESPONDENT

JUDGMENT

The Claimant was until 20th March 2015 the Director, Customer Care of the respondent, Safaricom Limited a public limited liability company incorporated in Kenya, having first joined the respondent on 5th December 2007 as Head of Call Centre, and rising steadily to Chief Customer Care, then Director Executive Head of Customer Care, before being promoted to the positon of Director Customer Care. The claimant avers that her annual performance appraisal rating for the entire 7 years that she worked for the respondent ranged between "*very good*" and "*excellent*" making her eligible for annual bonuses. She avers that she was not subjected to any form of disciplinary action during the entire period.

She avers that one 20th March 2015 while at Strathmore Business

School attending a two weeks program sponsored and paid for by the respondent, she was called by the Office of the Chief Executive Officer (CEO) of the respondent allegedly for an urgent appraisal. That her attempts to reschedule the appraisal on grounds that she was in the middle of a continuous assessment test at Strathmore Business' School were declined.

When she arrived at the CEO's office, he called in the Director Human Resources. The CEO then informed the claimant that he had decided that they should mutually separate. She was immediately led to the Boardroom where the Director, Corporate Affairs and Legal Services was waiting with a "*mutual separation agreemen*t".

Since everything was so abrupt the claimant did not sign the mutual separation agreement immediately but requested to be allowed to consult with her family. She was immediately thereafter escorted out of the respondent's premises. On the same day the CEO sent communication to all its employees announcing senior leadership changes necessitated by "*an appreciation that business had become disconnected from its customers*". The CEO further sent out a press release to the effect that the claimant had opted to step down to pursue personal business interests.

The claimant signed the mutual separation agreement on 24th March 2015, which she avers was under duress and coercion. She gives the particulars of duress and coercion as –

> i. The Respondent announcing or causing to be announced through media outlets that the Claimant had voluntary stepped down from her role and position as Director of Customer Care at the Respondent ostensibly to pursue "*personal interests*" while knowing the same to be false.
>
> ii. The Respondent caused security personnel to escort the claimant from the Respondent's office and directing that the personal effects of the claimant would be delivered to the claimant's house by the claimant's personal assistant as the claimant would not henceforth access her office at the Respondent's premises (the then claimant's office).
>
> iii. The Respondent coercing the Claimant to sign a so called mutual separation agreement or face summary dismissal.
>
> iv. The Respondent unlawfully and maliciously disparaging and damaging the claimant's character and reputation through media channels and in meeting(s) held at the Claimant's place of work while addressing the Respondent's members of staff with other stranger(s) known to the Claimant without any reasonable or lawful excuse.

The Claimant contends that the said termination was wrongful for the reason that;

i) It contravenes Article 41 of the Constitution that guarantees the right to fair labour practice for failing to observe due process.

ii) It contravenes Article 47 of the Constitution, which guarantees the right to procedurally Fair Administrative Action.

iii) It contravenes section 45 and 46 of the Employment Act 2007, which imposes an obligation on the employer not to terminate an employee's employment unfairly.

iv) It contravenes section 4(3) and (4) of the Fair Administrative Act, 2015.

v) It contravenes Clause 36 and 44 of the Respondents' Staff Manual.

That owing to the negative and malicious publicity given by the Respondent regarding the circumstances under which the claimant left the company, her chances of securing alternative comparable employment is considerably diminished.

Aggrieved by the separation, the claimant filed the instant suit vide her statement of claim dated 18th March 2016 and filed on even date. She seeks the following orders against the respondent –

1. A declaration that the so - called mutual separation agreement dated 20th March 2015 amounted to unfair termination and/or wrongful dismissal.

2. A declaration that to the extent that the so - called mutual separation agreement sought to oust reliefs accruing to the Claimant for wrongful termination guaranteed by statute, the same is invalid and/or unenforceable.

3. A declaration that the Claimant had a legitimate expectation to serve the 1st Respondent till retirement age at 60 years and hence is entitled to compensation and damages assessed on the basis of her monthly gross pay as at 20th March 2015 till her expected retirement tabulated to the sums of Kshs.442,556,900/= before factoring annual increments, inflation and interest.

4. Damages for wrongful termination equivalent to 12 months' salary based on the gross salary earned at the time of wrongful termination on 20th March 2015 totalling Kshs.29,504,460/=.

5. Accrued bonus for the year ending 30th March 2015 for Kshs.8,836,803/=.

6. Any other relief that this court may deem just to grant.

7. Costs of suit and interest.

The respondent filed a memorandum of response dated 10th May 2016 which it amended by the amended memorandum of response and counterclaim dated 8th and filed on 14th June 2017.

In the amended memorandum of response and counterclaim the respondent denies the averments in the statement of claim and avers that investigations established that the Claimant's department had for a period of time systematically doctored performance reports with the claimant's knowledge and connivance to show higher performance so as to meet targets.

The Respondent avers that it received information through its whistle blower system of alleged doctoring of performance reports in the customer care centre headed by the Claimant. That Auditors undertook an investigation of the allegations including interviews with staff and checking the reports presented by the Claimant to the Executive Committee of the Respondent against the raw data in the system. The investigations revealed that there was a systematic doctoring of reports. Data from the call centre system was altered to reflect better performance whereas the actual performance was below target.

The respondent avers that the Claimant as director presented the doctored reports to the executive committee while she was fully aware of the actual performance. It avers that it confronted the Claimant with the results of the said report and she was given an option of going through the disciplinary process with the real likelihood of being summarily dismissed and losing all benefits or mutually separating.

That the Claimant took several days to weigh her options and on her own volition elected not to go through the disciplinary process and to separate by mutual agreement.

The respondent avers that the Claimant was a senior officer, well educated, with considerable experience and took adequate time to consider her options. That she was at liberty to decline the separation agreement and go through the disciplinary process.

The respondent avers that the Claimant entered into the separation agreement on her own volition and without any coercion. That the Claimant executed the separation agreement on her own volition and after taking several days to consider her options. The execution was done willingly and without any coercions. Further, that the Claimant took the benefit of the said agreement and only filed the suit after getting full payment under the Agreement which included ex-gratia amounts way above the amounts she was entitled to under law.

The Respondent avers that the Claimant is estopped from reneging on the agreement after taking its full benefit including avoiding the disciplinary process that would have resulted in her losing her benefits.

The respondent further avers the announcement of the Claimant's departure was accurate and factual and consistent with the agreed terms of the separation agreement.

The respondent avers that the claimant was not escorted by security guards or denied access to her office as alleged and she is put to strict proof on the allegations thereof.

That if any questions will arise as to the Claimant's character and reputation it will arise from these proceedings where the history of doctored reports will now be made public and there will be an opportunity to establish the Claimant's role and culpability thereof. The separation agreement had shielded the Claimant from scrutiny.

That the Claimant's departure from employment was based solely on the mutual termination agreement and the Respondent will rely on it for its import and meaning and avers no or no reasonable grounds have been given to warrant a departure from the said agreement.

The Respondent avers that there is no legitimate expectation in law of life employment. All employment contracts are liable to termination in the manner stipulated in the contract and the law. Further that the averments of fact in the paragraph that the Claimant had done no wrong is not factually true. That the Claimant by executing the separation agreement opted not to go through the disciplinary process that would have led to her summary dismissal. That the claimant cannot approbate and reprobate taking the benefit of the agreement on the one hand, which included foregoing the disciplinary process, and wanting to declare it void without giving back all money and benefits she has taken from the agreement.

In the counterclaim the respondent avers that the Claimant presented doctored reports to the executive committee to show higher performance so as to meet targets while she was fully aware of the actual performance which was below target.

That when Claimant was presented with the option of either going through the disciplinary process with the real likelihood of being summarily dismissed and losing all benefits or mutually separating, the claimant elected not to go through the disciplinary process but to separate by mutual agreement after taking several days to weigh her options.

The respondent avers that the Claimant was paid ex-gratia amounts on the agreement to mutually separate and on the understanding that the Claimant would be spared disciplinary action.

That without prejudice to the response herein, the Respondent contends that in the event that the Court holds the separation agreement to be void and that the claimant was wrongfully terminated, the Respondent shall seek the following amounts from the Claimant which were paid to the Claimant in the separation agreement: -

i). 3 months' salary in lieu of notice.................... Kshs.4,797,225

ii) 3 months' car allowance.................................... Kshs.660,000

iii).................................. 15 days' salary for every complete year

of service.. Kshs.6,366,763

iv) Prorated Bonus pay... Kshs.4,838,757

v) Prorated Employee Performance Shares, pro-rated up to

20th March 2015... Kshs.12,059,722

vi).................................. 11 outstanding leave days accrued and not taken up to

20th March, 2015.. Kshs.33,743

vii)............ An Ex-gratia amount in consideration of the restraint

of trade.. Kshs.16,668,680

Total Kshs.46,224,890

The respondent prays as follows –

a) The sum of Kshs.46,224,890 being the separation amounts;

b) Costs of the Counterclaim; and

c) Any other relief that this Court may deem fit and just to grant.

At the hearing the claimant testified on her behalf and expounded on the issues set out in the statement of claim and the witness statement filed therewith.

The respondent called one witness PAUL KASIMU, its Chief Human Resource Officer (previously Human Resource Director). RW1 also largely expounded on the issues set out in the response to statement of claim and counterclaim/.

Under cross examination he stated that there was no disciplinary process to establish that business had become disconnected as communicated in the CEO's communication to staff after the release of the claimant. He testified that the claimant was paid according to the mutual separation agreement which provided that she would be paid 3 months' salary in lieu of notice, car allowance, 15 days' salary for each completed year of service, prorated bonus,

shares, leave and medical cover for self and family.

The separation agreement further had a clause on restraint of trade for which the claimant was paid Shs.16,668,680 as consideration.

RW1 testified that the reports that contain the circumstances under which the claimant left employment were not shared with her prior to the meeting of 20th March 2015. He testified that the report was prepared by Ethics and Compliance Division of the respondent on 5th February 2015, some 45 days before the separation. He testified that the report does not make any reference to an interview with the claimant. He further testified that the mutual separation contract does not refer to the performance related queries in the report.

RW1 testified that the only restraint in the mutual separation agreement was that the claimant does not work with or for the respondent's competitors which condition the claimant did not contravene.

Determination

I have considered the pleadings, the evidence adduced in court and the written submissions filed by the parties. The issues for determination are whether the claimant's termination was unfair and if she is entitled to the remedies sought.

Unfair Termination

The procedure for fair termination is provided under Section 41 of the Employment Act which requires that an employee is first informed of the reason why the employer is contemplating separation. The employee is then given an opportunity to respond to the charges in the presence of either a union shop floor official or a colleague, if the employee desires so. It is only after this process that the employer should make the decision to dismiss the employee as was stated in the case of **Simon Muguku Gichigi v Taifa Sacco Society Limited [2012] eKLR**, where this court held;

> *"Labour and employment rights are now anchored in the Bill of Rights and are protected under Article 41 of the Constitution of Kenya 2010. 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."*

The Employment Act further requires an employer to prove the grounds for termination as set out in Section 43 of the Act.

In the instant suit, the claimant as called to a meeting, informed that her employment had been terminated then presented with a mutual separation agreement. Even before she signed the agreement, a communication had been released to staff and to the press that she had opted to leave to pursue other business interests. The communication released to staff is as follows –

> *"I wish to announce some changes to the Senior Leadership of the company. These changes have been necessitated by an appreciation that we as a business have become disconnected from our customers' needs at various levels. We therefore have to repurpose ourselves towards delivering a truly differentiated due proposition for our customers that is based on three key pillars:*
>
> *i.) Superior customer insights,*
>
> *ii.) Operational excellence in our market execution and lastly*
>
> *iii.) The delivery of great products and services.*
>
> *After 11 years of dedicated service to Safaricom, Peter Arina, General Manager Consumer Business will be leaving the company to pursue other interests. Peter has contributed to the company's strong commercial performance and during his tenure at Safaricom we have seen the phenomenal growth of non-voice revenue streams such as mobile data, PRS VAS and of course the now famous Skiza portfolio.*
>
> *It is also time for us to bid farewell to Ms. Pauline Warui, Director, Customer Management, who has opted to step down from her role to pursue personal business interests. Pauline has held the role for the last 7 years, during which time, we have seen the implementation of aggressive call reduction initiatives, launching of innovative customer touch points and of course global*

recognition for the great work of our call center team.

As part of implementing our talent succession plans, it is my pleasure to announce the following appointments which take effect immediately: - …"

Under such circumstances, there was no way the claimant could insist on remaining in the employment of the respondent as she had already been replaced even before she signed the mutual separation agreement. She pretty much had no option as she had literally been thrown out of her office based on her uncontroverted evidence that the respondent has alluded to.

The totality of the above set of facts negates an atmosphere of free and unpressurised negotiations within the meaning of **Sandhu v Jan De Rijik Transport Ltd [2007] EWCA Civ 430 (10 May 2007**), where the Court of Appeal of England and Wales in a similar case had this to say –

"[51] …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."

The respondent blatantly abused and took advantage of its dominant financial position to flex its muscle on its employee to coerce an exit. This was abhorred in Sandhu's case as follows;

"[64] 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 employees position."

The respondent has argued that it is now well established that general principles of the law of contract apply to contracts of employment save as may be altered by the provisions of the Employment Act. That the Court of Appeal in the case of **Krystalline Salt Limited v Kwekwe Mwakele and 67 Others, Civil Appeal No. 79 of 2015 (2017) eKLR,** held that in Kenya, employment is governed by the general law of contract as much as by the principles of common law enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.

In Kenya, contracts are governed by the Law of Contract Act, Chapter 23 of the Laws of Kenya. Section 2 thereof provides for the application of English Law to Kenya. It provides as follows:

"Save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of this section and by the Acts of Parliament of the United Kingdom specified in the Schedule to this Act, to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya:

Provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal."

The respondent submits that a contract is a legally binding agreement which recognises and governs the rights and duties of the parties to the agreement. For a contract to be binding there has to be an offer, which includes the terms the offeror proposes; Acceptance, which may signified by signature of the offeree in case of a written contract; and Consideration, the price of offeror is willing to pay. Consideration must be something of value. Once this is done, a contract is complete.

The respondent further submits that the principle of freedom of contract states that people have the right to legally bind themselves. It is a principle which holds that contracts are based on mutual agreement and free choice. This principle postulates that people are able to fashion their relations by private agreements. Simply put, parties are free to enter into any contractual arrangements as long as such arrangements are not expressly prohibited by law, statutory or otherwise.

In the English case of **Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd (2016) EWCA Civ 396**, Lord Justice Beatson stated as follows;

"Absent statutory or common law restrictions, the general principle of the English law of contract is that parties are free to determine for themselves what obligations they will accept. The parties have the freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth or by conduct."

This principle was applied in the case of **Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR**, where court explained that –

"... It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration".

The South African Constitutional Court upheld Mutual Separation Agreement in the case of **Muyiwa Gbenga-Oluwatove v Reckitt Benskiser South Africa (Pty) Limited and Another, Case CC 41/16**. In this case, Muyiwa Gbenga-Oluwatoye concluded a contract of employment with the Respondent. An investigation for misrepresenting his qualifications and employment history began in February, 2014. This resulted in his suspension. The quarrel was that during his employment negotiations with the Respondent, the Applicant untruthfully

identified Unilever as his then current employer, whereas in truth it was Standard Chartered Bank. The Applicant was dismissed. The Applicant alleged that there was no disciplinary hearing and that infringed his right to be heard. A mutual separation agreement was entered into by the parties to determine their future relationship. The Applicant look issue with a clause of the separation agreement that waived recourse to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court. The Constitutional Court in dismissing the application for leave in appeal held as follows;

> *"… we must consider the importance of giving effect to agreements, solemnly concluded, by parties operating from the necessary position of approximate equality of bargaining power. Here, the power of the Labour Appeal Court's approach is obvious. What is at issue here is a powerful consideration of public policy - the need for parties to settle their disputes on terms agreeable to them.*
>
> *The public, and indeed our courts, have a powerful interest in enforcing agreements of this. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer."*

In **Muyiwa Gbenga-Oluwatove v Reckitt Benskiser South Africa (Pty) Ltd and Another**, (supra), the South African Constitutional Court further held that –

> *"Employment is not a marriage. It can be dissolved by consent" Parties to an employment contract can mutually agree to terminate the contract on the basis of mutual undertakings between them e.g. waiver of claims, confidentiality, future cooperation, etc. This method is not provided for in the law but it is commonplace and the terms of the mutual separation are legally enforceable. In* ***Max Masoud Roshankar and another v Sky Aero Limited [2015] eKLR****, where the court stated: "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." Note that in the above case, the right of each party to terminate the contract at will is affirmed, with no mention of giving reasons or holding a disciplinary hearing prior to such termination. The terms of the separation are normally contained in a Mutual Separation Agreement.*

In **Frederick Kariuki Kamau v Bank of India [2015] eKLR**, the court stated –

> *"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 an employer can exercise similar right of terminating an employee with notice or make a payment in lieu of such notice."*

Further, in the case of **William Barasa Obutiti v Mumias Sugar Company Limited, Civil Appeal No. 198 of 2004 (2006) eKLR,** the Respondent, Mumias Sugar Company Limited had mooted a scheme to reduce the staff through what it called Voluntary Early Retirement Scheme ('VERS')- The Appellant submitted that was prejudicial, unfair and irregular. The Court held as follows;

> *"It is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. The agreement of mutual release may be subject to terms as in VERS. In such circumstances, the agreement will be effective to override formal or substantial restrictions placed on the termination of the contract by the original contract itself."*

The Court in the above case quoted with approval the English case of **Latchford Premier Cinema Ltd v Ennion and Paterson (1931) 2 Ch. 409**. In the case, by the company's articles of association, it was provided that the office of a director should ipso facto be vacated if, by notice in writing to the company, he resigned his office. Directors of the company orally tendered their resignations as directors at the annual general meeting and their resignations were accepted by a resolution passed at the meeting. They thereafter claimed the right to continue to act directors on the ground that, as their resignations had to be made by notice in writing, their oral resignations were invalid. The Court held that –

> *"The directors' oral resignations were valid since there was no ground in law for saying that, where a written contract for service had been made which required written notice on either side before it could be terminated, it could not be terminated orally by mutual agreement by the parties."*

In **National Bank of Kenya Limited v Hamida Bana and 103 Others, Civil Appeal No. 72 of 2017 (2017) eKLR**, the Court in giving effect to the VER scheme which limited the application of the HR manual on the exit procedures held as follows –

> *"It is not in dispute that the respondents accepted the terms offered in the circular according to their respective applications as well as acceptance letters issued by the appellant. Similarly, it was open for the respondents to reject the aforesaid terms and indeed not take advantage of the VER scheme. … A concomitant of the doctrine of freedom to contract is the binding force of the contract."*

The Respondent argued that the mutual separation agreement be treated as any other agreement between an employer and an employee.

The respondent submitted that this Court in the case of **Paul Njaga Kihara v Chase Bank (Kenya) Limited in Receivership and Another (2018) eKLR**, gave effect to a mutual separation agreement for the termination of the Claimant's employment as the 1st Respondent was restructuring in a bid to create a sustainable payroll structure.

The Respondent argued that there are no legal restrictions limiting the rights of employers and employees to enter into an agreement terminating the employment contract as held by the Court of Appeal in **William Barasa Obutiti** (supra), the agreement would be effective to

override formal or substantial restrictions placed on the termination by the original contract itself.

The respondent further argued that there was no duress as the claimant signed the mutual separation contract four (4) days after receiving it. That the Claimant has not adduced evidence showing that in signing the Agreement there was a combination of pressure and lack of practical choice or even violence of any nature. The Respondent submits that there was no violence or threat to violence to the person of the Claimant or at all.

The respondent submits that the case of **Sandhu v Jan De Rijik** is not applicable as the employee in that case endorsed on the separation agreement that the separation was not mutual. The respondent father relied on the case of **Gbenga-Oluwatoye v Benckiser South Africa (Pty) Limited and Another (2016) ZALAC 4: (2016) 37 ILJ** where a senor employee signed a mutual separation agreement. The court observed as follows –

> *"Having regard to the parties' relative positions, including their bargaining power and their level of knowledge of the contract, there was no inequity here. The applicant was employed in a senior management position. He had ample previous experience at senior level. There was no indication that he did not understand that the separation agreement limited judicial redress."*

The respondent submits that the claimant is estopped from reneging on the agreement after taking full benefit including dividing disciplinary process that would have resulted in her losing her benefits. It relies on **State of Punjab and Others v Dhaniit Sins Sandhu, Civil Appeal No. 5698-5699 of 2009**, the Supreme Court of India expressed itself as follows;

> *"The principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled to on the footing that it is valid and then turn round and say it is void for purpose of securing some other advantage."*

In **Doge v Kenya Canners Ltd (1989) KLR 127** Justice A B Shah (as he then was) in explaining the principle of estoppel aptly stated –

> *"It is a principle of justice and equity. It comes to this: when a man by his words or conduct, has led another to believe that he may safely act on the faith of them and the other does act on them. He will not be allowed to go back on what he has said or done when it would be unjust or inequitable to do so."*

The Supreme Court of India in **Rajasthan State Industrial Development and Investment Corporation and Another v Diamond and Gem Development Limited and Another AIR 2013 SC 1241** held as follows –

> *"A party cannot be permitted to blow hot and cold, fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such a contract or conveyance or order."*

All the cases cited by the respondent are not applicable to the case herein. In this case 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 a mutual separation agreement and dismissal.

Had the claimant been presented with charges and then given the opportunity to forego a disciplinary hearing while fully aware of the charges and the evidence to back the charges, the situation would have been different as 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. This cannot be equated or compared with a voluntary early retirement scheme where an employee applies for the same after considering the disclosed benefits offered by the employer. 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. Even before she had digested the contents, a circular was sent out to the staff to inform them she had left and a press release sent to the media. This cannot be anything other than a dismissal.

Taking into account that the respondent's defence was that the separation was on account of misconduct following investigations which revealed that there was systematic doctoring of reports to reflect better performance and that there was no disciplinary hearing or a discussion to agree on terms of separation, the respondent cannot avoid lability by reference to the signing of the mutual separation agreement.

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

Remedies

The claimant prays for a declaration that the so - called mutual separation agreement dated 20th March 2015 amounted to unfair termination and/or wrongful dismissal and that to the extent that the so - called mutual separation agreement sought to oust reliefs accruing to the Claimant for wrongful termination guaranteed by statute, the same is invalid and/or unenforceable.

I have already declared accordingly.

The claimant further prayed for payment to the expected date of retirement. In support of her claim she relies on the decision in **Benuel**

Mariera v Award Enterprises Limited where the court awarded 12 months' gross salary. The respondent however submits that the claimant is not entitled to that payer. It cites a litany of cases where the court had made a determination of the matter.

In **Alphonse Maghanga Mwahanya v Operation 680 Limited (2013) eKLR** it was held as follows; -

> "*The question therefore is whether the Employment Act or the Industrial Court Act can now be authority to grant damages for breach of contract under the common law. My simple answer is that the Employment Act, 2007 and the Industrial Court Act have not opened an avenue for this Court to grant damages equivalent to the unserved term of an employment contract. What the Employment Act has done is to empower the Court to award compensation up to a maximum of 12 months' gross pay for unfair termination of contract, whether definite, fixed term or indefinite."*

In the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission, Industrial Cause No. 203 of 2011**,

it was held as follows: -

> "*There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word 'permanent employment.*
>
> *Claimant is not entitled to special damages of Kshs.42,588,000 which is equivalent to the loss of income to the date of retirement. There was no guarantee of employment to the date of retirement. The claim is thus dismissed."*

The above position was adopted by the Court of Appeal in the case of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited, Civil Appeal No. 25A of 2013**.

Rika J. in **D. K Njagi Marete v Teachers Service Commission Industrial Cause No. 379 of 2009**, stated that: -

> *"What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.* ***In Industrial Court Cause No. 1722 of 2011*** *between* ***David Mwangi Gioko and 51 Others v Nairobi City Water and Sewerage Company Limited*** *and* ***Industrial Court Cause No. 611 [N] of 2009*** *between* ***Maria Kagai Ligaga v Coca Cola East Africa Limited****, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round …*
>
> *A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy ...."*

In the **High Court Civil Case No. 1139 of 2002** between **Menginya Salim Murgani v Kenya Revenue Authority**, Ojwang J. (as he then was) held that: -"

> "*...it would be injudicious to found an award of damages upon sanguine assessments on prospects.*

In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well endowed man, likely to find occupational engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.

In **Marilyn Mbuthia v Safaricom Limited (2019) eKLR**, where the Claimant had sought for salary from the date of termination until retirement, this Court quoted with approval the decision in **Engineer Francis N Gachuri v Energy Regulatory Commission** (supra) and declined to award the Claimant salary

from date of termination until retirement.

In view of the decisions above which can be taken to have settled the law on the question whether an employee who has been unfairly terminated can be paid for the unserved period to the date of retirement, the Claimant is not entitled to prayers as pleaded in paragraphs 28 and 33(c) of the claim. From the said decisions, it is clear that this prayer has no basis in law or in contract. The same is accordingly dismissed.

The claimant further prayed for compensation. This is provided for under Section 49(1)(c) of the Employment Act provided that the court takes into consideration the factors set out in Section 49(4) thereof.

I have considered the circumstances under which the claimant was terminated. It was not humane at all. The claimant had no inkling that it was coming. She had not been accused of any misconduct and no issues had been raised about her performance. Taking into account all the circumstances surrounding the termination of her employment, the amounts paid to her in compensation in respect of the restraint of trade clauses of the mutual separation agreement, her legitimate expectations taking into account her work history and the length of service, it is

my opinion that 8 months' salary is reasonable compensation for the unfair termination of her employment. I thus award her **Kshs.14,552,600** in respect thereof.

The claimant further prayed for bonus in the sum of Kshs.8,836,803. This is special damages that must be strictly proved. She did not state how she had arrived at the figure claimed. All she submitted was that this court should take judicial notice of the financial results of the respondent. Financial status of a public company is not a matter of judicial notice. The minimum the claimant should have done is to place the accounts before the court or to demonstrate how she arrived at the specific figure claimed.

Further the claimant does not deny that she was paid bonus as part of her exit package in the sum of Kshs.4,838,757.

I find that the claimant has not made a case for payment of bonus as claimed with the result that the same is dismissed.

Counterclaim

The respondent counterclaimed for Kshs.47,224,890.00 being the amount paid pursuant to the mutual separation agreement. The same constitutes notice, car allowance, service pay, bonus, prorated performance shares, outstanding leave days and an ex-gratia payment of Kshs.16,668,680 in restraint of trade. All the items, except the compensation for the restraint of trade are statutory or contractual and the claimant would have been entitled to the same even assuming that there was no mutual separation agreement. The payment in restraint of trade was for consideration. RW1 confirmed that the claimant complied with the terms of the restraint of trade clause of the mutual separation agreement. I find nothing that the claimant is not entitled to as of right in the counterclaim. The result is that the counterclaim is dismissed with costs.

In conclusion I declare the termination of the claimant unfair and award her compensation the sum of **Kshs.14,552,600.00.** The respondent shall pay the claimant's costs for both the claim and the counterclaim.

Interest shall accrue on the decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2020

MAUREEN ONYANGO

JUDGE