



**Issa Mutungi & Co Advocates v Sitai (Appeal E026 of 2023)  
[2024] KEELRC 1492 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1492 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
APPEAL E026 OF 2023  
M MBARŪ, J  
MARCH 20, 2024**

**BETWEEN**

**ISSA MUTUNGI & CO ADVOCATES ..... APPELLANT**

**AND**

**ELFINE NAOMI SITAI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J. M. Kituku (SPM)  
delivered on 17 October 2023 in Kilifi MCELRC No. E001 of 2022)*

**JUDGMENT**

1. The background to the appeal is a claim filed by the respondent in Kilifi MCELRC No. E001 of 2022 on the grounds that through an oral contract of employment in June 2018 she was employed by the appellant in the position of advocate at a wage of Kshs. 50,000 per month. In December 2018, the appellant sent a phone text message to the respondent who was pregnant at the time and terminated her employment, and specifically informed her not to resume work after delivery in February 2019. The respondent proceeded on two months of maternity leave without pay and only found out that the appellant had replaced her or informed her of the redundancy. The respondent claimed that she was discriminated against, unfairly, and unlawfully terminated in her employment and claimed the following dues;
  - a) 2 months’ pay in lieu of notice Kshs. 100,000;
  - b) Unpaid house allowances Kshs. 45,000;
  - c) Pro-rated leave dues Kshs. 20,192.30;
  - d) 12 months’ compensation for unfair dismissal and/or redundancy Kshs. 600,000;
  - e) Aggravated and or exemplary damages;

- f) Certificate of service;
  - g) Costs.
2. The appellant filed a response on the grounds that they employed the respondent to work as an advocate under a 3-month probation and her employment was never confirmed. She only worked from October to December 2018 and was later relieved of her duties when the appellant was not satisfied with her performance during the probation period. Through phone text, the appellant notified the respondent that her employment would not be confirmed in January 2019. The alleged discrimination is without proof, there was no unfair termination of employment as alleged and the probation period ended and employment was not confirmed. The respondent was earning Kshs. 50,000 per month which was consolidated and including her house allowance and the claims made are not justified.
  3. The trial court heard the parties and delivered judgment on 17 October 2023 with a finding that there was discrimination against the respondent and unfair termination of employment;
    - a) Ksh.2 million for termination on the grounds of pregnancy;
    - b) Kshs. 300,000 for 6 months' compensation for unfair termination of employment;
    - c) Costs and interests;
    - d) Certificate of service.
  4. Aggrieved by the judgment, the appellant has 13 grounds and the basis is that the trial court proceeded without jurisdiction ousted by section 90 of the Employment Act and the suit being time-barred and facts pleaded in response and witness statements. Termination of employment was on 1<sup>st</sup> January 2019 and the time to file suit lapsed on 1<sup>st</sup> January 2022. The respondent only filed the claim on 22 January 2022 outside the limitation period and the suit should have been struck out.
  5. The appeal is also filed on the grounds that the finding that there was termination of employment due to pregnancy and hence discrimination against the respondent was in error. The appellant was aware of the respondent's pregnancy at the time of employment and that she was due for delivery in February 2019 and such cannot have been the basis for termination of employment. The trial court failed to take into account the appellant's proprietor, herself a woman, testified together with other employees that they had delivered while in employment and were allowed to take leave and resume work. The respondent only worked for 3 months while on probation and the appellant was not satisfied with her work performance leading to termination of employment.
  6. The award of damages for alleged discrimination on account of pregnancy was not justified and no evidence was produced. The respondent was earning Kshs. 50,000 per month and the award of Kshs. 2,400,000 was inordinately high and the claim being time barred, the judgment should be set aside with costs.
  7. Both parties attended and agreed to address the appeal by way of written submissions.
  8. The appellant submitted that the respondent was employed in October 2018 and not June 2018 as alleged. This fact is confirmed in the NSSF statement for October 2018.
  9. The appellant submitted and admitted that the employment of the respondent was terminated on 1<sup>st</sup> January 2019.
  10. The respondent filed her claim on 25 January 2022 out of time and hence outside the 3 years' limitation period required under Section 90 of the Act as held in Joseph Kiria Kinyua v Attorney General

[2019] eKLR; John Kiiru Njiiri v University of Nairobi [2021] eKLR that Section 90 of the Act is in mandatory terms and a suit filed outside time cannot be cured in any other way save for the court to stop as there is no jurisdiction.

11. The appellant submitted that the trial court erred in proceeding to hear the respondent without jurisdiction. the court ought to have stopped and struck out the claim.
12. The appellant submitted that the finding by the trial court that there was discrimination against the respondent on account of pregnancy was without proof or evidence. Termination of employment was on account of performance that was found unsatisfactory and at the end of the probation period of 3 months' employment, the respondent was not confirmed. The appellant was employed while pregnant. She cannot turn around and claim that the same was applied against her as the grounds for termination of employment. She did not claim that she was treated differently from other employees of the appellant who testified to the fact that they enjoyed maternity leave while in the service of the appellant.
13. In the case of SMW v Hardware Trading Store Limited & Another [2021] eKLR the court held that in a case of discrimination against the employee, Sections 5 and 46(a) of the Act, where discrimination is alleged on an arbitrary ground, the burden is on the claimant to prove that the conduct complained of is not rational and that it amounted to discrimination and that such matter was unfair. The respondent failed to discharge this burden and the findings by the trial court were not justified. The appeal should be allowed.
14. The respondent's advocate attended and was allowed more time to file written submissions. There was no compliance.

### **Determination**

15. A first appellate court is called to review the entire record, re-assess, and arrive at its conclusions.
16. Employment is regulated under the [Employment Act](#), 2007 (the Act). Whether oral or written contract employment, the Act outlines the procedures, rights, and duties of an employer or employee. The employer has to issue the contract of employment. The NSSF statement is not a primary record of employment. It does not define or confer employment as alleged by the appellant.
17. The appellant failed to discharge its duty to file work records and particulars of employment save to confirm that the respondent was employed at a monthly wage of Kshs. 50,000 and employment ended on 1<sup>st</sup> January 2019 at the end of probation due to unsatisfactory performance.
18. The respondent too admitted that through a phone text message from the appellant, employment was terminated on 1<sup>st</sup> January 2019.
19. The claim before the trial court was filed on 25 January 2022.
20. The issue of jurisdiction was not raised in the response or through notice. However, a point of law can be raised and addressed at any stage of the proceedings. However, such matters ought to be addressed immediately and at the preliminary stage to avoid parties taking a long trial only to end up with questions of law concerning jurisdiction on appeal. In the case of *Mediamax Network Limited v William Momanyi 7 2 Others* [2022] eKLR the Court of Appeal acknowledged the fact that an objection on a pure point of law and based on the filed pleadings should be addressed but to save on costs and time and to avoid confusing issues, such matter should be the first call.
21. Where it is apparent to the court that there is an issue of law arising from the pleadings, the court must invite parties to attend and address such matters. The appellant has raised in the appeal the question

of law with regard to the provisions of Section 90 of the Act. there are no written submissions by the respondent in this regard.

22. The fact of employment termination on 1<sup>st</sup> January 2019 is not contested. The respondent ought to have filed the claim before the lower court on or before 31<sup>st</sup> December 2022. She filed suit 24 days late. A day outside the 3 years' time limit cannot be cured. The provisions of Section 90 of the Act are mandatory.
23. In the case of Thuita Mwangi & another v Attorney General & another Petition No. 250 of 2019, the court held that filing a claim seeking constitutional rights protections such as a discrimination does not extend the time to file suit within the 3 years required under Section 90 of the Act. The same position was reiterated in the case of Ambongo Abuso v Nairobi City County [2021] eKLR.
24. In the case of Joyce Wanjiku Muchiko & Another v Telkom (K) Limited, Cause No.1299 of 2011, the court held that a claim filed outside the 3 years required under Section 90 of the Act is statute barred. In the case of Maria Machocho v Total (K) Limited, Cause No.2 of 2012 the court held that;

Before the coming into operation of Section 90 of the *Employment Act*, the statutory limitation for causes of action based on breach of employment contract or contract of service was that provided for contracts in general. In Section 4(1) of the *Limitation of Actions Act*, and it was 6 years. Section 90 of the *Employment Act* has now amended the *Limitation of Actions Act* to specifically provide for a limitation period of three years based on breach of contract of service or arising out of *Employment Act*.

25. These findings are buttressed in the case of Nicodemus Marani v Timsales Limited, Cause No. 204 of 2013 the court held that the power given to the court to extend time outside 3 years allocated under Section 90 of the Act allowing parities to file suit out of time.
26. The rationale for setting time limits is to allow a respondent to know its case within a reasonable time that can be allowed to secure its rights. To also ensure that a respondent is not ambushed after a long period when work records are no longer available. In Gathoni v Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981, the court while addressing the importance of setting time limitations in filing suits held that;

The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest

27. The provisions of Section 90 of the Act are mandatory. A time-barred claim cannot be cured through any other method. The court is denied jurisdiction to proceed on the entire claim.
28. The trial court ought to have discerned this legal issue and addressed it and terminated the proceedings. To this extent, the appeal is with merit.
29. Before conclusion, the award of damages on the finding that the respondent was discriminated against on account of pregnancy, indeed as submitted by the appellant, pregnancy is not sickness. While still pregnant, the respondent was employed by the appellant. There is no application to take maternity leave or that she was delivered of a child on a given date and that resulted in termination of employment. Section 5 of the Act secures an employee from discrimination and when such a matter is pleaded on a given ground, the employee must particularise the reasons leading to such an assertion. The mere fact of termination of employment while the respondent was pregnant is not in itself discriminatory.

- 30. The appellant conceded that the termination of employment was based on the unsatisfactory performance of duty while the petitioner was on probation. The jurisprudence of the court in such a matter has since changed. An employer cannot justify the termination of employment without due process on the grounds that the employee was on probation. In the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR the court held that an employee under probationary terms of employment is entitled to the due process of the law, such contract notwithstanding. The right to a hearing and the need for an employee who is on probation to be accorded the due process similar to other employees placed under similar circumstances is a constitutional requirement. Where an employee is alleged to be of poor performance, notice and hearing should be issued in accordance with Section 41 of the Act. Treating the employee differently on the reasoning of a probationary contract is an unfair labour practice.
- 31. On the question of costs, these are discretionary. The respondent attended but failed to file any written submissions. It is only fair that the respondent is ordered to pay 50% costs due to the appellant.
- 32. In this case, the trial court having moved without jurisdiction, the appeal is found with merit and is hereby allowed. The judgment in Kilifi CMELRC No. E001 of 2022 is hereby set aside in its entirety. The appellant is awarded 50% of due costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 20 DAY OF MARCH 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....