



**Mwajomba v Mambogani Limited (Cause E430 & 448 of 2020  
(Consolidated)) [2024] KEELRC 722 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 722 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E430 & 448 OF 2020 (CONSOLIDATED)**

**MA ONYANGO, J**

**MARCH 14, 2024**

**BETWEEN**

**CHRISTINE WAWUDA MWAJOMBA ..... CLAIMANT**

**AND**

**MAMBOGANI LIMITED ..... RESPONDENT**

**JUDGMENT**

1. In the memorandum of claim dated the 24<sup>th</sup> August 2020 and filed on the 27<sup>th</sup> August 2020 the Claimant alleges breach of contract, unfair and unlawful termination as a result of constructive dismissal from employment, discrimination on account of pregnancy as well as unfair labour practices against the Respondent.
2. She avers that she started working at the Respondent's restaurants as a waitress on the 2<sup>nd</sup> February, 2018 with a starting salary of Kshs.15,000/= . That due to her excellent work and customer service, she was promoted to the position of a telephone operator in November, 2018, then to junior cashier in March, 2019 and in July, 2019 she was promoted to the position of cashier, earning a salary of Kshs.32,375/= . She was posted to the Respondent's Garden City Restaurant. The Claimant states that she excelled at her work as the cashier and her contract was extended on 2<sup>nd</sup> February, 2019 and again from 2<sup>nd</sup> February 2020 to 2<sup>nd</sup> February, 2021.
3. That she continued working dutifully up until 23<sup>rd</sup> March, 2020, when she proceeded for her annual leave. The Claimant states that she was expected to report back to work on 25<sup>th</sup> April, 2020. She did not report to work as planned because on 24<sup>th</sup> April, 2020, the Ministry of Health published protocols for management of restaurants and eateries during the period of Covid-19 Pandemic which restricted the operations of the Respondent as it had to comply with the said protocols. She stated that on the same day she received a WhatsApp message from the Respondent's Human Resource Manager, Mr Alex Mulwa, who requested for her email address although she did not know the reason why her email was required.



4. That she did not receive any email communication from the Human Resource Manager until 5<sup>th</sup> May, 2020, when she an email informing her that she had been sent on indefinite unpaid leave effective on the 21<sup>st</sup> May 2020.
5. The Claimant avers that she was not invited to any consultative meeting or forum prior to 21<sup>st</sup> April, 2020 as she was away on annual leave.
6. The Claimant prays for the following remedies;
  - a. A declaration that the Respondent breached the Claimant's employment contract
  - b. A declaration that the Claimant was illegally and unfairly dismissed through constructive dismissal.
  - c. A declaration that the Respondent discriminated upon the Claimant on account of her pregnancy.
  - d. A declaration that the Respondent violated the Claimant's right to fair labour practices
  - e. A declaration that the Respondent violated the Claimant's right to access justice
  - f. An award of Kshs.356,125.00 as lost earnings for breach of contract.
  - g. An award of ksh 388,500.00 being 12 months compensation for unfair and illegal termination.
  - h. An award of ksh 32,375.00 for one month's in lieu of notice
  - i. An award of ksh 97,125.00 for unpaid maternity leave.
  - j. An award of ksh 6,000,000 as compensation for discrimination on account of pregnancy and unfair labour practices
  - k. An order directing the issuance of a certificate of service
  - l. Costs of the suit.
  - m. Interests on all the monetary orders at court rates from the date of the award until payment in full
  - n. Any further orders as the court may deem just.
7. The Respondent filed a memorandum of appearance on the 17<sup>th</sup> September 2020 and a Statement of Defence dated 24<sup>th</sup> September, 2020. It avers that the reason for the failure to have the Claimant return to work after paid leave was the publication by the Ministry of Health of Protocols for Management of Restaurants and Eateries during the period of Covid-19 Pandemic. The Respondent states that it was unable to recall the Claimant and 73 other employees who had been on paid leave and was forced to make decisions to place the employees on unpaid leave upon consultations with them on telephone due to the measures and restrictions put in place by the Government on business operations since 15<sup>th</sup> March 2020 and the prejudice and hardships these had caused the Respondent's business.
8. That prior to being placed on unpaid leave the Claimant was on her annual paid leave. That due to the strict Ministry of Health Guidelines against crowding and requiring social distancing, it was not possible to convene a forum of 74 employees without violating the guidelines and putting the said employees at the risk of contracting Covid-19 and as such it was necessary that the employees be consulted individually over telephone. The Respondent stated that the Claimant's employment was not terminated.



9. The Respondent states that hotels and eateries were reopened and indeed the Claimant did plead with the Respondent's Human Resource Manager as did numerous other employees to be returned to work but it was not possible on account of the restrictions of movement imposed in the Country that had negatively affected the Respondent's business.
10. The Respondent whilst admitting that some employees were recalled, denies that the recalling was done in a clandestine manner, in open bias and discrimination. The Respondent states that through its Human Resource Manager, it was in constant communication with the Claimant. That the email sent by the Claimant to the Human Resource Manager enquiring about her maternity leave was misplaced as the Claimant was already on leave though unpaid. The Respondent stated that the letter was written the same time as the Claimant's lawyer's demand letter, that it was a mere gimmick intended to unjustly fix the Respondent with liability.
11. The parties agreed to have the matter disposed of by way of witness affidavits and written submissions.
12. The Claimant submitted that the intention of the letter by the Respondent dated 21<sup>st</sup> April, 2020 was to unilaterally amend the employment contract dated the 2<sup>nd</sup> February 2020. That the mere fact that the Respondent sent the Claimant on unpaid leave for a period of about 10 months, without instructions on resumption, clearly indicated that the Respondent was not interested in the Claimant's employment and that the process used to send the Claimant on leave was in fact an unprocedural redundancy. The Claimant relied on the case of Christopher Kyalo Mutiku v Scholastica Ajode t/a Skajo Airline Handling Agency (2019) e KLR. In that case the Claimant was placed on indefinite and unpaid leave. The court observed: "He was not told when to resume. He was not given any information on his status after he was sent on unpaid leave. He was not recalled and did not receive any letter of termination. He was left dangling in the wind. He had worked for 9 years. He did not have any role in circumstances leading to his departure. His employment record has not been faulted."
13. The Claimant also relied on the case of Ben Murage Njogu v Ramani Warehouse Limited (2021) where the court stated that "an employer must give an employee clear and unequivocal instruction on the status of the employee's contract. It cannot be that an employee is told to go home; would be recalled at an appropriate time; and that should the employee find alternative employment, he is free to take it. The employment relationship must be made clear. This fluidity of the relationship advanced by the Respondent, does little in defining the parties' mutuality of obligations. ....The possibility of recall after sending home, would suggest that the Claimant was being laid off, rather than retrenched. Layoff is volatile in nature, allowing for recall of an employee once the layoff period ends. In this case the Respondent intended in its letter, that the Claimant would resume duty, once the Covid 19 imposed situation ended. But again, the Respondent was not sure when this situation would end. The Claimant was not given any specific date of resumption. He was advised to feel free to take up an alternative job. This uncertainty leads to what may be seen as retrenchment situation. The Respondent intended to terminate the Claimant's contract, without following the legal procedure, or facing the legal consequences, of termination."
14. It was submitted on behalf of the Claimant that the Respondent engineered a well calculated plan to deny her an opportunity to work and to proceed on maternity leave contrary to the Respondent's claim that the Claimant was still an employee of the Respondent. It was submitted that the Claimant had met the criteria formulated in GMV v Bank of Africa Kenya Limited 2013 e KLR as cited in Winnie Treezer Ochieng v Label Craft (k) Ltd (2021) in which the court stated that the Claimant must establish that she belongs to the protected class, demonstrate that she qualified for the job lost and show that she suffered adverse employment action directly as a result of her pregnancy. She must provide prima facie proof that other explanations by the employer are pretextual, and the real reason for termination was



- the pregnancy. That the employee must as a minimum, establish that there is a nexus between the adverse employment decision and her pregnancy.
15. It was submitted for the Claimant that there was a nexus between the denial of maternity leave and the Claimant's pregnancy. That it was uncontroverted that the Claimant was still an employee at the time of denial of maternity leave, that she was on the third trimester of her pregnancy and her contract was due to expire on 2<sup>nd</sup> February, 2021.
  16. The Respondent on its part submitted that contrary to the allegation that the Claimant was sent on unpaid leave without any consultative process, the Respondent was forced to shut down its Garden City Branch where the Claimant was stationed due to restrictions put in place that required restaurants to remain open for take away services only. That the branch majorly provided dine-in services. That there indeed were consultations though in a very restricted environment as there was no other way to consult or engage with the more than 75 employees who were on paid leave. The Respondent submitted that it would not have been possible to call a physical gathering of over 75 employees as had been suggested by the Claimant's advocates.
  17. The Respondent submitted that a consultative process is not required to have a particular form and the form adopted by the Respondent was sufficient, fair and just in the circumstances prevalent at the time.
  18. The Respondent further submitted that it did not at any time revise the terms of employment of the Claimant. That the sending of the Claimant and 74 other employees on unpaid leave after the paid leave was over was merely a response to the unforeseen restrictions brought about by the Covid-19 Pandemic. That it was a way to survive as opposed to completely shutting down the Respondent's business. That this was in the hope that the situation would improve and the Claimant would resume work.
  19. The Respondent submits that the case of Patrick Kariuki v Mustek East Africa Limited [2021] eKLR on unilateral amendment of employment contract cited by the Claimant is inapplicable in the circumstances of this case. That it is distinguishable and ought to not be relied upon.
  20. The Respondent submitted that there was no violation of section 10 (5) of the *Employment Act* as to lead to a compromise of the Claimant's right to fair labour practices as submitted for the Claimant.
  21. As to whether the Claimant was unfairly and unlawfully terminated, the Respondent submitted that the Claimant acted prematurely since the circumstances leading to her and 74 others being sent home on unpaid leave were justifiable and were continuing, that a final decision as to the status of their employment had not been made. That the restaurant business of the Respondent was adversely affected and there was a real risk of the same collapsing in which case all employees would have been out of a job. That the circumstances essentially frustrated the performance of the employment of the contract at the time and the Respondent as employer did all it could in order to mitigate the effects of the pandemic on the business and its employees. That the Claimant did not give the Respondent an opportunity to recall the Claimant after the situation improved.
  22. The Respondent submitted that no evidence was adduced to prove that the Claimant was discriminated on account of pregnancy and no nexus has been established between the alleged loss of employment, if at all, and her pregnancy. The Respondent submitted that one cannot conclude that the decision to send the Claimant on unpaid leave. That the decision not to recall her by the time she instituted the instant suit had nothing to do with the fact that she was pregnant there being many other staff members who were at the time out on unpaid leave.

### **Analysis and Determination**



23. I have carefully considered the pleadings and submissions filed herein. The issues arising for determination are whether the Respondent breached the Claimant's employment contract; whether the Respondent unfairly terminated the Claimant's employment; whether the Claimant was discriminated on grounds of pregnancy and whether the Claimant is entitled to the prayers sought in her claim.
24. It is the Claimant's case that the Respondent breached her employment contract by sending her on indefinite unpaid leave in February 2020 without consultation. That the Respondent breached her employment contract by amending her contract unilaterally. The Claimant relied on the provisions of section 10(5) of the [Employment Act](#) which sets out particulars to be stated in a contract of employment.
25. The Claimant stated that she was supposed to report back from annual leave on 25th April 2020 but did not as on 24<sup>th</sup> April 2020 the Ministry of Health published protocols for management of restaurants and eateries as a control measure following the outbreak of COVID-19 Pandemic. The Claimant further stated that on the same day she was called by the Respondent's Human Resource Manager Alex Mulwa who requested for her email address for purposes of sending her communication. That the communication was not sent until 5<sup>th</sup> May 2020 and did not mention unpaid leave.
26. For the Respondent it is contended that it was forced to shut down its Garden City Branch where the Claimant was stationed due to the restrictions put in place as a consequence of Covid-19 which required restaurants to remain open for take away services only. That the branch predominantly provided dine-in services. The Respondent insists that there were indeed consultations though in a very restricted environment. That there was no other way to consult or engage the 75 employees who were at that time serving on paid leave.
27. It is further the Respondent's contention that it did not revise the contract of the Claimant or of any of its employees, that sending them on unpaid leave after expiry of the paid leave was a response to the unforeseen restrictions brought about as a consequence of the outbreak of Covid-19. That it was a way for the business to survive in the hope that the situation would improve and the employees would resume work.
28. The Respondent submitted that Patrick Kariuki case (supra) cited by the Claimant is distinguishable and not applicable to the instant case as the circumstances were not the same. In the said case the court held that a unilateral amendment to an employment contract would be deemed to be unfair labour practice and construed as a breach of contract.
29. While considering the impact of Covid-19 on a contract in *Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited* (Civil Appeal 64 of 2022) [2023] KECA 700 (KLR) (16 June 2023) (Judgment) the Court of Appeal observed as follows:

We take cognizance of the government mandated lockdown that affected all institutions in this country and the effect it had on all businesses. Like other institutions of higher learning, the JKUAT Nakuru campus was affected by the lockdown and subsequently closed its doors. It is therefore not disputed that for a period the appellant was rendered unable to use the property subject of the lease agreement and was therefore, not generating any income from the intended purpose of the contract.

Consequently, it is our view that the pandemic was a force majeure event that caused the appellant undue difficulty in continuing with the lease agreement in accordance with its purpose and making the payments thereupon agreed. The appellant, in good faith, continued to make payments as required up to January 2021 long after seeking to be released



from the lease agreement vide a letter dated 10<sup>th</sup> July 2020. Through the Respondent's own actions of restricting the appellant's exit it curtailed its own chances of entering into business arrangements with other entities. The pandemic was no secret, and the Respondents were aware of the government directive to close schools and universities. Therefore, to require performance in the face of such unforeseen and unavoidable circumstances, not caused by any acts and/or omission on the part of the appellant is absurd, unfair, and unjust.

30. As submitted by the Respondent, Covid-19 was not an anticipated occurrence and no employer would have anticipated and prepared for it. Further, the announcement of containment measures by the Government which affected the Respondent's operations and therefore the Claimant's terms of service were abrupt and gave no room for consultations. The Respondent has however demonstrated that it did what was possible by calling the employees affected, the Claimant included, and informing them of its intentions which at the time were expected to be temporary.
31. The Claimant stated that she did not report to work after her leave as expected because on 24<sup>th</sup> April 2020 the Ministry of Health published protocols for management of COVID-19 for restaurants and eateries. She further stated that the Respondents Human Resource Manager called her on the same date about the same Covid-19 protocols. It is clear that even if the Respondent did not do anything the Claimant would still not have been in a position to report to work due to the COVID-19 protocols.
32. I am convinced that during the telephone call the Respondents Human Resource Manager explained to the Claimant the reason he wanted her email number. This is reflected in the opening sentence of the letter dated 21<sup>st</sup> April 2020 which the Claimant received by email on 5<sup>th</sup> May 2020 as reproduced below:

MAMBO

MWAJOMBO, CHRISTINE WAWUDA

MAMBOGANI LIMITED

21 /04/2020

REF; UNPAIP LEAVE

As per our telephone conversation, you are aware that we are facing a Global Pandemic in regard to COVID-19.

With the current measures put in place by the government including the partial lock down, business has greatly been affected and we are operating under very tight conditions notwithstanding the fact that we had to close the Garden city outlet.

We have tried hard to bolster our delivery revenues but customers are also watching their expenditure and ordering restaurant food is not their first choice. To compound matters, we have been forced to introduce special offers to entice customers, and these have further dented revenues.

Take note that your March salary was paid in full and your pending leave days in the month of April are 24. As agreed, 15 days will be paid in April, and the 9 days balance will be paid in the month of May.

We urge each and every staff member to bear with us during this difficult economic time.

Stay safe, keep safe.

Regards,



Signed  
Alex Mulwa HRM  
Mambogani LTD  
CC. NISH SHAH  
DIRECTOR

33. The letter refers to discussions with the Claimant and explains the measures taken by the Respondent following the Covid-19 protocols put in place by the Government. The letter does not mention any changes in the terms of employment of the Claimant.
34. At paragraphs 24, 25, 27, 43 and 44 of his witness affidavit Mr. Mulwa, the Human Resource Manager of the Respondent states:
35. That is worth noting that the above decision was arrived at while the staff were still on paid leave and each and every staff member was telephoned by the Respondent and notified of the decision and given an explanation on why such a decision was taken and I even went further and sought consent from all the employees including the Claimant. In the said telephone call I requested the employees for their email addresses to enable me send them letters seeking their consent to place them on unpaid leave as per the management resolution and as per the discussions with them on phone.
36. That with regard to the Claimant, she sent to me on 25<sup>th</sup> April 2020 via WhatsApp messenger service her email address after I had requested for it in the telephone conversation we had.
37. That as at 25<sup>th</sup> April 2020 when Christine Mwajombo was set to resume to work all the above conditions were still in place. Nairobi and several other counties were still on lock down and the curfew and still in place so was the Gazette Notice for Working Till 4PM. Garden City restaurant which is among the restaurants where her services would be required was still closed indefinitely and the other two restaurants Lavington and Westlands were still on partial operations doing delivery and take-away only.
38. That in view of all the foregoing, I wish to state that when the decision to send staff on unpaid leave was arrived at, all of them were on paid annual leave as the Respondent had anticipated that the situation would have normalised by the time the employees' annual leave days had been utilised, a thing which unfortunately did not happen.
39. That prior to placing the affected employees on unpaid leave, I personally took a lot of time to telephone each one of them and explain to them the reasons why the Respondent was taking the decision to place them on unpaid leave and even going as far as seeking their approval for the said decision by following up the telephone consultation by email. In the circumstances all affected employees including the Claimant were consulted.
40. I find that the Claimant has not proved that the Respondent unilaterally amended her contract without consultation as alleged. The Claimant has therefore not proved that her contract was breached by the Respondent.
41. The second issue for determination is whether the Respondent unfairly terminated the Claimant's employment. The Claimant submitted that by its letter dated 21<sup>st</sup> April 2020 the Respondent unilaterally amended her employment contract dated 2<sup>nd</sup> February 2020. Further, that by sending the Claimant on unpaid leave for 10 months without instructions on resumption of duty the Respondent unprocedurally declared her redundant.



42. From the letter sent to the Claimant which has been reproduced above, there is no indication that the Claimant was declared redundant or that she would be away on unpaid leave for 10 months. In the Witness Affidavit of Mulwa, he states that according to the Respondent the Claimant was still an employee of the Respondent. That there was no breach of contract and that the prevailing circumstances were beyond the Respondent's control.
43. I find that the Claimant has not proved that her employment contract was terminated by the Respondent.
44. The Claimant further alleged that she was discriminated on grounds of pregnancy. The Claimant states at paragraph 8 of her witness affidavit that at the time she was sent on unpaid leave she was already pregnant. The Claimant relies on exhibit CWM-8 which appears to be a document where the Respondent was explaining the reason why it did not recall the Claimant back to work. The document which does not have a title or a signature indicating the source, seems to be part of an explanation by the Respondent on why the Claimant was not recalled when the Respondent reopened its Restaurant at Garden City where the Claimant was stationed. It states that no cashier was recalled as there was very little cashier work that was being undertaken by the managers. The reopening was in July 2020. Part of the document reads:
- “we would like to confirm that the entire company has only 4 cashiers and up to date none amongst them has been recalled from leave as business is still very low with minimal operating hours of between 11.30am and 7.00pm which can only accommodate one shift. Before the pandemic outbreak we used to operate on two shifts closing the restaurant between 10pm and 11pm.
45. It is not clear from the record when the Claimant first informed the Respondent of her pregnancy as she does not indicate the same. The medical report the Claimant refers to which is from Mediheal Hospital Eastleigh does not indicate that it was submitted to the Respondent. The first communication from the Claimant to the Respondent referring to her pregnancy on record is the undated letter titled “Advisory On Maternity Leave” which according to the Claimant's written submissions, was sent to the Respondent's Human Resource Manager on 20<sup>th</sup> July 2020.
46. It was the Respondent's position that it did not discriminate the Claimant on account of her pregnancy.
47. From the evidence on record the Claimant was not given any differential treatment from all other employees of the Respondent who were in the same situation as her. For an employee to prove discrimination the employee must prove that the employer treated her differently from other employees to her detriment and that treatment was as a result of the condition the employee complains about. In this case the Claimant alleges that the discrimination was on grounds of her pregnancy.
48. From the evidence on record I find no proof of discrimination on grounds of pregnancy or any other form of discrimination against the Claimant.
49. Having found that the Claimant's contract was not unilaterally amended, that her employment was not terminated unfairly or at all and that she has not proved discrimination on grounds of pregnancy or at all, the Claimant is not entitled to any of the remedies sought in her Claim.
50. Consequently, I find the Claim to be without merit. The same is accordingly dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF MARCH 2024**



**MAUREEN ONYANGO**  
**JUDGE**

