



Kiamah v Mutai t/a Kiogora Mutai & Co Advocates (Cause E530 of 2021) [2024] KEELRC 1840 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1840 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E530 OF 2021**

SC RUTTO, J

JULY 12, 2024

BETWEEN

GLADYS WAMBUI KIAMAH CLAIMANT

AND

**KIOGORA MUTAI T/A KIOGORA MUTAI & CO
ADVOCATES RESPONDENT**

JUDGMENT

1. The Claimant brought the instant suit by way of a Statement of Claim filed on 1st July 2021. It is the Claimant's case that she was employed by the Respondent vide a letter of appointment dated 3rd December 2020 (sic) as an Associate Advocate. The contract of employment was to commence on 1st January 2020 but she commenced employment on 1st December 2019. The Claimant further avers that upon completion of her probation, the Respondent confirmed her employment via a letter dated 26th May 2020. It is the Claimant's case that her gross salary was Kshs 80,000/= and her terms of employment were permanent and pensionable.
2. According to the Claimant, she performed her duties diligently and realized increased return in terms of work and revenue output both quantitatively and qualitatively.
3. From the record, the employment relationship was short-lived seeing that the Claimant was terminated from employment with effect from 30th November 2020. Terming her termination unfair and unlawful, the Claimant has sought the following reliefs against the Respondent:
 - a. A declaration that the Claimant was unfairly and unlawfully terminated;
 - b. An order that the Respondent pays the Claimant an equivalent of Twelve (12) months pay being payment for unfair and unlawful termination.
 - c. An order that the Respondent pays the Claimants full salary of Kshs. 80,000/= for April 2020.



- d. An order that the Respondent pays the Claimant 50% of her salary for May, June, July, August, September, October and November 2020.
 - e. A declaration that the Claimant was entitled to a one (1) month notice period and an Order that the Respondent pays the Claimant (1) Month Salary in lieu of Notice.
 - f. General Damages for Breach of Contract.
 - g. Damages for violation of the rights of the Claimant under *the Constitution* of Kenya 2010 and the *Employment Act* No. 13 Laws of Kenya.
 - h. An order that the Respondent pays the Claimant KES. 40,000 being service pay equivalent to 15 days' pay for the year worked based on the salary figure of KES.80,000.
 - i. Costs of this suit
 - j. Interest on (b) - (h) at Court rates from the date of filing this suit until payment in full.
4. The Respondent countered the Claim through its Response dated 31st August 2021. The Respondent has admitted the employment relationship but denied that the Claimant was employed on permanent and pensionable terms. The Respondent has further denied the Claimant's assertions that she diligently performed her duties and responsibilities. According to the Respondent, the Claimant consistently failed to meet her work targets and deadlines. He further avers that he is a stranger to the Claimant's assertions that she was terminated illegally or unfairly. It is the Respondent's case that the termination was discussed and agreed upon by the parties and the Claimant was given one month's notice which she served as she oriented her successor and the parties parted amicably.
 5. It is against this background that the Respondent has asked the Court to dismiss the Claim with costs.
 6. The trial took place on diverse dates during which both parties called oral evidence.

Claimant's Case

7. The Claimant testified in support of her case and for starters, she sought to rely on her witness statement and the list and bundle of documents filed alongside the Statement of Claim to constitute her evidence in chief.
8. It was the Claimant's evidence that the contract of employment expressly provided that any party desirous of terminating the contract ought to give the other a one month notice period prior to the actual termination. During the subsistence of the contract, it was never lawfully varied or vacated by any other duly executed agreement.
9. The Claimant stated that the litigation department realized a steady improvement under her despite challenges that were discussed with the Respondent from time to time. In her view, she met and exceeded her targets.
10. It was the Claimant's further evidence that without any notice or consultation whatsoever, the Respondent paid only 70% of the June 2020 salaries as opposed to 100%. She contended that this was in breach of the contract that subsisted.
11. She further stated that sometime about 11th August 2021, the Respondent held a discussion with all employees which culminated in an agreement that the Respondent would pay 50% salaries beginning with July 2020 but the 50% balance of the July 2020 salary would be paid at a later date. It was also agreed that the 30% balance for June 2020 would be paid at a later date.



12. The Respondent disregarded the terms of these consultations and via a memo dated 14th August 2020 which no employee agreed to sign, he proceeded to unilaterally implement.
13. She reluctantly and for lack of any other option continued to work despite the new terms being unfavourable and hostile to her needs in addition to the same having been made in breach of the terms of the consultations.
14. The Claimant further stated that from October 2020, the firm experienced an increased workload which required her to attend to full working hours in a week, together with the on-target collections realized but the Respondent refused to review her salary back to 100% as per the contract of employment despite her constant pleas.
15. That the Respondent temporarily closed the firm in April 2020 and directed that staff work from home. She diligently worked from home and took charge of online filing and conducting hearings from home as directed.
16. The Respondent however declined to pay her salary for April 2020 and instead, gave her a mere stipend of Kshs.20,000/= after her constant pleading for salary, as opposed to her full salary of Kshs. 80,000/= . It was her contention that she collected revenue for the Respondent despite the closure and subsequent working from home.
17. That the Respondent directed employees, to report to work on a schedule. She continued to report as per the schedule and working from home, and put effort towards finalizing hearings, negotiating out of court consents, raising fee notes and following up on collections despite the working conditions.
18. The Claimant averred that at all material times, she always raised revenue enough for her full salary and commissions but the Respondent continuously refused to review her salary back to 100%.
19. That the Respondent began raising issues and finding unfounded fault in her since she started requesting for 100% salary resumption.
20. That on or about 12th November 2020 at a time when she was pregnant, in one of the management meetings, she communicated her expectant status to the Respondent and informed him for purposes of prior planning that she would be proceeding for maternity leave within one month thereof.
21. This communication was not received well by the Respondent who within 24 hours of the said communication issued her with a Notice of Termination via an email on 13th November 2020.
22. The Claimant further stated that the Respondent purportedly disguised the termination as based on poor performance on her part while in the real sense, the Respondent was not ready or willing to grant her the opportunity to proceed on her maternity leave.
23. According to the Notice of Termination, she was terminated effective 30th November 2020 subject to a period of notice running from 13th November 2020 to 30th November 2020 which was insufficient and in breach of the contract of employment and the law.
24. Other than disguising the termination as having a basis in her performance, which basis was not supported by any appraisal/evaluation, and which termination was not done upon a background of fair procedure, she was not issued with any justifiable reasons for her termination despite her demanding for the same.
25. The Claimant further stated that upon her request to review her salary to 100%, the Respondent began making unreasonable demands such as demanding that she reports back to the office after attending court in out-of-court stations such as Nakuru, Meru, and Muranga even when the same was impossible



- due to travel and time logistics. That the Respondent did not appreciate the strenuous travel logistics and only offered transport allowance enough for use by public means.
26. The Claimant further averred that the Respondent is a discriminative and biased employer. She contends that the job vacancy advertisement put out by the Respondent in November 2019 in search of a legal associate was in itself discriminative as it particularly had a bias towards male applicants.
 27. During her interview for the post of legal associate, the Respondent asked gender discriminative questions, particularly questioning whether she intended to have any other children. She was also required to show why she should be employed despite being female yet the Respondent wanted male applicants. She performed over and above expectations and she was subsequently employed.
 28. The Claimant further averred that despite the contract of employment expressly providing that she was entitled to a medical cover, the Respondent declined and/or neglected to implement this in breach of the contract of employment.
 29. According to the Claimant, the Respondent, violated her rights not to be discriminated against when he took out a similar cover and continued to implement the same for her colleague who worked in a similar position at the Respondent's firm despite her several pleas and reminders.
 30. The Claimant asked the Court to allow her Claim as prayed.

Respondent's Case

31. The Respondent herein testified in support of his case as RW1. Equally, he adopted his witness statement to constitute his evidence in chief. He proceeded to produce the list and bundle of documents as well as the supplementary documents filed on his behalf as exhibits before Court.
32. It was RW1's testimony that the Claimant's salary was to be reviewed annually depending on the performance of her duties as stipulated under Clause 2 of the Letter of Appointment.
33. That unfortunately, upon the Claimant assuming her job, there was an unprecedented pandemic (COVID-19) that led to a complete shutdown of the Law Firm. He called an office meeting and all staff agreed to work for two days a week with a reduced pay of 50% which all parties agreed to and understood in view of the circumstances.
34. That the Claimant was never discriminated against on account of her pregnancy. According to RW1, he became aware that the Claimant was expectant when she had already left the Firm. It was his contention that there was no single communication from her to such effect even to enable the office prepare.
35. RW1 further denied that the Claimant was discriminated against on the issue of medical cover since she had not been confirmed which confirmation would have made her eligible for the same. This was further complicated by the issue of the COVID-19 pandemic which made it necessary to close the office abruptly.
36. That the Claimant barely worked for the Firm given that the year 2020 was mostly not active due to the COVID-19 pandemic.
37. RW1 further averred that the terms of the Claimant's contract stipulated under Clause 5 of the Letter of Appointment that she would report to him and duties and responsibilities would be assigned as need arises, but with a bias towards Civil Litigation work, insurance and debt collection.
38. That the Claimant did not diligently perform her duties and responsibilities as she consistently failed to meet her work targets and deadlines as evidenced by various office memos to her on the issue.



39. RW1 further stated that the Claimant's contract was reviewed and several issues were raised and it was noted that she was not punctual in reporting to the office, was absent on some days without explanation, and did not normally report back to work when she attended Court out of station. Moreover, the Claimant also failed to meet her monthly targets of collected fees and failed to update her financial reports on time.
40. When it became evident that the Claimant was not going to change the shortcomings, they agreed to part amicably and he gave her one month's notice which she utilized to hand over to a new advocate.
41. It was RW1's evidence that for the short duration the Claimant worked with him, her performance remained unsatisfactory thereby necessitating her termination.
42. That further, the Claimant was paid all her terminal dues.

Submissions

43. It was the Claimant's submission that there was no justification whatsoever for termination of her employment by the Respondent. That the Respondent simply terminated her employment because she was expectant and scheduled to start her maternity leave in December 2020 and the Respondent could not fathom paying her full salary while on maternity leave and the fact that he did not want to include her in the Firm's medical cover and her request to get her 100% salary.
44. Placing reliance on the case of *National Bank of Kenya V Samuel Nguru Mutonya (2019) eKLR*, the Claimant argued that the Respondent's evidence that she was terminated on account of poor performance flies in the face of the pleadings and the factual premise of this case. She termed this an afterthought that has no factual foundation or legal premise.
45. On this score, the Claimant submitted that the Respondent not only failed to adduce evidence showing that she was put on performance improvement and failed to do better but also failed to produce before this Court, their appraisal performance policy or practice parameters to measure good performance at the Respondent's work place.
46. The Claimant further submitted that the Respondent failed to adhere to the mandatory provisions of Section 41 of the *Employment Act*, 2007. According to her, this resulted in an unfair termination of her employment under the provisions of Section 45 of the *Employment Act*.
47. In the same breath, the Claimant posited that the Respondent admitted not having complied with Section 41 of the *Employment Act*, 2007 by issuing a notice to show cause, inviting her for a disciplinary hearing, and conducting a disciplinary hearing among others. To buttress this argument, the Claimant cited the case of *Peterson Ndung'u & 5 others vs Kenya Power and Lighting Company Limited (2014) eKLR*, *Mary Mutanu Mwendwa vs Ayuda (2013) eKLR* and *Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Limited (2013) eKLR*.
48. The Claimant further submitted that she was discriminated against on account of her pregnancy status. In her view, the Respondent terminated her on 13th November 2020 after the staff meeting of 12th November 2020 because he (Respondent) was informed that she was proceeding on maternity leave starting December 2020.
49. It was her further submission that the Respondent's action of refusing, failing to put her on a medical cover whilst other advocates in the same Firm of the same cadre enjoyed the medical cover, was discriminatory and contrary to Article 27(1) (2) and (5) of *the Constitution*, 2010.



50. On this issue, the Claimant placed reliance on the case of *Gicburu vs Package Insurance Brokers Ltd (Petition 36 of 2019)* (2021) KESC 12 (KLR) (Civ) (22nd October 2021) (Judgment).
51. The Respondent on the other hand submitted that there were valid and fair reasons to consider and subsequently terminate the Claimant's services. It was his position that the termination was in line with Section 45 of the *Employment Act*, 2007.
52. In support of the Respondent's submissions, reliance was placed on the case of Kipkirui Chepkeres Labati vs Cooperative Bank of Kenya Limited (2021) eKLR.
53. The Respondent further submitted that the Claimant was granted an opportunity to defend herself and remedy the shortcomings he had raised. The Respondent further argued that the letter of confirmation highlighted the areas on which the Claimant was to work on. That the various email correspondence also highlights and depicts the various instances where the Claimant failed and abrogated her duty to the detriment of her employer.
54. The Respondent stated in further submission that the main reason for not detailing the details of non-performance heading to his loss of business is because he was giving the Claimant a chance to reform instead of having a record that would impact her future professionally. It was his view that he had taken his role in guiding the Claimant seriously and wished her well in her professional endeavours.
55. With respect to the claim of discrimination, the Respondent submitted that the Claimant did not inform him of her pregnancy. He further argued that the Claimant did not make a formal notification to him nor did she make an application for maternity leave. The Respondent maintained that the Claimant did not give him the notice required under Section 29(4) and (5) of the *Employment Act*.
56. It was the Respondent's further submission that the reasons for disengagement were clear and had nothing to do with the Claimant's pregnancy status, given her pregnancy was not known when issues in contention were being raised.
57. In the Respondent's view, the raising of the issue of discrimination in the claim after termination is an afterthought and does not meet the constitutional threshold for violation of constitutional entitlement as established in the case of Anarita Karimi Njeru vs Republic.

Analysis and Determination

58. Flowing from the pleadings, the evidentiary material on record as well as the rival submissions, it is clear that the Court is being called to resolve the following questions: -
 - i. Whether the Respondent has proved that there was a justifiable reason to terminate the employment of the Claimant;
 - ii. Whether the Claimant was afforded procedural fairness prior to termination of her employment;
 - iii. Whether there is a case of discrimination;
 - iv. Is the Claimant entitled to the reliefs sought?

Justifiable reason?

59. In terms of Section 43(1) of the *Employment Act* (Act) an employer is required to prove that the reasons for termination of employment and failure to do so, such termination is deemed to be unfair.



In addition, Section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove: -

- a. that the reason for the termination is valid;
- b. that the reason for the termination is a fair reason-
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; ...

60. In this case, it is evident that the reasons for the Claimant's termination from employment were not explicit and quite vague. I say so because the email dated 13th November 2020, through which the Respondent communicated the end of the employment relationship to the Claimant, refers to the reorganization of the litigation department as a result of persistent challenges.
61. In an employment context, termination as a result of reorganization is categorized under "redundancy" in which case an employee loses his or her employment, by involuntary means through no fault of his or her own. In terms of Section 2 of the *Employment Act*, this involves termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.
62. Evidently, the circumstances contemplated under Section 2 of the *Employment Act* aforesaid were not apparent in the case herein as the Claimant was notified that she would be replaced in the Respondent's litigation department by a new team leader. As such, her position was to subsist only that she was to pave way for another person. Fundamentally, she was not declared redundant.
63. In his testimony before Court, the Respondent stated that the Claimant consistently failed to meet her work targets and deadlines. He further stated that the Claimant's contract was reviewed and it was noted that she was not punctual in reporting to the office, was absent on some days without explanation, and did not report to work when she attended out-of-court stations. That further, she failed to meet her monthly targets and update her financial reports.
64. Notably, the foregoing issues were not raised in the email of 13th November 2020. Therefore, they did not constitute the reasons for which the Claimant was terminated from employment.
65. Indeed, I cannot help but question why the Respondent failed to indicate the reasons he now gives as being behind the Claimant's termination from employment, in the email of 13th November 2020.
66. Further to the foregoing, the Respondent did not identify the specific dates when the Claimant was alleged to have been absent from work, reported to work later than the reporting time, or failed to report back to work after attending an out-of-court station.
67. Notably, the Respondent exhibited a copy of the Master Diary for the year 2020 as well as an excerpt of the attendance register from 1st September 2020 to 30th November 2020 in support of his assertion with respect to the Claimant's absence from work.
68. Be that as it may, the Respondent did not assist the Court by drawing a nexus between the Claimant's absence from work and the said exhibits. This issue was further compounded by the Respondent's failure to identify the specific dates in question.
69. With respect to the Claimant's failure to meet her targets and deadlines, the Respondent stated that the Claimant was not performing to the required standard and that he had appraised her and informed her of the areas she needed to improve on.



70. Nonetheless, there is no evidence on record to demonstrate that the Claimant was evaluated on her performance against specific measurable targets. In the same vein, the Respondent did not adduce evidence to prove that indeed, there were set targets that the Claimant was aware of and which she was required to meet by the end of the period under review.
71. In addition, the Respondent did not prove that it had put in place measures to evaluate the Claimant's performance. Most of all, there was no report or such other document constituting the Claimant's overall performance evaluation.
72. In light of the foregoing, I am led to question how the Respondent was in a position to determine that the Claimant had not met her work targets without evaluation of her overall performance against set targets.
73. On this issue, I will follow the determination by the Court of Appeal in the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR, where the Court cited with approval the holding in the case of *Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013)*. In that case, the Court reckoned thus:
- a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act, 2007*. The employer must show that in arriving at the decision of noting 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 once the policy or evaluation system has been put in place. 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.
 - c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
 - d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."
74. I subscribe to the position taken by the Court in the above case and find that for the Respondent to arrive at a determination that the Claimant was not meeting her work targets, it needed to have put in place measures to assess her performance. This included but not limited to target setting and providing the manner of assessment of her performance against such targets. As I have stated, this was not evident in this case hence it follows that the Respondent's determination that the Claimant had not met her work targets was not arrived at based on an objective assessment.
75. To this end, I am led to conclude that the Respondent has failed to discharge its evidential burden by proving that it had a justified reason to terminate the Claimant's employment. To this end, her termination was not substantively justified.



Procedural fairness?

76. Pursuant to Section 45 (2) (c) of the Act, an employer is required to comply with the provisions of fair process and prove that it accorded an employee a fair hearing. The specific requirements of a fair hearing are provided for under Section 41 of the Act in the following manner: -
- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
77. It is the Claimant's case that she was terminated from employment without due process. On his part, the Respondent averred that the separation was amicable.
78. Be that as it may, there was no evidence from the Respondent's end supporting his assertion of a mutual separation.
79. Further to that observation, there is no evidence that the Claimant was issued with a notice detailing the allegations levelled against her and putting her on notice that the Respondent was considering terminating her employment based on the said allegations.
80. Similarly, there is no evidence that a hearing was convened and the Claimant was invited to make her representations and to defend herself against whatever allegations.
81. I find it imperative to underscore that the provisions of Section 41 of the Act are mandatory hence it follows that anything short of that process, is unprocedural and unfair. The case of *Postal Corporation of Kenya vs Andrew K. Tanui* [2019] eKLR clearly articulates this position. In that case, the Court of Appeal held as follows:
- “It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with.....Four elements must thus be discernible for the procedure to pass muster:-
- (i) an explanation of the grounds of termination in a language understood by the employee;
 - (ii) the reason for which the employer is considering termination;
 - (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - (iv) hearing and considering any representations made by the employee and the person chosen by the employee.”
82. Applying the aforementioned precedent to the case herein, I arrive at the inescapable conclusion that the Claimant's termination from employment was procedurally unfair within the meaning of Section 45 (2) (c) as read together with Section 41 of the Act.



83. The total sum of my consideration is that the Claimant's termination was both unfair and unlawful in terms of Sections 41, 43 and 45 of the Act.

Discrimination?

84. The Claimant has cited the Respondent for discrimination on account of her pregnancy. She has further contended that the Respondent failed to take out a medical cover for her but did so for her colleague who worked in a similar position at the Firm.
85. With respect to the claims of pregnancy, the Claimant stated that she communicated her pregnancy at a management meeting on 12th November 2020 and the Respondent did not receive this communication quite well as he proceeded to terminate her employment within 24 hours thereof.
86. The Respondent has refuted the Claimant's assertion and denied knowledge of her pregnancy. According to him, he came to know of the Claimant's pregnancy after she had left the Firm.
87. Admittedly, by dint of Section 5(7) of the Act, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that section. Nevertheless, the Claimant was first required to establish a prima facie case for discrimination in order for the burden to shift.
88. The Court (Rika J) in the case of *G M V vs Bank of Africa Kenya Limited* [2013] eKLR, reckoned that "All the ladies are required to do, is establish a prima facie case, through direct evidence or statistical proof, that they have been discriminated against at employment, on account of their pregnancies. Courts have stated that the employee needs to:- Establish she belongs to a protected class; Demonstrate she qualified for the job she lost; Show she suffered adverse employment action, directly as a result of her pregnancy. She must provide prima facie proof, that other explanations by the employer are pretextual, and the real reason for termination was the pregnancy; Lastly, the employee must as a minimum, establish that there is a nexus between the adverse employment decision, and her pregnancy..."
89. Fundamentally, the employee alleging discrimination on grounds of pregnancy must first establish that she was pregnant at the material time hence belonged to a protected class.
90. In this case, the Claimant did not establish that at the material time, she was pregnant. Save for pleading that she was pregnant and was due to proceed on maternity leave in December 2020, there was no evidence in the form of medical records or birth notification to confirm this fact and thus prove that she belonged to a protected class.
91. The bottom line is that beyond asserting that she was pregnant at the time, the Claimant needed to corroborate her assertion with some form of evidence to prove as much. In this case, she didn't, hence her claim that she was discriminated against by the Respondent on grounds that she was pregnant collapses.
92. With respect to the medical cover, the Respondent averred that the Claimant was not onboarded on the Firm's medical cover as she had not been confirmed and which confirmation would have made her eligible for the same. That further, this was complicated by the COVID-19 pandemic which necessitated the closure of the office. Be that as it may, he did not proceed to substantiate the manner in which the COVID-19 pandemic made it impossible for him to onboard the Claimant on the Firm's medical cover seeing that she was confirmed on 26th May 2020.
93. Needless to say, the Respondent has not advanced a valid reason for failure to take out a medical cover for the Claimant while her colleague serving in the same capacity enjoyed this benefit.



94. As was held by the Supreme Court in the case of *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR):

“According to section 5(7) of the Act, an employer alleged to have engaged in a discriminatory practice must give reasons for taking certain actions against the employee. Where such actions are shown not to have any justification against the protected group, then there exists discrimination against such an employee and must therefore be addressed. In this instance, the appellant had discharged the burden as to shift it to the respondent who failed to discharge on their part.”

95. Applying the above decision by the Supreme Court to the case herein and taking into consideration Section 5(7) of the Act, it is my finding that the Respondent did not prove the reason for his failure to accord the Claimant similar treatment to her colleagues by onboarding her on the Firm’s medical cover.

96. In the circumstances, the Court returns that the Respondent has failed to prove that the Claimant was not discriminated and treated less favourably than her counterparts. To this extent, the Claimant’s claim with respect to discrimination succeeds.

Reliefs?

97. As the Court has found that the Respondent has failed to prove that it had a valid and fair reason to terminate the Claimant’s employment and that it subjected her to a fair process prior to termination, the Court awards her one (1) month’s salary in lieu of notice and compensatory damages equivalent to two (2) months of her gross salary. This award takes into consideration the length of the employment relationship which was relatively short, the circumstances attendant to the Claimant’s exit from the Respondent’s employment and the fact that the Claimant mitigated her loss as she secured alternative employment almost immediately following her termination.

98. The Claimant has further claimed that without any notice or consultation, the Respondent paid only 70% of the June salary as opposed to 100%. According to the Respondent, he called a staff meeting and it was agreed that all staff to start working for two days a week with reduced pay. In essence, this was a variation of the terms of the contract of employment.

99. On her part, the Claimant acknowledged that the Respondent had a discussion with all the employees which culminated in an agreement that the Respondent would pay 50% salaries beginning July 2020 but the balance of 30% for the June salary would be paid at a later date.

100. It is unequivocal that the Claimant’s salary was a significant term of her contract of service hence any change was to be done in line with the provisions of Section 10(5) of the Act which provides as follows:

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

101. In line with the above statutory provision, the Respondent was duty-bound to obtain the Claimant’s prior approval in writing before downgrading her salary. Evidently, this was not done as no evidence was adduced to that effect. Indeed, there is no evidence at all that the Claimant was consulted prior to the reduction of her salary and that she accepted the terms of the reduction.

102. In this regard, the Respondent did not act in accordance with the provisions of Section 10(5) of the Act.



103. Further, I must say that the Respondent's assertions that the Claimant did not render any service during the month of April 2020 does not hold, as she exhibited a copy of her output for that month and it is apparent that she raised the sum of Kshs 123,568/= in revenue.
104. Granted, the outbreak of the COVID-19 global pandemic brought about an unprecedented turn of events and I have no doubt in my mind that this affected the Respondent's operations. This position notwithstanding, it was prudent that the Respondent undertakes any measures towards adjusting the Claimant's salary within the confines of the law and specifically, Section 10(5) of the Act.
105. To this end, the Claimant is awarded salary withheld for the months of April, June, July, August, September, October and November 2020.
106. The claim with respect to service pay is declined as it is evident from the extract of the Respondent's payroll exhibited by the Claimant, that she fell within the ambit of the exclusions under Section 35(6) of the Act.

Orders

107. In the final analysis, the Court enters Judgment in favour of the Claimant against the Respondent in the following manner:
 - a. A declaration that the Claimant's termination from employment was unfair and unlawful.
 - b. The Claimant is awarded one (1) month's salary in lieu of notice being Kshs 80,000.00.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 160,000.00 being equivalent to two (2) months of her gross salary.
 - d. The Claimant is awarded unpaid salary for the months of April 2020 (Kshs 60,000/=) June 2020 (Kshs 24,000/=) July 2020 (Kshs 40,000/=) August 2020 (40,000/=) September 2020 (Kshs 40,000/=) October 2020 (Kshs 40,000/=) and November 2020 (Kshs (40,000/=).
 - e. The Claimant is awarded the sum of Kshs 500,000.00 being compensation for breach of her right to equality and freedom from discriminations guaranteed under Article 27(5) of the Constitution and Section 5(3) of the Employment Act not to be discriminated.
 - f. The total award is Kshs 1,024,000/=.
 - g. Interest shall apply on the award in (f) above at court rates from the date of Judgment until payment in full.
 - h. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

.....
STELLA RUTTO

JUDGE

Appearance:

For the Claimant No appearance

For the Respondent Mr. Kamindo instructed by Ms. Omwenga

Court assistant Millicent Kibet



ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

STELLA RUTTO

JUDGE

