



Muigai v Kuku Foods Kenya Limited (Employment and Labour Relations Cause 777 of 2019) [2025] KEELRC 1354 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1354 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 777 OF 2019**

MN NDUMA, J

MAY 8, 2025

BETWEEN

AGATA WANGARI MUIGAI CLAIMANT

AND

KUKU FOODS KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed suit on 15/11/2019 against the Respondent seeking the following reliefs:
 - a. 12 months' salary as damages for wrongful and unfair dismissal being Kshs. 1,853,779.20
 - b. A declaration that the failure by the Respondent to adhere to the Kuku Foods Kenya Employee Handbook when dismissing the Claimant was discriminatory and contrary to the Employment Act, 2007.
 - c. General damages for discrimination for subjecting the Claimant only to a different disciplinary procedure other than what the Respondents Employee Handbook provided.
 - d. General damages for discrimination on account of pregnancy and denial of her right to return to work on completion of her maternity leave.
 - e. Notice period
 - f. Unpaid leave days
 - g. Costs of the suit
 - h. Such further or other relief this Honourable Court may deem fit.
2. The Claimant (CW1) adopted a witness statement dated 14/11/2019 as her evidence in chief and was cross-examined by counsel for the Respondent.



3. Claimant stated that she was employed by the Respondent on 22/12/2010 as Trainee Shift Supervisor. That the Respondent had just commenced its operations in Kenya and Claimant was one of its pioneer staff who helped the Respondent to break into the Kenyan market.
4. That the Claimant underwent training on the job and obtained Leading a Shift Certification (LAS) on 30/4/2011. On 20/7/2012, she obtained Leading a Restaurant in Manager's Absence (LAR) Certification.
5. That on 11/9/2013, she obtained certification from Africa Operations College and on 30/3/2014, she received certification for Leading a Restaurant Continuously (LARC).
6. In 2015, Claimant said she received a certificate in recognition of 5 years of dedicated service to the Respondent and thereafter was awarded a certificate BSC 2016 award in recognition of her outstanding work from the Respondent.
7. That the salary was raised on 4/10/2012 to Kshs. 80,000/= and on 16/4/2014 to Kshs. 120,000/= and on 1/4/2017 to Kshs. 145,0331.38.
8. CW1 said she continued to work diligently and faithfully and on 1/12/2016 was appointed as a Developing Champions Trainer. On 25/1/2017, she received recognition as a winner for Restaurant Compliance Checklist (RCC).
9. That she served for a period of 9 years until the Respondent summarily dismissed her from employment on 30/8/2019. At the time CW1 stated she earned Kshs. 154,481.60 per month.
10. The Claimant stated that the dismissal violated clause 2.4.1 of the Kuku Foods Kenya Employee Handbook and section 44 (4) of the [Employment Act](#), 2007, which stipulates the only valid grounds for summary dismissal.
11. CW1 denied charges of negligence levelled against her. That she was not adequately informed of the charges against her stating that the vague allegation of negligent discharge of duties was not valid basis of summary dismissal.
12. That the dismissal of the Claimant coincided with a time she was in her third pregnancy trimester and the selective manner in which the Respondent elected to apply the disciplinary procedure to the Claimant was unfair, discriminative and biased which fact complicated the Claimant's pregnancy further aggravating the damage she was subjected to by the Respondent.
13. The Respondent denied the Claimant the right to return to work on completion of her maternity leave thus discriminating her on account of pregnancy. That this violated Kuku Foods Pregnancy Policy and the [Employment Act](#). The Claimant returned to work on 24/8/2019, and was told to go back home without being given any reasons confirming that the decision to terminate the employment of the Claimant had already been made.
14. The Respondent did not make good the claim despite service of demand letter.
15. Under cross-examination by Advocate Ombati for the Respondent, the Claimant stated that she was discriminated upon on grounds of pregnancy. Claimant said this was her 3rd child while in the employment of the Respondent. Claimant said she was not accorded a fair hearing. That she was given many restaurants to oversee which she could not manage during pregnancy. That she was overwhelmed. That she had responsibility of 22 restaurants as Development Champion Trainer. That she had to coordinate with field trainers, report training and do certification. Claimant said that she was disciplined for failing to send a Development Champion report on 16/3/2019 to the Respondent.



- Claimant said only one Assistant Manager had completed their module at the time. The Claimant said that she had taken unpaid leave for one month due to pregnancy complications. The Claimant said she was paid during her maternity leave. That on 19/3/2019 she was summoned to a disciplinary hearing and received final warning letter. That there was no appeal procedure. That she was in her 3rd pregnancy trimester when her work was made difficult. That she had complications by the time she took maternity leave. That her movement was difficult. That her line manager had exempted her from all round movements and this had affected her work.
16. Claimant said certification of one Jacinta was not raised in the Notice to Show Cause but was raised at the disciplinary hearing. Claimant said she was not given time to prepare for the matters raised at the hearing. Claimant said the warning letter of 24/7/2018, was also not raised in the Notice to Show Cause. That Notice to Show Cause did not provide any particulars of negligence. The offences were not clear.
 20. RW1, Joyce Wanjuiku Chege testified for the Respondent. RW1 stated that she was the Human Resource Manager of the Respondent. That she had served Respondent for a period of 5 years and was aware of the issues at hand. That Claimant was employed on 22/12/2010 as Trainee Shift Supervisor. That Respondent invested greatly in training for all employees to impart them with necessary skills to run the business.
 21. That on 1/12/2016, Claimant was appointed Developing Champions Trainer and key duties included training of managers, tracking report and evaluating performance of the trainee to completion, calibrate the module for activities and skills assessment and calibrate execution of Development records.
 22. That on 18/3/2019, RW1 was informed by Capability Development Manager Jordane Bukusi, in the absence of the Claimant's line manager, Regional Training Manager that the Claimant had sent out an email to the management team of the Respondent indicating that one Jacinta, a Shift Supervisor had completed her training for the Assistant Restaurant Manager position and was ready for certification. That upon investigating, it was discovered that was not the case since Jacinta had neither completed her training modules as required nor was she ready for certification.
 23. That it was not the first time the Claimant had negligently performed her role and so was issued with a final written warning letter dated 24/7/2018.
 24. RW1 issued Claimant with Notice to Show Cause dated 19/3/2019 and notification of hearing for purpose of addressing the issue.
 25. The Claimant fell ill and could not attend the meeting scheduled for 21/3/2019.
 26. At the end of Claimant's sick leave, she went ahead to apply for and obtained her maternity leave for 3 months and a further one-month unpaid leave and resumed on 24/8/2019. On 27/8/2019, RW1 issued the Claimant with a notification of hearing together with a copy of the charge sheet. The Claimant and Jordane Bukusi attended the hearing on 29/8/2019. Claimant was informed of the charge of negligent discharge of duties with particulars set out.
 27. Claimant stated that the charge and particulars were false as tracking of the training progress of employee did not form part of her job description and that was the role of the General Manager. RW1 said this was indeed Claimant's job description well-articulated in the Developing Champion Training Programme for Internal Development Candidates and the DC Trainers Role and Responsibilities Handouts.



28. That the Claimant was found guilty of gross misconduct and was summarily dismissed upon completion of the hearing. The Claimant was paid terminal dues including salary for 7 days worked Kshs. 35,526.50, payment in lieu of leave days not taken Kshs. 8,881.55 totaling Kshs. 44,407.50.
29. That the suit lacks merit and it be dismissed.
30. RW2, Jodana Bukusi testified that she was a Capability Development Manager of the Respondent and had served for 1 ½ years. That on 16/3/2019, RW2 received an email from the Claimant stating that one Jacinta a Shift Supervisor had completed her training for Assistant Restaurant Manager position and was ready for certification.
31. That upon investigations it was discovered that that was not the case. That on 18/3/2019, RW2 Informed RW1 of the incident stating that it was not the first time the Claimant had negligently performed her role which led to the Respondent issuing her with a final written warning letter dated 24/7/2018.
32. The Claimant was issued with Notice to Show Cause dated 19/3/2019 as stated by RW1 and the hearing eventually took place upon return of the Claimant from maternity leave. That the Claimant faced charge of gross negligence, was found guilty and summarily dismissed.
33. Both RW1 and RW2 were closely cross-examined by counsel for the Claimant, Mr. Ochieng and they both denied that they did not follow Respondent's procedure in disciplining the Claimant. They denied also that they did not provide reasons for the dismissal in the letter of dismissal. They too denied that they did not avail the Claimant the alleged report of investigations. They did not explain why a final warning that had expired was considered to commence a disciplinary hearing that led to her dismissal from employment. They denied discriminating the Claimant on grounds of her pregnancy and failing to take into account that she experienced pre-natal difficulties that impacted her work negatively before she proceeded on maternity leave.
34. They denied that the decision to dismiss the Claimant was made before the hearing. That Jacinta did not attend the disciplinary hearing.

Determination

35. The parties filed written submissions which the court has considered together with the evidence adduced by CW1, RW1 and RW2. The issues for determination are: -
 - a. Whether the Respondent had valid reason(s) to summarily dismiss the Claimant.
 - b. Whether the Respondent discriminated the Claimant on grounds of pregnancy.
 - c. Whether the Respondent followed a fair procedure in summarily dismissing the Claimant.
 - d. Whether the Claimant is entitled to the reliefs sought
36. The court will deal with all the issues globally, the starting point being that the employer has the obligation to prove that it had a valid reason to summarily dismiss the Claimant from work in terms of section 43(1) and (2) of the *Employment Act*, 2007. The employer had a further obligation to follow a fair procedure under section 41 of the said Act. Furthermore, in terms of section 5 of the said Act, where an employee alleges discrimination, as in this case on grounds of pregnancy the onus shifts to the employer to disprove that the said discrimination actually took place.



37. Section 5(3) reads,

“(3) No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee

- a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
- b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

(5(3) It is not discrimination to;

- a. take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;
- b. distinguish, exclude or prefer any person on the basis of an inherent requirement of a job
- c. employ a citizen in accordance with the National employment policy,
- d. or restrict access to limited categories of employment where it is necessary in the interest of state security

38. 5(6) provides that;

‘In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section’

39. On 24/7/2018 the Respondent issued the Claimant with a final warning letter on allegations that the Claimant had negligently conducted her work as a Trainee Shift Supervisor by sending out an email to the management team of the Respondent indicating one Jacinta, a Shift Supervisor, had completed her training for the Assistant Restaurant Manager position and was ready for certification but upon further investigation it was discovered that this was indeed not the case as Jacinta had neither completed her training modules as required under the Respondent’s set out policy nor was she ready for certification.

40. That since this was not the first time the Claimant had negligently performed her role, she was issued with a final written warning dated 24/7/2018.

41. It is not in dispute that the Claimant’s job description included: -

- a. Training store managers
- b. Tracking reporting and evaluating the performance of the trainee (Shift Supervisor during and on completion of the training)
- c. Calibrating, the modules activities and skills assessment and
- d. Calibrating execution of Development record

42. RW1, Joyce Chege testified that she proceeded to issue the Claimant with a Notice to Show Cause dated 19/3/2019 and notification of hearing to address the issue. That the Claimant fell ill and could



not attend the hearing date set for 21/3/2019 and RW1 cancelled the hearing and planned to revisit the same once the Claimant resumed duty.

43. The Claimant was meanwhile on sick leave associated with pregnancy complications. That upon end of the sick leave, the Claimant applied for 3-month maternity leave and a further one-month unpaid leave and resumed work on 24/8/2019. That on 27/8/2019 RW1 issued the Claimant with a notification of hearing with a copy of her charge sheet. The hearing was held on 29/8/2019 which was attended by the Claimant and one Jordana Bukusi. The Claimant was charged with gross negligence – negligent discharge of duties as set out in the charge sheet.
44. The Claimant denied any particulars of negligence stating that for the 9 years she had served from 22/12/2010 up to that time, she had discharged her work diligently and had variously been promoted, recognized and received salary raise for good work. That she was then earning Kshs. 154,481.60 though she had started at a low paid salary as a Trainee Shift Supervisor.
45. That the disciplinary hearing contained the Employee Handbook called the Kuku Foods Kenya Employee Handbook which was put in place to prevent arbitrary, unfair and biased decision to dismiss an employee including the Claimant.
46. That in particular the dismissal violated clause 6.2 of the Handbook and section 44(4) of the *Employment Act, 2007*.
47. Clause 6.1.2 on dismissal reads: -

“Dismissal only occurs once all the required disciplinary steps have been followed. Performance-related dismissal can occur if job requirements are not met and there is no alternative position to which you can be moved. summary dismissal can occur for serious offences – see section 6.6.1 Disciplinary.”
48. Clause 6.6.1 on Disciplinary procedure reads: -

“A summary of the Disciplinary procedure is given below, you must take note that other sections, short of dismissal, may also be implemented as part and parcel of the progressive discipline. These sanctions may include, but are not necessarily restricted to demotion and/ or suspension without pay.
49. The various levels of sanction applied by the company are the following: C = Counselling VW - Verbal warning WW - Written warning FWV - Final Written Warning D - Dismissal
50. Time periods relating to validity of warnings are the following: Verbal warning: Expire after 3 months from date of imposition. Written warnings: Expire after 9 months from date of imposition Final warning: Expire after 17 months from date of imposition (emphasis added)
51. The Handbook continues to provide examples of offences which could result in dismissal for the first offence without going through all levels of sanction for every offence: “Theft Fraud Sabotage Assault Weeps Incitement Intimidation Alcohol or others substance abuse Reckless or negligent driving Gross misconduct.”
52. The court makes the considered finding that according to clause 6.6.1 of the Kuku Food Employee Hand book, only the stated offences could lead to a summary dismissal for a first offence.
53. As at 27th August 2019, when the Claimant after return from maternity leave was notified of a hearing on an offence of gross negligence – negligent discharge of duties which resulted in a hearing on 29/8/2019 and a summary dismissal on 30/8/2019, the final written warning dated 24/7/2018 had



- already expired in terms of clause 6.6.1 and the Claimant could only be treated as a first offender for purpose of meeting of punishment on the said offence.
54. Furthermore, the Respondent did not rebut the testimony by the Claimant that she was not provided with the documents related to the offence; that the fact that at the time of alleged offence, she was suffering great disability arising from pregnancy complications and in fact, RW1 subjected her to disciplinary process and accusations while she was on medical leave and within days upon return from maternity leave.
 55. The Respondent did not satisfy the court that it had at any one time before the disciplinary process that led to her dismissal subjected the Claimant to a performance improvement training or program nor is there any evidence that the past good record of the Claimant which had led to continuous promotion and salary increment had been taken into account.
 56. Indeed, the Respondent did not place before court any tangible evidence by way of minutes of the hearing to demonstrate that it had satisfied the requirements of section 41 and 43 of the [Employment Act](#), 2007 in following a fair procedure at the hearing and that it had proved that the Respondent had valid reasons to summarily dismiss the Claimant.
 57. Though the court is not satisfied that the Claimant was specifically targeted and discriminated on grounds of pregnancy, the court is satisfied that the manner in which RW1 continuously followed the matters regarding the Claimant in close proximity disregarded the difficulties the Claimant was facing while experiencing a difficult pregnancy period, a fact which is not in dispute. The court construes the conduct by RW1 to constitute harassment on a balance of probabilities.
 58. The court finds that the case of Mackinery versus BC Jel, relied upon by the Respondent in this matter is not appropriate in that the Respondent did not accuse the Claimant of any dishonest conduct but was found to have been negligent, without juxtaposing the circumstances of the case with the medical difficulties the Claimant evidently experienced at the material time which RW1 seemed to blatantly disregard.
 59. Furthermore, the Claimant had in terms of section 47(5) the evidential burden of prima facie showing that the summary dismissal was wrongful but the burden of prove that the Respondent had a valid reason to summarily dismiss the Claimant, that is to provide justification, for the summary dismissal squarely lay with the Respondent.
 60. The Respondent has failed to discharge the burden placed on it under section 43, 45 and 47(5) of the Act.
 61. Accordingly, the court finds that the summary dismissal of the Claimant within the meaning stated in Gilbert Kasuweli Kith verus Nyali Beach Holding Resort [2015] eKLR and Henry Ochido versus NGO Co-ordination Bord [2015] eKLR that the employees bear the burden of not only providing all the necessary employment records but where an employer fails to do so, an adverse presumption will be made against the employer in evaluating the burden of proof in an employment matter.

Remedies

Notice

62. In the present matter, the Claimant was summarily dismissed without notice and was not paid in lieu of notice. The court finds that the Claimant is entitled to one month's salary in lieu of notice in the sum of Kshs. 154,481.60.



Leave pay

63. The Claimant did not prove that she was owed leave days upon summary dismissal. The claim is dismissed for want of prove.

Compensation for unlawful dismissal

64. The court having found that the summary dismissal of the Claimant was unlawful and unfair, further finds that the appropriate remedy applicable to the case is in terms of section 49(1)(c) and (4) of the *Employment Act*, 2007.
65. In this respect the court finds that the Claimant had risen steadily in her career since joining the employment of the Respondent. That the Claimant had served diligently for a period of 9 years. That her career progression was unlawfully curtailed by the Respondent. The court finds that the Respondent did not prove that the Claimant contributed to the summary dismissal. The court specifically found RW1 was unduly overbearing and not considerate of the pregnancy sickness the Claimant experienced at the time she was subjected to difficult work and subsequent disciplinary action. The Claimant was not paid terminal benefits upon dismissal including notice pay. The Claimant was not compensated for the job loss. The Claimant suffered loss and damage including lack of means to support herself and family.
66. Although the court did not find that discrimination had been proved against the Respondent, the court concluded that this was a case of harassment which in itself is an aggravating circumstance in the circumstance of the case.
67. The court has considered the Supreme court decision in *Ken freight (EA) Limited v Benson K. Nguti [2016] eKLR* in which the court stated: -
- ‘Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee’s employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m)’
68. The court awards the Claimant the equivalent of ten (10) months’ salary in compensation in the sum of Kshs. (154,481.60) x 10 = Kshs. 1,544,816.00.
69. The claim for damages for discrimination is dismissed for lack of merit.
70. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:
- a. Kshs. 154,481.60 notice pay
 - b. Kshs. 1,544,816.00 compensation
Total award Kshs. 1,699,297.60
 - c. Interest at court rates from date of judgment till payment in full.
 - d. Costs of the suit

DATED AT NAIROBI THIS 8TH DAY OF MAY 2025



MATHEWS NDUMA
JUDGE

