



Gitonga v Karanja Njenga Advocates (Employment and Labour Relations Cause E625 of 2021) [2025] KEELRC 2042 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2042 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E625 OF 2021**

JW KELI, J

JULY 4, 2025

BETWEEN

BEATRICE NDUTA GITONGA CLAIMANT

AND

KARANJA NJENGA ADVOCATES RESPONDENT

JUDGMENT

1. The claimant was an advocate and upon leaving the services of the law firm/ Respondent, filed a memorandum of claim dated 29th July 2021 against the respondent seeking for the following reliefs:-
 - A. A declaration that the claimant's termination by the Respondent was procedurally un-fair.
 - B. That the respondent be compelled to pay the claimant as follows:-
 - i]. One month salary in lieu of Notice-Kshs. 135,874.00
 - ii]. Damages for discrimination- Kshs. 3,000,000.00
 - iii]. Maximum compensation for unfair termination- Kshs. 1,630,488.00
 - iv]. Certificate of service
2. In support of the claim the claimant filed her verifying affidavit , her witness statement dated 29th July 2021 and list of documents of even date together with the bundle.
3. The Respondent entered appearance through the law firm of Njeru , Nyaga & Co. Advocates and filed Response and counterclaim dated 6th September seeking general damages against the claimant for breach of contract on account of having operated a parallel law firm while employed by the respondent leading to a conflict of interest and loss of business for the Respondent's law firm. In support of the response was filed list of documents dated 6th September 2021 together with the bundle of documents.



The respondent relied on the witness statements of Margaret Njoki Mwangi dated 6th September 2021, Lawrence Muriuki dated 26th November 2024, Jane Wangari dated 6th September 2024, Monicah Kaveke Musyoka dated 6th September 2024, Peris Karanja of 6th September 2024 and that of Mary Wambui Thairu of even date.

4. The claimant's case was heard on the 21st November 2024 when the claimant testified on oath, adopted her witness statement dated 29th July 2021 and produced her documents as C-exhibit 1-4. She was cross-examined by counsel for the Respondent, Mr. Njeru and re-examined by her counsel.
5. The respondent's case was heard on the 4th February 2025 with 6 witnesses who testified on oath, adopted their witness statements and were cross-examined by counsel for the claimant, Nyagah and re-examined by their counsel.
6. On closure of the respondent's case the parties took directions on the filing of written submissions and both complied.

Claimant's case in summary

7. The claimant's case as per her witness statement adopted as evidence in chief was as follows:- The claimant was engaged by the Respondent on 8th January 2018, associate advocate earning Kshs. 135,874.00 per month par [30] days and the job ceased on 13th January 2019, with no reason was given. That, upon employment the Respondent used to pay her salary on monthly basis and issue me with pay-slips. That, she was a hardworking and diligent employee of the Respondent who would work with less or no supervision during the period of my employment with the Respondent. That, she took Maternity leave on 14th September 2018, which leave was for four months [4] and she was to resume duties on 13th January 2019. That, one month down her maternity leave she was invited to attend a meeting by the Respondent over the phone. That, she had been advised by her doctor not to engage in any work that was strenuous and/or stressful. Further, her child was very young, and had not gotten a reliable person to handle her. That while at the meeting by the Respondent and such explanation she gave to the Respondent. That, despite her explanation to the Respondent of the reason it was difficult for her to attend the meeting, they still insisted to have a meeting with her a decision she found unfair given the circumstances and which she was forced to do an email further to the tele-conversation they had. That, after the expiry of her maternity leave, she reported back to work at the usual workplace of the Respondent but was terminated verbally upon arrival and informed that her services were no longer required.
8. That, the termination was discriminatory on grounds that all her employment troubles started the moment she applied for maternity leave. That, the termination by the Respondent was procedurally unfair on ground-
 - i. That she was not issued with a notice to show cause letter why my employment should not be terminated, if at all there was a wrong doing on my part, which letter was not issued.
 - ii. That there was no notice issued to myself prior to the termination.
 - iii. That she was not accorded any hearing prior to the termination, in other words, she was judged unheard.
9. That no reason was given to her prior to the termination. That, she sought assistance from her advocate on record who wrote a letter of demand to the Respondent on 9th March 2021 but the same did not settle the matter hence the reason she filed the case in court for determination.



Respondent's case in summary

10. The Claimant was engaged by the Respondent on or about 8th January 2018 to manage the Litigation Department and at the material time was the only Advocate in the Department. The Claimant and the Respondent anchored their relationship on an Oral Agreement. In consonance with the agreement, the Claimant was to receive a gross pay of Kenya Shillings 135,874.00, monthly.
11. That during her tenure as an employee at the firm, the same was not without its fair share of asperities. While the challenges were perceived by the Respondent as ordinary in the preliminary stages of the employment, the same mutated to the anomalous. The Claimant proved to be incompetent [in light of the standards expected of an Advocate], exercised little to no diligence in her work and was an imperilment to other employees at the firm. She missed the firm's court sessions while tending to her own private practice at her firm Nduta Kabiria & Company Advocates.
12. Innumably, the Claimant failed to attend court sessions. This led to resentments from the clients and lack of confidence in the firm. Moreover, the work done by the Claimant was full of typographical errors and grammatical mistakes as exhibited in our bundle of documents.
13. During the Claimant's employment at the firm, it became evident that she was pregnant. When her time for delivery came, the Claimant initially applied for 4 days Annual Leave from 17.09.2018 to 21.09.2018 and subsequently and for the three [3]-months Maternity Leave [90 days] from the 21st September 2018 to 21st December 2018 which were duly signed by the Claimant and the Managing Partner of the Respondent and granted. The same is exhibited by the Copy of the Leave Application Form appearing at Page 56 and 57 of the Respondent's List of Documents dated 6th September 2021.
14. In the month of October 2018, the Claimant was invited to the office for a brief meeting at her convenience or call if she was not in a position to avail herself. This is exhibited in the email correspondences appearing between pages 54 and 55 of the bundle of documents. The Claimant however confirmed that she would avail herself on the Friday of 30.11.2018 at 11.30 am, a period of two and a half months after delivery. The Claimant attended the meeting on the 30.11.2018 evidenced by her collection and the signing of the November salary cheque appearing at Page 69 of the Bundle of Documents despite her denial that she came to the office on the on the said date. However, the Claimant became hostile and abusive momentarily prematurely ending the meeting.
15. The Claimant vanished and only retreated to the offices two and a half months later on the 12.02.2019 accompanied with her infant paralyzing the office operations. Suffice to state that this was well over One and a half [1.5] months after the lapse of the Maternity Leave on the 21.12.2018. Subsequently, she never showed up again.
16. The parties filed written submissions on close of the hearing of the Respondent's case.

Determination

Issues for determination

17. The court having heard the case was of the considered opinion that the issues in dispute for determination were:- Whether the termination was fair, Whether there was discrimination, Whether the claimant was entitled to reliefs sought, Whether the counterclaim was merited.



Whether the termination was fair

18. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 [2] of the Employment Act to wit:- ‘45[2] A termination of employment by an employer 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 employees conduct, capacity or compatibility; or
 - [ii] based on the operational requirements of the employer; and
 - [c] that the employment was terminated in accordance with fair procedure.” To pass the fairness test the termination must pass the substantive [in terms of reasons] fairness and the procedural fairness under section 41 of the Employment Act [Walter Ogal Anuro v Teachers Service Commission[2013]eKLR].
19. Section 43 provides for proof of reasons for termination as follows:- ‘43. Proof of reason for termination
- [1] In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
 - [2] 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.”
20. The Claimant in paragraph 11 of the claim stated that after expiry of her maternity leave, she reported back to work at the usual workplace of the Respondent in Nairobi but the Respondent decided and terminated her verbally. In her witness statement dated 29th July 2021 the Claimant stated that on expiry of maternity leave she reported to normal workplace and her services were terminated verbally upon arrival and informed that her services were no longer required. The Respondent in RW1 [Peris Karanja] witness statement stated that the Claimant was invited for a meeting and visited office on 30th November 2018 to discuss issues of concern. That she became hostile and abusive and meeting ended prematurely. That she was expected back on 21st December 2018 but did not report back until 12th February 2019 when she appeared at the office with an infant in a manner to disrupt the office.
21. Did the Claimant report back after maternity. It was not in dispute the Claimant was required to report back on 21st December 2018 on expiry of maternity. At page 48 of Respondent’s document was maternity leave form completed by Claimant of 21st September 2018 – 21st September 2018. It was approved. During the hearing the Claimant confirmed she was currently practising in her own lawful Nduta Kabiria and company Advocates which she registered sometimes in September 2018 which was 6 months into her employment. The Claimant told the court that she returned to office on 13th January 2019 and Peris Karanja [the manager] told her, her services were no longer required. She admitted that the allegation was not in her statement. It was confirmed 13th January 2019 was a Sunday. The Claimant confirmed the Respondent had biometric access to the office. The claimant said she should have reported on 14th January 2019. She confirmed that she had misled the court. She alleged to have been on 4 months maternity yet her leave form had 90 days. The Claimant confirmed that her name was not on the biometric data on 14th January [page 65 of the Respondent’s bundle]. The court from



the foregoing concluded the Claimant never reported back to work after expiry of maternity leave. She thus absconded from work.

22. An employee absconding the employer is required to take steps to end the employment according to section 41 of the *Employment Act*- ‘41. [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.”
23. The employer failed to take steps to procedurally terminate the services of the claimant under section 41 [supra]. While there was prove of absconding to be a valid reason of termination under section 44 there was no compliance of section 41 of the *Employment Act*. The employer ought to have proved effort to conduct employee and inform her of intention to terminate the employment on basis of absconding. The Claimant is awarded 1 month notice pay for the procedural flaw.

Whether there was discrimination,

24. Section 5[3] of the *Employment Act* outlaws discrimination on the basis of several factors including gender and pregnancy. It provides that:-
- “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, marital 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.”
25. In relation to the burden of proof when it comes to cases involving discrimination, Section 5 [7] of the same Act 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.” The Honourable Supreme Court in the case of *Gichuru v Package Insurance Brokers Ltd* [Petition 36 of 2019] [2021] KESC 12 [KLR] [22 October 2021] [Judgment] held as follows:-
- “[44] The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination, it was not with regard to any of the specified grounds. Subsection 7 thus provides:



“[7] 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.”

[45] Section 47 [5] of the *Employment Act* further requires that:

“ [5] For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

[46] This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer. 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.

[47] This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:

“ [49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:

‘ ...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....’

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as



unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.”

[48] Black’s Law Dictionary, 10th Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination...

[49] Discrimination is also defined in the International Labour Organisation Discrimination [Employment and Occupation] Convention, 1958 [No 111] as follows: -

“ For the purpose of this convention the term discrimination includes –

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation ;such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers’ and workers’

organizations where such exist, and with other appropriate bodies – Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.”...

26. In the same vein, the Court in the case of Reuben Wamukota Sikulu v Director of the Human Resource Management, Ministry of Devolution & Planning & 2 others [2020] eKLR held that: -“What the employee is required to do is establish a prima facie case, through direct evidence or statistical proof, that he or she was discriminated against on any of the grounds set out in Article 27[4] of *the constitution*, which include; race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. To establish a prima facie case, the appellant had a duty to demonstrate he qualified for the position he was denied; show that he suffered an adverse employment action as a result of the discrimination; must provide prima facie proof that other explanations by the employer are not contrived or without basis; that the real reason for denial of promotion was discriminatory and the reasons must bear unreasonableness or other types of malpractices which must be linked to the suffering endured by the employee. Once the employee establishes a prima facie case, the burden shifts to the employer, to show a legitimate explanation for refusing to grant the promotion. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate a clear, specific, and non-discriminatory reason for denying the promotion.”
27. Has the Claimant established a prima facie case that she was discriminated against? In the Supreme Court case of Law Society of Kenya v Attorney General & another [2019] eKLR, the Honourable Court explored the definition of discrimination in great detail. It held:-“We thus make the logical inference that the Petitioner meant that Section 25[1] and [3] of the Act is inconsistent with the former Constitution as it contravened Section 82 of the said Constitution which prohibited discrimination. In addition, this is the Section that corresponds with Article 27 of *the Constitution* 2010.



[79] According to Black’s Law Dictionary, 8th ed. [Bryan A. Garner, ed.] [St. Paul, MN: West Group, 2004], page 500, discrimination is “the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap.”

Further, in *Willis v The United Kingdom* [2002] 34 EHRR 547 the European Court of Human Rights defined discrimination as:

“...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society”. [See *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, as per McIntyre J.]

In our own jurisdiction, the Court of Appeal in *Barclays Bank of Kenya LTD & Another v Gladys Muthoni & 20 Others* [2018] eKLR held as follows;

“.....Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... 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.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

[80] Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances...”

28. The question that this Court must answer, therefore, is whether there was a “distinction” or “different treatment” or “prejudicial treatment” between the Claimant and other employees of the Respondent on account of her pregnancy as claimed, in relation to the termination of her employment, bearing in mind that in the Court of Appeal case of *Mohammed Abduba Dida v Debate Media Limited & Another* [2018] eKLR, the Court held that mere differential or inequality of treatment does not per se amount to discrimination. In order for it to do so, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; and that it does not rest on any rational basis having regard to the object which the legislation has in view. In the matter in casu, save for the Claimant stating that all her employment troubles began when she went away on maternity leave and she was later terminated from employment when she returned, the Claimant has not demonstrated that the real reason for the dismissal was the Claimant’s pregnancy. During her oral testimony, the Claimant expressly stated that while she was recalled to the office for a meeting during her maternity leave, she did not attend the meeting. She was also unsure of the exact date when she returned to work. On the contrary, the Respondent indicated that the Claimant failed to report to work when she was due to do so. I have seen the email evidence presented by the parties. On page 45 of the Respondent’s Bundle, the Respondent produced an email dated 9th October 2018 authored by one Peris of email address peris@knjenga.co.ke where she instructed one Florence to request the Claimant to come in for a meeting or to call her if she was not in a position to. The said email is inconsistent with the Claimant’s narrative that she was forced to attend an in-person meeting. On her part, the Claimant presented an email dated 22nd October 2018 sent to one “pmk@knjenga.co.ke” requesting to attend the meeting when her baby was older. The Claimant has not proved that the email address pmk@knjenga.co.ke belongs to her employer or that it was received by the employer.



29. The emails produced by the Respondent also demonstrate that the Claimant and Respondent were butting heads way before she went on maternity leave. This is evidenced by the emails dated 16th April 2018 and 20th April 2018. It is therefore not true that the Claimant's pregnancy was the cause of the parties' conflict.
30. Critically, the Claimant has not proven that there was a differentiation between her and other members of staff, by showing, for instance, that her colleagues who were pregnant were not called about work during their maternity leave. RW2 told the court she was not called while on maternity and was not aware that anyone was even called. This was not sufficient basis to hold there was a case of discrimination. The claimant was in charge of litigation in the lawfirm. It was not proved that the call was unjustified. In establishing the existence of a prima facie case, it is not enough for the Claimant to merely state that there was discrimination. She was required to prove some sort of differentiation, distinction or prejudicial treatment of her, as compared to other employees carrying out similar duties. The claimant had prima facie burden to show that she suffered an adverse employment action as a result of the discrimination [vide the said call to a meeting while in maternity leave]; must provide prima facie proof that other explanations by the employer are not contrived or without basis. [Reuben Wamukota Sikulu v Director of the Human Resource Management, Ministry of Devolution & Planning & 2 others [2020] eKLR] The court finds it is not unreasonable to make a call to an employee while on maternity as the said employee could be holding key information affecting the operations of the employer. At the worst the employee can be compensated by extension of time of the maternity by the time of the call. In any event it was just one instance. In the instant case, the claimant did not prove the adverse effects suffered by being called for a meeting which she told the court she did not attend and which from evidence before the court was not the basis of termination as she received her salary in the next month of November the call having been made in October. Discrimination is a serious issue and should be left to deserving cases. For this reason, the claim under the head of discrimination fails.

Whether the claimant is entitled to orders sought

31. The claimant had sought the following reliefs -
- a. A declaration that the claimant's termination by the Respondent was procedural unfair.
 - b. That the respondent be compelled to pay the claimant as follows;-
 - i]. One month salary in lieu of Notice-Kshs. 135,874.00
 - ii]. Damages for discrimination- Kshs. 3,000,000.00
 - iii]. Maximum compensation for unfair termination- Kshs. 1,630,488.00
 - iv]. Certificate of service
32. The court held the termination was on basis of absconding and the employer failing to comply with section 41 of the Employment Act hence was procedurally unfair and the claimant is awarded 1 month's salary notice pay.
33. The claim for discrimination failed.
34. Claim for compensation - The claimant absconded, she had worked for less than a year for the respondent. She was engaged in January 2018 and in September 2019 she proceeded on maternity leave. The court established that the claimant further registered a lawfirm in her name in July 2018 before proceeding on maternity and had many issues in the employment . I find she did not deserve compensation outside the notice pay.



Whether the counterclaim was merited.

35. The counterclaim for general damages was based on a claim of breach of contract by the claimant accused of operating a parallel lawfirm while in employment allegedly leading to conflict of interest and loss of revenue to the employer's lawfirm. The claimant denied having done any business under the lawfirm while in employment. Other than evidence of the registration of the law firm while in employment, there was no material evidence before the court that that the claimant operated the lawfirm while in employment to prove the alleged conflict of interest and /or loss of revenue by the respondent. The counterclaim was not proved on a balance of probabilities and fails.

Conclusion

36. The termination was held as lawful but procedurally unfair. The claim is allowed. Judgment is entered for the claimant against the respondent as follows:-

- A. Notice pay of 1 month Kshs. 135,874/-
- B. Cost of the suit with interest at court rate from the judgment date
- C. Certificate of service to issue under section 51 of the *Employment Act*.

37. 30 days stay of execution is granted.

38. It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF JULY 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Gaya h/b Katu

Respondent: Ms. Kirui h/b Njeru Nyaga

