Otieno v Absa Bank Kenya (Cause E065 of 2024)
[2025] KEELRC 214 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 214 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E065 OF 2024

JK GAKERI, J

JANUARY 30, 2025

BETWEEN

WILFRIDA OTIENO ..... CLAIMANT

AND

ABSA BANK KENYA ..... RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 14th August, 2024, alleging unlawful termination of employment by the respondent.

2. It is the Claimant's case that she was transferred to Migori from 1st September, 2019 served probation till 1st June, 2020 and was employed on permanent terms until 23rd March, 2022 when her services were terminated for poor performance.

   That the claimant's gross salary was Kshs.104,938.00 per month.

3. It is the claimant's case that on or about 2021 she was expectant and was on sick off on and off and thus unable to perform and occasionally went on sick leave.

4. The claimant admits that her performance plummeted, was issued with a notice to show cause, attended a disciplinary hearing and was eventually terminated from employment.

   The claimant alleges that attempts to explain were unsuccessful.

   The claimant prays for:

   i. A declaration that termination of employment by the respondent was unfair for non-compliance with the provisions of the *Employment Act* and *the Constitution* of Kenya.

   ii. Pay in lieu of notice Kshs.104,000.00

   iii. Damages for wrongful dismissal Kshs.1,248,00.90

iv. Severance pay Kshs.124,800.00

v. Unpaid house allowance Kshs.187,200.00

vi. Costs of this suit.

Respondent's case

5. The respondent admits that the claimant was its employee until 23rd March, 2022 when her employment was terminated and served probation until 3rd June, 2020.

6. It is the respondent's case that the claimant's performance started declining in 2020 and was placed on a Performance Improvement Plan (P.I.P) from March to June 2021 but it did not improve, and was placed on another P.I.P from August to December, 2021.

7. The respondent denies that the claimant's performances started declining in September 2021 after she fell pregnant, an issue the claimant did not raise as the reason for under performance.

8. It is the respondent's case that prior to the termination of employment, the claimant was issued with notices to show cause, placed on P.I.Ps and invited for a disciplinary hearing.

9. That the claimant was paid a consolidated salary of Kshs.104,939.00 per month.

10. It is the respondents case that it accorded the claimant opportunity to improve her performance through the P.I.P, issue notices to show cause and the claimant responded, was invited for hearings and informed of her right to be accompanied by a colleague and signed minutes.

11. The respondent avers that on termination of employment, the claimant did not appeal the decision, was paid salary in lieu of notice the procedure was fair, no house allowance was payable and she was not declared redundant to be entitled to severance pay.

The respondent prays for dismissal of the claimant's case with costs.

Claimant's evidence

12. On cross-examination, the claimant confirmed that she started working in Migori on 1st September, 2019 and the contract of employment provided for termination of employment on the grounds of misconduct or inability to perform for a sustained period of time, facts she admitted having been aware of.

13. The Claimant admitted having a role profile or job description as a Universal Banker.

14. The witness admitted that she had targets to meet and appraisals were conducted though she was unaware of the rating, that her best score was 79% and was never scored good at any point during her employment.

15. That a score of 72.9% precipitated the 2nd P.I.P as it was unsatisfactory and she was expectant then.

16. The claimant admitted that the PIP stated the support was available and the contact person's name was given.

17. The claimant testified that his performance declined towards the end of the period (56.77%) and a notice to show cause was issued, responded acknowledging her poor performance promising to improve and attended a hearing pursuant to the letter of invitation dated 7th September, 2021.

18. That at the hearing, she attributed her poor performance to health challenges but not pregnancy and promised a good score but another warning letter followed and was placed on another P.I.P from August 2021 to December 2021, for purposes of improvement.

19. The claimant admitted that ill health or pregnancy were not identified as reasons for under performance in the P.I.P but change of location and many clients were.

20. That a document from Oasis Health accorded the claimant sick off from 18th October, 2021 to 25th October, 2021 on account of severe headache and malaria and another sick off for 3 days had been given by St. Johns Mission Hospital on 20th September, 2021.

21. It was her testimony that the P.I.P was explicit that assistance needed would be availed to make her a better performer at 85% by December, 2021 but attained a rating of 71.7%, an under performance and a notice to show cause was issued to explain why disciplinary action should not be taken for the poor performance.

22. The Claimant admitted that she was aware that poor performance would lead to termination of employment and promised to raise the score to "good" by June 2022.

23. The witness admitted that in her response to the notice to show cause she did not indicate that the pregnancy impacted on her performance.

24. The claimant confirmed that she was invited for a disciplinary hearing and could attend with a colleague, attended alone and hearing proceeded and she signed the minutes.

25. The claimant confirmed that her health was not reflected in the minutes and did not state that it had any effect on her performance in her statement and employment was terminated thereafter vide letter dated 23rd March, 2022 and the reason was poor performance.

26. On reliefs, the claimant admitted that she was paid in lieu of notice and was a member of the NSSF and another pension scheme by the employer and her employment was terminated by the respondent.

27. It was the claimant's testimony that neither her counsel nor any other person explained to her what consolidated salary meant and she did not ask.

28. Finally, the claimant admitted having been paid Kshs.112,309.40 and was given a certificate of service.

Respondents evidence

29. RWI, Mr. Vaslas Odhiambo confirmed, on cross-examination that the claimant had a role profile but had no evidence to prove it was given to her.

30. It was his testimony that during ½ two performance period, the claimant was pregnant but did not explain the issue anywhere and the documents on record had not been presented to the bank. However, he admitted that the documents on sick off were forwarded, such as the letter dated 20th September, 2021.

31. RWI was categorical that the respondent bank was unaware of the claimant's health challenges and documents on record showed that she was due in May 2022.

32. The witness confirmed that the 1st notice to show cause was issued in 2021 and two warnings were issued.

33. That the claimant chose to attend the hearing unaccompanied by a colleague.

34. According to the witness, 3 days notice was sufficient and the claimant did not raise the issue.

35. On re-examination, RW1 testified that role profiles were given to all employees and the claimant admitted having been aware of her job description.

36. The witness testified that the claimants letter dated 20th September, 2024 stated that the claimant had been seen at the writer's facility and asked for 3 days sick off for typhoid fever and the same were given.

That the letter made no mention of the claimant's pregnancy

That a subsequent sick off for one week was given for malaria.

37. RWI confirmed that he had not seen any other document on the claimant's health as the Hand book on record had not been given to the bank.

38. That the Covid-19 pandemic was confirmed in 2020 and the claimant went to Migori on 1st September, 2019 and did not raise the issue of inadequacy of notice in her response.

Claimant's submission

39. As to whether termination of the claimant's employment was procedural and lawful, counsel for the claimant submitted that since the claimant was pregnant and the time of termination and under performance was occasioned by the claimant's pregnancy the termination was therefore discriminatory as held in Ako V Abso Motors Limited [2021] eKLR.

40. Counsel further argued that the respondent did not tender any evidence to demonstrate poor performance by the claimant other than copies of warning letters.

41. Reliance was made on the sentiments of Mbaru J. in Jane Samba Mukala V Ol Tukai Lodge Ltd [2013] eKLR on the employees right to be called to defend his/her performance, to urge that the respondent ought to have taken measures to address the claimant's poor performance.

42. Reliance was also made on the decision in GMV V Bank of Africa [2013] eKLR to urge that the claimant was discriminated and the termination of employment was on account of pregnancy and was thus entitled to the reliefs sought.

Respondents submissions

43. As to whether the respondent followed due process in terminating the claimant's employment, counsel for the respondent submitted that the law was complied with and cited Oyombe V Eco Bank Ltd [2022] KECA 540 KLR on the elements of fair procedure as, reason for which termination of employment was being considered, explanation of the grounds in a language understood by the employee, entitlement of the employee to a representative of his or her choice when the explanation of the grounds is done and hearing and considering any representations made by the employer or representative.

44. Counsel urged that the respondent had a system of setting measurable goals for the claimant and her performance was regularly assessed, she was placed on a Performance Improvement Plan (P.I.P) and failed after two (2) attempts and admitted that her performance was below standard.

45. To reinforce the submission, counsel urged that the claimant was invited to a disciplinary hearing, informed of her right to be accompanied by a colleague, attended, was accorded time to defend herself and signed the minutes and the respondent issued a letter of termination of employment thereafter and the claimant did not appeal the decision.

46. As whether termination of the claimant's employment was grounded on fair and valid reasons, counsel submitted that the termination of employment was justified on poor performance as the letter of termination of employment dated 23/03/2022 stated and the claimant was at all material times aware that poor performance was a ground for termination of employment.

47. That the claimant never attributed her termination from employment to pregnancy.

48. Reliance was made on the decisions in National Bank of Kenya V Samuel Nguru Mutonya [2019] eKLR and Jane Samba Mukale V Ol Tukai Lodge Ltd (supra) for the threshold for termination of employment on account of poor performance, to urge that the respondent had a practice to measure good performance against poor performance and after appraisal steps were taken to enhance the claimant's performance as held in Jane Wairimu Machira V Mugo Waweru & Associates [2012] eKLR.

49. Counsel submitted that the claimant was appraised, found to be under performing was on a P.I.P on two occasions for 3 months and performance did not improve.

50. Reliance was made on Naumy Jemutai Kirui V Unilever Tea Kenya Ltd [2020] eKLR to urge that the 3 months period was reasonable.

51. Counsel submitted that termination of the claimant's employment was substantively and procedurally fair.

52. As to whether the claimant was discriminated on account of pregnancy, counsel submitted that the claimant had not pleaded discrimination and parties are bound by their pleadings as held in COTEC Security Group Ltd V Kenya National Private Security Workers Union [2024] KEELRC 610 KLR to urge that the issue ought to be disregarded altogether.

53. That for the burden of proof to shift to the employer to show that there was no discrimination, the employee must establish a prima facie case by evidence, as held in GMV V Bank of Africa Kenya Ltd [2013] eKLR and the claimant had not done so.

54. According to the respondent's counsel, the claimant's performance had been deteriorating since the commencement of her employment and did she not raise the issue of pregnancy as the cause of her under performance, that none of the sick offs on record showed that the illness was as a result of pregnancy and the letter issued on 8th September, 2022 came after termination of the claimant's employment and child birth.

55. On the reliefs sought, counsel urged that as the termination of employment was fair was not on account of redundancy, the claimant was a member of the NSSF and NHIF and her salary was consolidated, the claimant was not entitled to any of the reliefs sought.

Analysis and determination

56. It is common ground that the claimant was appointed as a Universal Banker by the respondent effective 1st September, 2019 and posted to Migori under a written contract of service executed on 23rd August, 2019 at a salary of Kshs.104,938 per month.

57. Records show that the claimant's employment was confirmed on effective 1st June 2020 after successful completion of the probation period.

58. The term sheet attached to the letter of appointment stated that the claimant's salary was consolidated and the employment was terminable by one month's notice of either party.

59. Significantly, the claimant confirmed that she had targets to meet and the respondent conducted performance appraisals regularly. She also confirmed awareness of the fact that her employment was dependent on meeting targets as agreed upon with the supervisor and under performance for a sustained period of time could lead to termination of employment.

60. It is not in contention that the claimant's employment was terminated by the respondent vide letter dated 23rd March, 2022 on grounds of poor performance namely; the claimant's overall performance weighted performance score by December 2021 was 71.7% against a target of at least 100%.

61. Evidence on record reveals that the claimant's overall weighted performance score was 72.9 for 2020 against a target of at least 100%.

62. It is equally common ground that owing to the claimant's under performance, she was placed in two Performance Accelerator Plans (PAP) from March 2021 to June 2021 and from August 2021 to December 2021.

63. It is not in contest that the PAPs were intended to enhance the claimant's performance, a fact she admitted on cross-examination.

64. Equally not in contest is the fact that after the 1st PAP, the claimant was issued with a notice to show cause, responded, was invited for a capability hearing, attended and as a consequence, the first warning letter was issued which the claimant received on 12th October, 2021.

65. A similar concatenation of events played out after the second PAP save that the after the capability hearing, a termination letter was issued.

66. In her written statement, the claimant states that she was expectant on or about 2021 and proceeded on sick offs on and off and could not perform as she used to a fact the respondent was aware of.

67. RWI testified that the claimant did not attribute her poor performance to pregnancy or health challenges and had not availed any documentation on the fact that she was expectant, though she forwarded two sick off notes for malaria and typhoid fever.

    The issues that commend themselves for determination are:

    i. Whether termination of the claimant's employment was unlawful.

    ii. Whether the claimant is entitled to the reliefs sought.

68. On the 1st issue it is trite law that for a termination of employment to pass muster, it must be proved that the employer had a valid and fair reason relating to the conduct of the employee, capacity or compatibility or based on the operational requirements of the employer and the termination of employment was conducted in accordance with a fair procedure.

69. There must have been as substantive justification and procedural fairness.

70. See Walter Ogal Anuro V Teachers Service Commission [2013] eKLR and Naima Khamis v Oxford University Press (EA) Ltd (2017) eKLR.

    In the latter the Court of Appeal expressed itself as follows:

    > "... From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantial unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness

arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required".

The Court is guided by these sentiments

Reasons for termination

71. As adverted to elsewhere in this judgment, the claimants' performance in 2020 and 2021 was generally rated as under performance and need for improvement and as further noted the reason for termination of employment was clearly identified as poor performance.

72. Although the claimant did not contest the score, she testified and submitted that her performance was impacted upon by her pregnancy and general health.

73. In her memorandum of claim, the claimant avers that as she was expecting a baby, her input reduced and a consequence, notices to show cause were issued. Similarly, in her written witness statement the claimant states that she was expectant "on or about 2021".

74. From her evidence, it is unclear as to when the claimant became pregnant.

75. Strangely, the claimant did not attribute her poor performance to the vagaries occasioned by the COVID-19 pandemic, particularly in 2020 when she was undeniably not expectant.

76. To embellish her case, the claimant relies on two notes from Oasis Health dated 18th October, 2021 and St. Joseph's Mission Hospital Migori for one week bed rest and 3 days sick off respectively, for malaria and typhoid fever.

77. RWI admitted that these two documents were forwarded to the respondent and no other, evidence the claimant did not controvert.

78. In addition, the claimant attached a copy of the Mother & Child Health Handbook by Oasis Health.

79. For unexplained reasons, the claimant did not officially or otherwise inform the respondent that she was expectant and was not candid with the Court as well as there was no indication as to when the pregnancy could have occurred or when pre-natal care commenced.

80. It is the duty of an employee to disclose conditions which in his or her opinion are likely to impact on his or her contractual obligations with the employer. A contract of service is in persona and non-delegable and if the person has challenges, it behoves the employee to disclose the circumstances to the employer.

81. In this case, although the claimant proceeded on sick off for only 11 days in September 2021 and October 2021, the same may have nominally impacted on her performance.

82. An employer cannot be presumed to know that an employee is expectant, which is a private matter.

83. However, during the capability hearing held on 30th September, 2021, the claimant mentioned in passing that her health had been challenging but promised to do her best.

84. Puzzlingly, the claimant had no document any evidence from a health institution or chemist as evidence of the alleged health challenges.

85. Even assuming that the claimant had serious health challenges, facts of which she did not share with the employer, the same could only have impacted on the performance in last quarter of 2021 during the currency of the 2nd PAP.

86. Puzzlingly, during the capability hearing held on 2nd March, 2022 the claimant did not raise the alleged health challenges yet she was due in May 2022, a fact she confirmed on cross-examination.

87. Finally, the claimant responded to the two notices to show cause in writing dated 24th August, 2021 and 18th February, 2021 and in neither instance did she attribute her underperformance to pregnancy or health challenges.

Section 43(2) of the *Employment Act* provides that:

The reason or reasons for termination of a contract, are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

See also Naima Khamis V Oxford University Press (EA) Ltd (Supra).

88. In Galgalo Jarso Jillo V Agricultural Finance Corporation [2021] eKLR B.O.M Manani J. stated as follow:

> "...All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists..."

89. Similarly, in Kenya Revenue Authority V Reuwel Waithaka Gatahi & 2 Others [2019] eKLR, the Court of Appeal expressed itself as follows:

> "The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing to terminate the employee's services. That is a partly subjective test".

90. The foregoing sentiments are further fortified by the sentiments of Lord Denning in British Leyland UK Ltd V Swift [1981] I.R.L.R 91 on "the band of reasonable responses test".

91. From the foregoing analysis of the evidence and the authorities above, it is discernible that he Court is satisfied that the respondent has evidentiary demonstrated on a preponderance of probabilities that it had a valid and fair reason to terminate the claimant's employment for under performance.

92. The claimant admitted that she was never rated "Good" throughout her employment at Migori and the PAPs clearly stated the support was available to enable her to perform and identified who she could contact for that purpose.

93. Significantly, although RWI testified that the claimant was transferred to Migori during the Covid-19 pandemic, that was factually incorrect as the first confirmed case in Kenya was in mid-March 2020 more than 5 months after the claimant's employment.

Procedure

94. As held in Pius Machafu Isindu V Lavington Security Guards Ltd [2017] eKLR, compliance with the provisions of Section 41 of the *Employment Act* is mandatory and non-compliance renders termination of employment procedurally unfair.

95. Similarly, in Jane Samba Mukala V Ol Tukai Lodge Ltd [2013] eKLR, Monica Mbaru stated as follows:

> "This is important to note as where poor performance is shown to be a reasons for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this 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. Section 5 (8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

Therefore, 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 applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.

Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee.

Where this procedure as set out under section 41 of the *Employment Act* is not followed, then a termination that arises from it will be procedurally flawed. It is procedurally irregular..."

96. It is common ground that the respondent had a performance management system and a scoring system which the claimant was aware of and did not contest the ratings she was given.

97. Relatedly, the respondent had a Disciplinary Capability and Grievance Policy and Procedure which it reviewed periodically. It provided for suspension of employees, issue of notice to show cause, response in 3 days of receipt, report of investigation be share with the employee at least 3 working days notice of the disciplinary hearing, right of employee to adduce evidence, cross-examine witness and be represented by a colleague or trade union representative, decision of panel be communicated to the employee and sanctions include written caution, 1st and final written warnings and dismissal and right of appeal within 5 working days and an Appeal Panel appointed to hear the same within 10 days after availment of all documentation.

98. According to the policy the Appeal Panel could require the parties to address them in person and could unhold the action/dismissal, increase or reduce the sanction, overturn the decision, set the proceedings aside for a fresh hearing before a different decision maker or advise that further investigation may be required.

99. It is not in dispute that the claimant was issued with and received two notices to show cause dated 23rd February, 2021 and 16th February, 2022 received on 24th February, 2021 and 17th February, 2022 respectively.

100. Whereas the former required a response by 5:00 on Friday 26th February 2021, the latter required one by close of business on Saturday 19th February, 2022.

101. Both notices accorded the claimant less than the prescribed number of days in responding to the notices, the fact that the claimant did not raise the issue notwithstanding.

102. Both notices accorded her 2 working days contrary to Clause 5.3.2 of the respondents Disciplinary Capability and Grievance Policy and Procedure which provides for three (3) working days of acknowledgment of receipt.

103. Finally, the notice to show cause dated 19th August, 2021 required a response by 5:00pm Tuesday 24th August, 2021 a day after it was received and the claimant complied.

104. For unexplained reasons the respondent failed or refused to comply with its own policy and procedures on notices.

105. Similarly, as regards the capability hearing held on 30th September, 2021 at 11:00am, invitation notice dated 27th September, 2021 was received on even date thus according the claimant 2 working days as opposed to the three prescribed by the policy.

106. Although RWI testified that 3 days notice was sufficient, as provided by the policy, the respondent accorded the claimant only 2 working days.

107. An organizations policies, manuals or guidelines or procedures bind both employee and the employer and are intended to ensure sync in the operations of the organizations and the Human Resource function.

108. Both parties are expected to abide by them otherwise they become empty platitudes that are violated with abandon.

109. The Court will not countenance such a situation as it is inconsistent with the tenets or precepts the organization has undertaken to abide by.

110. In Mulwa Msanifu Kombo V Kenya Airways [2013] eKLR Mbaru J. held that:

> " The Court will intervene in administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice or if the procedure is in breach of the agreed or legislated or employers prescribed applicable policy, or standards..."

111. In sum, other than the less than the prescribed number of days accorded to the claimant to respond to notices to show cause and the capability hearing slated for 30th September, 2021, which the Court considers essential, as it implicates the employees right to fair hearing and preparation for the hearing, coupled with the time to procure a colleague and in this case, the respondent's Disciplinary Capability and Grievance Policy and Procedure prescribed the thresholds, the court is satisfied that all the other procedural safeguards were complied with.

Strangely, the claimant did not appeal the termination of employment.

112. Guided by the provisions of Section 45(4) and (5) of the *Employment Act*, the Court is satisfied that taking into consideration all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the claimant's employment in that it consistently accorded the claimant less that the prescribed number of days.

113. Finally, as correctly submitted by the respondent's counsel, the record shows that the claimant neither pleaded nor alleged that she was discriminated by the respondent on account of pregnancy.

114. It is trite law that parties are bound by their pleadings. See Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others [2014] Eklr which cited with approval the Nigerian Supreme court decision in Adetoun Oladeji V Nigeria Breweries PLC SC 91/2002

(sentiments of Aderemi JSC, Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR, Elizabeth O. Odhiambo V South Nyanza Sugar Co. Ltd [2019] eKLR among others.

115. In Kenya Power & Lighting Co. Ltd V County Government of Nairobi & Attorney General [2017] eKLR, the court explained the functions of pleadings namely;

> " The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further to define the precise issues for determination so that the court may conduct a fair trial, the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances.
>
> Material facts are only those relied on to establish the essential elements of the cause of action, a pleading should not be so prolix that the opposite party is unable to ascertain with precision the cause of action and the material facts that are alleged against it".

116. Assuming that the claimant's memorandum of claim contained all the material facts the claimant desired to rely on, then the court is agreement with the respondent that the claimant neither pleaded nor alleged that she was discriminated on account of pregnancy.

117. More poignantly, the claimant adduced no shred of evidence to show that there was some semblance of discrimination by the respondent, either in their relationship with the supervisor, colleagues or in the appraisal process.

118. Records reveal that the claimant took the evaluations positively and promised to do better next time.

119. This is clearly discernible from the minutes of the two capability hearing meetings held on 30th September, 2021 and 2nd March, 2022 respectively.

120. On discrimination, in Nyarangi and Others V Attorney General [2008] KLR 688 the Court stated:

> " Direct discrimination involves treating someone less favourabley because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances"
>
> Similarly, in Peter K. Waweru V Republic [2006] KLR as follows:
>
> > "...Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to ...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description..."

121. Article 27 of *the Constitution* of Kenya and Section 5(3) of the *Employment Act* out law direct and indirect discrimination on the ground of race, pregnancy, sex, marital status, health status, ethic or social origin, colour, age, disability, religion, culture, dress, language or birth.

122. Notably, Section 5 (7) of the *Employment Act* imposes a heavy burden of proof on the employer to disprove allegations of discrimination by an employee.

123. However, for an employee to succeed in asserting discrimination, he or she must demonstrate a prima facie case of discrimination and it is only then that the burden shifts to the employer.

124. The foregoing is fortified by the sentiments of the Court of Appeal in Boniface Momanyi Nyachae V Kenya Orient Insurance Co. Ltd [2023] KECA 136 (KLR) where the court expressed itself as follows:

> " The appellant's assertion regarding the issue of discrimination is hinged on the evidentiary burden and who bears it in the circumstance. As noted above, Section 5(7) of the *Employment Act* places the burden of disproving discrimination on the employer. The crux of that provision is that once an employee has made out a prima facie case of discrimination, the burden then shifts to the employer to disprove the allegation. A prima facie case is one in which a court properly directing itself would conclude on the evidence presented that there exists a right which has been infringed. Only then can the burden shift to the respondent to disprove the allegation".
>
> The Court is bound by these sentiments.

125. In the instant case, having noted that the claimant did not plead discrimination in the first instance, the claimant could not have identified particulars of discrimination or availed supportive evidence.

126. In Boniface Momanyi Nyachae V Kenya Orient Insurance Co. Ltd (Supra), the Court of Appeal laid it bare that

> " ...In essence, the claimant bears the burden to set out prima facie, the claim upon which the burden shifts to the respondent to disprove the allegation...All the appellant did was state a claim but failed to prove. It is not enough to just make a blanket claim without making a proper showing of the claim.
>
> Accordingly, therefore we find that the appellant failed to show any prima facie case of discrimination against him..."

127. In the instant case the claimant neither stated the claim or prove it. There was no allegation or assertion of discrimination for the respondent to disprove.

128. The foregoing is vividly demonstrated by the absence of particulars of discrimination and most importantly, absence of a prayer in damages for discrimination.

129. Clearly, the claimant's submission that she was discriminated by the respondent on account of pregnancy has no evidential foundation.

As regards the reliefs sought, the court proceeds as follows:

i. Pay in lieu of notice Kshs.104,000.00

The claimant admitted on cross-examination that pay in lieu of notice was paid.

The claim is dimissed.

ii. Severance pay

The claimant admitted, on cross-examination, that his employment was terminated by the respondent and her written witness statement dated 9th July, 2024 so affirms.

It is trite law that severance pay is only payable in a redundancy.

The prayer is dismissed.

iii. Unpaid house allowance

As adverted to elsewhere in this judgment, a fact the claimant admitted on cross-examination the Term Sheet annexed to the letter of appointment expressly stated that the claimants consolidated salary package was Kshs.1,259,256.00 per annum or Kshs.104,938.00 per month.

Under Section 31(2) of the *Employment Act* the provisions of Section 31(1) of the Act on provision of reasonable housing accommodation or payment of housing allowance by the employer do not apply where the contract contains a provision which consolidates the wage and salary with housing allowance.

In addition, although the copy of pay slip on record is not a primary contractual document, it clearly states that the claimant's salary was consolidated.

The claimant confessed on cross-examination that she did not seek an explanation from her advocate or anyone else on what consolidated meant.

The pray is unstainable and it is declined.

iv. Compensation for unfair termination

Having found as above, the claimant qualifies for compensation under the provisions of Section 49(1)(c) of the *Employment Act*.

The Court has considered that the claimant never expressed her wish to remain in employment, did not appeal the decision notwithstanding the fact that she was notified of her right to do so, the claimant substantially contributed to the termination of employment, had two previous warnings and the respondent substantially complied with the provisions of the *Employment Act*, the equivalent of one (1) months salary is fair compensation, Kshs.104,938,00.

130. In the upshot judgment is entered in favour of the claimant against the respondent as follows:

a. Declaration that termination of employment was procedurally unfair.

b. Equivalent of one (1) months salary Kshs.104,938,00.

c. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF JANUARY, 2025.

DR. JACOB GAKERI

JUDGE

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 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 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.

DR. JACOB GAKERI

JUDGE