



**Brinks Security Services Limited v Timothy (Civil Appeal
E021 of 2021) [2024] KECA 690 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 690 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E021 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
JANUARY 25, 2024**

BETWEEN

BRINKS SECURITY SERVICES LIMITED APPELLANT

AND

ELIZABETH MWENDE TIMOTHY RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) delivered on 23rd November 2018 in ELRC Cause No. 264 of 2016)

JUDGMENT

1. This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) (J. Rika, J.) delivered on 23rd November 2018 declaring that the termination of the respondent's employment with the appellant was unfair and based on pregnancy discrimination. The respondent was awarded one month's salary in lieu of notice at Kshs. 9,500.00; the equivalent of twelve months salary in compensation for unfair termination at Kshs. 114,000.00; arrears of salary at Kshs. 28,500.00; and damages for pregnancy discrimination at Kshs. 750,000.00. The appellant was also ordered to forthwith release the certificate of service to the respondent.
2. The appellant contends that the findings by the learned Judge are flawed; that the respondent did not prove that she was unlawfully terminated from employment to justify the findings and awards by the trial court; and that the award for pregnancy discrimination is baseless as no prayer in that regard had been made.
3. The facts are that the respondent, Elizabeth Mwendu Timothy, was on 15th October 2011 employed by the appellant, Brinks Security Services Limited (the employer), as a guard at a monthly salary of Kshs. 9,500.00. According to the respondent, on 17th October 2014, she submitted a written application for maternity leave to her employer. The leave was to commence on 1st November 2014. Instead of granting her maternity leave, the employer unilaterally approved 25 days annual leave starting on 1st



- November 2014 to end on 30th November 2014 with an expectation that she would report back to work on 1st December 2014.
4. However, on 30th November 2014, she was admitted at Coast Province General Hospital Mombasa in labour where she underwent a C-Section surgical operation and was blessed with child. It was the respondent's testimony that a few days after delivering her child, and while still recuperating in hospital, she communicated on telephone with her employer's Branch Manager and informed him that she was still hospitalized. The Branch Manager apparently retorted that her "delivery was none of his business" and informed her that she was expected to report back to work immediately.
 5. The appellant was discharged from hospital on 3rd December 2014 to continue recuperating at home. She reported back to work on 5th February 2015, when, according to her, the Branch Manager told her that she was dismissed from employment. She was neither given notice, nor paid any terminal dues, she asserted.
 6. The appellant's version of events as told by the Mombasa Branch Manager of the respondent, Bernard Kyengo, was different in some material respects. According to him, the respondent did not apply for maternity leave. Rather, she applied for, and was granted annual leave, with a return date of 1st December 2014 when she was expected to resume work. In support, he produced as an exhibit, a leave application form (the leave form) on the appellant's letter head indicating that the nature of leave sought by the respondent was indeed annual, as opposed to maternity leave. He went on to say that the respondent did not return to work on 1st December 2014 as expected and neither did she communicate. In his view, she failed to report back to work after her leave without any explanation or permission. She deserted employment. He did not see her until she filed this claim, he maintained.
 7. The learned trial judge reviewed the evidence before granting the respondent the reliefs to which we have already referred and hence the present appeal.
 8. We heard the appeal on 27th June 2023. Learned counsel for the appellant Mrs. Mutua briefly orally highlighted her written submissions in which it was urged that no evidence was tendered to support the allegations by the respondent that she was verbally terminated from employment; that the respondent willingly and without coercion signed a leave form in which she sought annual leave which was granted but she did not return to work; that the respondent did not discharge her burden of prove to establish that she was terminated from employment or that the alleged termination was unfair. In support, counsel cited the case of *Rudolf Shitandi Daraja v. Zablon Juma Atulo t/a Z. J. Atulo & Company Advocates* [2016] eKLR.
 9. It was submitted further that the finding by the Judge that the respondent was denied maternity leave was not supported by any evidence; that the issue of discrimination based on pregnancy was not pleaded and was raised for the first time in the closing submissions as an afterthought; and that no prayer was made for damages and the trial court erred in awarding damages. Numerous decisions, among them, *Galaxy Paints Co. Ltd v. Falcon Guards Ltd* [2000] EA 885; *Housing Finance Company of Kenya v. J. N. Wafubwa* [2014] eKLR, were cited for the proposition that issues for determination in a suit flow from the pleadings and a court is not at liberty to deviate from the pleadings; and that a prayer for "such other relief as the court may deem fit to grant" is not a carte blanche for the court to grant orders that have not been sought. The case of *Timsales Limited v. Samuel Kamore Kihara* [2016] eKLR was cited.
 10. Miss. Mutara learned counsel for the respondent in her written submissions on which she relied entirely, restated the facts and the findings by the trial court and submitted that the trial made correct findings based on the evidence adduced and that the appeal has no basis. Reference was made to the



case of *Yasmin Josephine Mokaya v. Kithure Kindiki t/a Kithure Kindiki & Associates*, Nbi ELRC Petition No. 62 of 2019.

11. We have considered the appeal and the submissions. The learned trial Judge was not impressed by the appellant's witness, Mr. Kyengo, whom he found, justifiably in our view, not to be a truthful witness based on that witness's apparent selective memory. The respondent's claim that she did not fill out the appellant's leave form and that the same was filled out by the appellant's manager is supported by Kyengo's own testimony under cross examination that it was filled out by his "senior Gabriel" who oversaw administration in his absence.
12. Based on our evaluation of the evidence, we fully concur with the findings of the learned trial Judge that the respondent:

"... offered qualitative and consistent oral evidence, supported by documents which are self-explanatory. She was expectant and applied as early as 17th October 2014 to go on maternity leave beginning 1st November 2014; she was instructed by the Respondent instead, to take a month of annual leave beginning 1st November 2014; she signed a Leave Form prepared by the Respondent, and left on 1st November 2014; a month later she delivered through C-section on the date her imposed annual leave expired, 1st December 2014; she was on treatment and recuperation in the months of December 2014 and January 2015; went back to work on 5th February 2015; and the Respondent shut her out, informing her through Kyengo, that she had been dismissed for alleged abandonment of duty. This evidence is consistent, qualitative and believable."

13. Based on those findings, which we fully endorse, we uphold the conclusions by the learned Judge that: respondent's statutory entitlement to 3 months maternity leave with full pay under Section 29 of the *Employment Act* was violated; that the respondent is entitled to her salary for November 2014 to February 2015; that the respondent's dismissal from employment when she reported back to work on 5th February 2015 was substantively and procedurally infirm and wrongful.
14. Consequently, we uphold the judgment of the trial court declaring her termination unfair and awarding her 1 month's salary in lieu of notice at Kshs. 9,500.00; the equivalent of 12 months' salary compensation for unfair termination at Kshs. 114,000.00 and arrears of salary of Kshs. 28, 500.00; and for the issuance of a certificate of service forthwith.
15. The award of Kshs. 750,000.00 for damages for "pregnancy discrimination" is problematic. In her memorandum of claim before the ELRC, the respondent's plea was that she applied for maternity leave from "1st November 2014 as she was expecting and due to deliver. However, the respondent declined her request and gave her only one month leave..." She pleaded further that on returning to work on 5th February 2015, she was dismissed, and her employment terminated.
16. It was on that basis that she averred that she was "unlawfully and unfairly dismissed from work." Nowhere in her claim did she claim discrimination, which, as explained by the Court in *Mohammed Abduba Dida v. Debate Media Limited & Another* [2018] eKLR, entails differential treatment or failure to treat all persons equally when no reasonable distinction between those favoured and those not favoured. In Kenya *National Assembly of Kenya v Tukero Ole Kina & another*; Mld Civil Appeal No. 166 of 2019, this Court expounded further that:

"Direct discrimination arises from the unfavourable treatment of a person arising from some characteristic possessed by that person, and the protected characteristics include those listed



in Article 27, namely race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

17. The appellant had no notice that it had to meet a claim based on discrimination. The learned Judge was himself all too conscious that no foundation had been laid for such a claim. He expressed in his judgment:

“The Claimant of course, ought to have pleaded pregnancy discrimination in a forthright manner. The Court has explained that pregnancy discrimination touches on much more than simple breach of contract of employment and breach of statutory provisions. It implicates constitutional rights, and should be pleaded, and separate from the prayer for compensation for unfair termination.”

18. It was not, with respect to the Judge, a question of absence of a “forthright” pleading. There was no pleading at all to support the claim. Neither did the respondent present any evidence of discrimination, beyond making the sweeping and unsupported general statement, which the appellant denied, that it is the policy of the appellant not to grant maternity leave.

19. As the learned Judge appreciated, “it is important for parties alleging pregnancy discrimination (and no such allegation had been made in the present case) to take the violation more seriously through proper pleadings and marshalling of evidence.” For the same reason, the award could not be justified on the basis that the respondent had prayed for “any other suitable relief” when no foundation for such relief had been laid in the pleading.

20. In the result, the appeal partially succeeds to the extent that we set aside the award of general damages of Kshs. 750,000.00 based on the faulty finding by the trial court that the respondent was discriminated upon on account of pregnancy. We uphold the awards for one month’s salary in lieu of notice at Kshs. 9,500.00; the equivalent of twelve months salary in compensation for unfair termination at Kshs. 114,000.00; arrears of salary at Kshs. 28,500.00.

21. Each party will bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR

