



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2071 OF 2015**

**MARK KIMUTAI SUGE.....CLAIMANT**

**VERSUS**

**UNILEVER KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant prays for payment of terminal benefits in the sum of Kshs. 12,441,945.75 by an amended statement of claim filed on 14<sup>th</sup> February 2018 following termination of employment by the respondent.
2. The claimant testified that he was employed by the respondent on 14<sup>th</sup> February 2000 in the position of Chief Personnel Manager at the then Brooke Bond Kenya Limited at Kericho.
3. That in the year 2004, the claimant was appointed Human Resource Manager and then Human Resources Business Partner Unilever Tea Kenya from the year 2004 to the year 2011.
4. That was the year 2007 to the year 2011. The claimant was responsible for Unilever Tea Kenya and Unilever Tea Tanzania while at the same time being the head of Human Resource Transformation (HRT) in both the tea and consumer business in East Africa. The claimant sat in both leadership Team Bonds during the period.
5. In August 2011, the claimant was transferred to Unilever Kenya Limited Nairobi as the Head of Human Resource function in Supply Chain department in Nairobi. The claimant served in that capacity until October 2013. The claimant testified that he was forced to put in a letter of resignation from employment.
6. That the claimant had many achievements as an employee of the respondent and initiated culture change projects such as pambazuka 2002-2004; Tustawi pamoja, 2005-2008; Human Resource transformation 2005-2008; HIV/AIDS initiative in the plantation 2000 to 2011; and Human Resource strategy development (organizing for quality 2011).
7. That the claimant won the individual Ramazani Award for Africa in 2004 and other awards in 2006 and 2009 (for SC) respectively. That the claimant worked for 13 years with excellence and earned numerous bonuses for his achievements. That in the year 2012 the claimant exited Unilever Tea Kenya (Kericho) to join Unilever Kenya Limited (Nairobi).
8. That the claimant was doing well, when he was surprised by a demand that he resigns his employment. This was prompted by the arrival of one Siddhartha Rama Swamy who misused Human Resource Management Policies and Procedures to throw out long serving employees under the guise of managing people out in order to avoid meeting payments of terminal benefits. Mr. Siddhartha used performance improvement plan (PIP) as a tool to unlawfully get employees out of their jobs.
9. The claimant testified that on 20<sup>th</sup> August 2017 one Ellen Bvekerwa, the Human Resource Director called him to a meeting which took place on 22<sup>nd</sup> August 2013 in her office. That Ellen informed the claimant that Unilever needed an immediate separation plan with claimant. The claimant was shocked and wrote a letter of protest dated 10<sup>th</sup> September 2017 to Human Resource Director. The claimant testified that he later learnt this was an orchestrated plan to replace him with one Ajay Tiwari who had come to Kenya at the time and worked alongside the claimant in Supply Chain Human Resource. That Ajay had come from Unilever India and had no work permit to operate in Kenya but continued to work for Unilever until the claimant was forced out of Unilever by Hellen and Mechell Chetty (Africa Head of Human Resource). Indeed, Ajay had literally taken over all the functions of the claimant by the time he was forced to resign. That Mr. Siddhartha Rama Swam, the vice president appeared to have made up his mind to replace all local level 2 managers and all key WLI managers with employees from Asia. Under the guise that they required quality Engineers and managers in the supply chain department. They discredited local managers and frustrated any efforts to recruit locally. The claimant was instructed not to look for employees from Kenya and Mr. Ajay Tiwan gave him a long list of candidates from Asia. Claimant challenged these moves hence the culmination. I was told to resign or the company would sack me. Ellen also suggested that the claimant should accept in the alternative a down grade to Assistant Manager Level which the claimant declined. The claimant testified that the working environment was made very hostile to the

claimant and the employer clearly did not require the presence of the claimant any longer.

10. The claimant wrote. *“The purported separation Package “dated 10<sup>th</sup> September 2015. Claimant stated that following the suggestion by Ellen that he should leave, the claimant had accepted to leave but with a compensation package. The proposal was based on previous exits in the company. The claimant stated that he wanted same treatment upon exit and nothing more. The claimant gave examples of one Stephen Muasya (then safety manager and Johnson Kaigu (then County Manager Zambia) both Unilever managers who had left before the claimant in similar circumstances and were compensated in full for loss of office at paid gratuity at the rate of 15 months salary for every year worked plus transport pay; 3 months salary in lieu of notice among others statutory benefits and in line with Unilever Kenya redundancy Policy 2017.*

11. The respondent did not write a response to the proposal by the claimant but on 17<sup>th</sup> September 2013, Ellen called the claimant to a discussion of the same. Ellen stated that the company would not pay the proposed package however the claimant must leave the respondent. Ellen proposed to pay the claimant six months salary in lieu of notice only.

12. Claimant stated that the employees usually served three (3) month mandatory notice if they initiated a resignation. Ellen told the claimant that the three month notice service had been waived in exchange of a letter of resignation.

13. On 19<sup>th</sup> September 2013, the claimant wrote again proposing to leave under early retirement scheme. Ellen called the claimant and told him that she was happy with the letter but the claimant should head the letter as *“Resignation”* with the terms of 6 month salary which would include notice, leave pay, relocation pay. The claimant complied with this instruction and wrote another letter dated 27<sup>th</sup> September 2013. The respondent replied to the letter on 30<sup>th</sup> September 2013 stating that the company had reached *‘a mutual agreement to terminate the contract’*

14. Claimant testified that he was coerced, forced, intimidated and threatened into resigning from employment with Unilever and prays to be awarded as prayed.

15. The claimant prays for a declaration that the termination amounted to a constructive dismissal and that he be paid terminal benefits in the sum of Kshs. 12,441,945.75 being severance pay for forced declaration of redundancy.

### **Defence**

16. RW1 Marry Nyagi testified for the respondent. She stated that the claimant was employed by the respondent on 1<sup>st</sup> August 2011 as Human Resource Business Partner attached to the Supply Chain Department in charge of East and Southern Africa. RW1 refuted the allegation by the claimant that he was employed by the respondent in the year 2000.

17. RW1 testified further that the claimant was employed by Unilever Tea Kenya Limited (UTKL), prior to August 2011 which is a separate and distinct legal entity from the respondent. That the claimant terminated his employment with UTKL before joining the respondent in the year 2011.

18. That the claimant had worked for the respondent for only three (3) continuous years and not thirteen (13) years as alleged. RW1 produced the letter of appointment dated 12<sup>th</sup> May 2011.

19. RW1 testified that the claimant worked for the respondent until 30<sup>th</sup> September 2013 when he voluntarily resigned following a negotiated separation agreement.

20. RW1 said that the respondent had experienced concern regarding the performance of the claimant which was found to be unsatisfactory in some respects.

21. That in the performance review done as at June 2013, the claimant had underachieved in all the set deliverables. RW1 produced the review report. The claimant was placed on performance improvement plan and this was communicated to him by his line manager. That this was in terms of the company performance improvement policy. During the discussions that followed, the claimant expressed desire to take advantage of the early retirement/resignation plan as per the Human Resource Policy. That the claimant was already 56 years old at the time. That based on the claimant’s proposal, the respondent and the claimant agreed to explore a mutual separation agreement with the intention that the claimant would exit by the end of the year 2013. That this was captured at page 3 of the claimant’s appraisal form where it states:

*“A mutual decision to terminate employment with Unilever was agreed on –there will not be self-assessment comments as Mark is on Garden Leave pending his exit by mutual agreement at end 2013”*

22. That the respondent and claimant commenced negotiations consequently with a view to agree on a mutual exit strategy. That the claimant was given sufficient time to consult and consider exit options and negotiate favourable package. Face to face meetings were held and email exchanges and letters done. The correspondence clearly shows that the claimant voluntarily agreed to resign from the respondent’s employment and to fake up a negotiated exit package. That there is no evidence of duress coercion or misrepresentation during the consultations until the final exit package was agreed upon as contained in the letter dated 30<sup>th</sup> September 2013. The letter partly reads:

*“After the discussion and the understanding that I should proceed and prepare an exit plan, I have after much reflection, done exactly that. So I propose as follows:*

(i) *I accept to go but with below compensation packaging.....”*

23. RW1 emphasized the various letters by the claimant which refer to discussions held between the claimant and the respondent. In the email dated 27<sup>th</sup> September 2013 the claimant stated:

*“I think I now understand what the early retirement option means to me. In that case, I go for the 6 months’ pay option that included notice pay. This means that my pension benefits will come in the normal way as if I had not gone for an early retirement.*

*I therefore suggest that you proceed to approve the 6 months pay option (inclusive of notice) to enable us close this with 4<sup>th</sup> October still as the exit date”*

24. In the said letter dated 30<sup>th</sup> September 2013, the claimant voluntarily resigned from employment and received an exit package of Kshs. 5,451,893 gross which included:

- (a) ex-gratia payment of three months salary;
- (b) Three months salary being earnings for three months between 1<sup>st</sup> October to 31<sup>st</sup> December 2013;
- (c) Payment of all outstanding annual leave days;
- (d) Relocation allowance of half month basic salary; and
- (e) Retirement benefits as per the respondent’s pension scheme/Union East African Pension Fund Rules.

25. RW1 testified that the allegations of constructive dismissal and discrimination lack any merit and the suit be dismissed with costs.

#### **Determination**

26. The issues for determination are:

- (a) Whether the claimant has made out a case for constructive dismissal.
- (b) Whether the claimant is entitled to the reliefs sought.

27. The basic ingredients of constructive dismissal were spelt out in the case of Milton M. Isinya vs Aga Khan Hospital Kisumu (2013) eKLR as follows:

- (a) The employer must be in breach of the contract of employment;
- (b) The breach must be fundamental as to be considered repudiation of breach;
- (c) The employee must resign in response to that breach; and
- (d) The employee must not delay in resigning after the breach has taken place, otherwise the court may find the breach waived.

28. In ***Robb Indiazzi vs Tembo Sacco Limited (2018) eKLR***, the court stated thus:

*“What amounts to constructive dismissal? In Industrial Court at Nairobi Cause number 611(N) of 2009 between Maria Kagai Ligaga vs Coca cola East and Central Africa Limited, the court held that constructive dismissal occurs where the Employer’s behavior is so intolerable that it makes it considerably difficult for the Employee to continue working. The employee initiates termination, believing himself, to have been fired. The employer is..... to no longer be interblend in honouring the terms of the contract of employment. The employee must demonstrate that the employee has engaged in repudiatory breach. The court must be persuaded that the employee has reason to resign. Employer’s actions need not be coercive threatening or in the nature of duress”.*

29. The competing evidence of the claimant vis a vis that of RW1 has led the court to the conclusion of fact as follows:

- (a) The claimant had served the respondent for a period of three (3) years and not thirteen (13) years as alleged. Prior to August 2011, the claimant had served a different and distinct legal entity related to the respondent.
- (b) The claimant had been subjected to performance review with measured indicators that he was not used to prior. The performance of the claimant had been found wanting. The claimant in the process of his evaluation proposed that he takes early retirement package and exits employment of the respondent.
- (c) Series of consultative meetings and exchange of letters and email between the claimant and representative of the respondent culminated in an agreed resignation and exit package set out in the letter dated 30<sup>th</sup> September 2013.

(d) It is apparent that the final exit of the claimant was a result of a consultative process in which the claimant was given time and opportunity to reflect on the various offers and counter-offers made in the consultative process.

(e) The court is satisfied that the termination and exit package finally arrived at by the parties was out of consensus.

(f) The claimant may have felt that he was no longer wanted by the respondent and that he was left with no choice but to leave the employment. However, the facts before court do not disclose a case of fundamental breach of the claimant's contract of employment leading to involuntary resignation termed constructive dismissal. Quite to the contrary, early exit negotiations in the claimant's words were common in the organization.

30. In the court's considered view, the claimant appears to have an afterthought on the amount of exit package he had agreed to and now wants an enhanced severance package from the court by finding that the termination of his employment was unlawful and award him compensation.

31. In the final analysis, the claimant has failed to prove on a balance of probabilities that the termination of his employment amounted to unlawful, constructive dismissal.

32. Accordingly, the suit lacks merit and the claimant is not entitled to the reliefs sought.

33. Given the long relationship between the claimant with the respondent and sister companies and the admitted service the claimant had given the group, the court finds this an appropriate case for each party to bear their costs of the suit.

**Dated Signed and delivered in Nairobi this 16<sup>th</sup> day of April, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

.....

**Judge**

**Appearances**

Olodo Tuli for claimant

Mr. Nyaburi for Respondent

Mamo – Court clerk.